IN THE COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2016

No. 1396

STATE OF MARYLAND

Appellant/Cross-Appellee

v.

ADNAN SYED

Appellee/Cross-Appellant

Appeal from the Circuit Court for Baltimore City, Maryland
(The Honorable Martin P. Welch, Sr.)

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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INTRODUCTION

The Circuit Court's decision to grant Syed a new trial can be affirmed on an alternative ground: trial counsel was ineffective for ignoring her client's request that she contact and investigate a potential alibi witness, Asia McClain, who was prepared to testify that she was with Syed at the time the State contends the murder occurred.

The Circuit Court found that trial counsel's failure to contact McClain rendered her performance deficient. To contest this, the State offers only hypotheticals for why trial counsel might conceivably have decided not to contact McClain. But the Circuit Court already rejected the State's theories as contrary to its factual findings, which cannot be disturbed absent clear error. More fundamentally, after-the-fact speculation does not alter the basic fact that trial counsel knew of but failed to pursue a potential alibi witness. That should be the end of the deficiency inquiry.

The State makes no effort to defend the Circuit Court's prejudice analysis, relying instead on misdirection. Yet, regardless of the other evidence presented at trial, alibi testimony from a disinterested witness that would have placed Syed far from the victim at the time of the murder is sufficient to undermine confidence in the verdict. Prejudice under *Strickland* requires nothing more.

The prejudice flowing from trial counsel's failure to investigate the McClain alibi is even clearer when assessed along with the consequences of trial counsel's other deficiency, an analysis the Circuit Court failed to perform. The State argues that Syed waived a "claim" of cumulative error. But Syed is not asserting a separate constitutional

claim; rather, Syed argues that the Circuit Court misapplied the ineffective-assistance standard—an argument that could not have been raised before now.

ARGUMENT

I. This Court Can Also Affirm the Circuit Court's Decision to Grant Syed a New Trial Because Syed's Trial Counsel Was Ineffective for Failing to Investigate the McClain Alibi.

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

Syed's trial counsel's failure to contact and investigate McClain before trial constituted deficient performance.

The State's argument in response does not answer the case law Syed cites, Syed Br. 39-40, nor can it credibly contest the Circuit Court's findings of fact. Instead, the State offers speculative theories—without the support of any witness testimony—about why trial counsel *might* have decided not to pursue the McClain alibi. State's Cross-Appeal Br. at 31-38.

The Circuit Court's analysis of trial counsel's performance was sound. After recognizing that its review must be "highly deferential" and must "presume[] that counsel has rendered effective assistance[,]" App-170 (citation omitted), the Circuit Court concluded that "reasonable professional judgment under the facts of the present case required trial counsel to contact the potential alibi witness and investigate whether her testimony would aid Petitioner's defense[,]" App-182. Trial counsel performed deficiently by failing to do so. In support of this conclusion, the Circuit Court made the following findings of fact:

- Hae Min Lee was murdered on January 13, 1999 sometime between 2:15 and 2:45 p.m. App-171 n.9.

- Prior to the start of trial, Syed gave trial counsel two letters he received from McClain. *Id*. at 172; *see also* Apx. 4, Apx. 6 (letters from McClain to Syed).

- In her letters, McClain indicated that she was with Syed at the Woodlawn Public Library during the "window when the victim was allegedly murdered." App-172.

- McClain's March 1, 1999 letter also provided "phone numbers through which she could have been contacted." *Id*. at 183; *see also* Apx. 4.

- Trial counsel's file confirms that, by July 13, 1999, she was aware that McClain could account for Syed's whereabouts from 2:15 to 2:45 p.m on the day in question. App-172; *see also* Apx. 16, Apx. 17 (note from trial counsel's file dated "7/13").

- "[T]rial counsel had nearly five months before trial to contact McClain[.]" App-183.

- "[N]either [trial counsel] nor her staff ever contacted McClain." App-172; *see also* Apx. 9, Apx. 12 (McClain affidavits confirming the same).

These findings of fact cannot be disturbed absent clear error. *See State v. Jones*, 138 Md. App. 178, 209 (2001). Crucially, the State fails even to challenge the factual finding at the center of the Circuit Court's holding—that "trial counsel made *no effort* to contact McClain[.]" App-182 (emphasis in original).[1]

[1] The State does question when Syed informed his trial counsel about McClain's potential alibi testimony. State's Cross-Appeal Br. at 33. But this is a red herring. Trial counsel had the relevant information in her possession "nearly five months" before the *first* trial—which resulted in a mistrial—commenced in December 1999. App-176. Trial counsel therefore "had ample time and opportunity to investigate the potential alibi." *Id*.; *see also Grooms v. Solem*, 923 F.2d 88, 91 (8th Cir. 1991) (explaining that counsel "should have contacted the witnesses" regarding the potential alibi even after learning of it "on the first day of trial").

The Circuit Court also grounded in legal precedent its conclusion that trial counsel performed deficiently. Its analysis started with *In re Parris W.*, 363 Md. 717, 727-30 (2000), a decision of the Maryland Court of Appeals involving the failure to call an alibi witness at trial that "cited favorably a number of cases, which ruled that counsel's failure to investigate a potential alibi witness is inconsistent with the exercise of reasonable professional judgment." App-174 (citation omitted); *see also Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992) (counsel's failure to contact or interview alibi witness was deficient); *Grooms*, 923 F.2d at 90 ("Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them . . . ."); *Montgomery v. Petersen*, 846 F.2d 407, 413 (7th Cir. 1988) (failure to investigate alibi witness was deficient). Applying the holdings of these cases to the facts before it, the Circuit Court concluded that "trial counsel's failure to contact and investigate McClain as a potential alibi witness" rendered her performance deficient. App-176.

In response to all of this, the State cites *not one case* in which a court found an attorney's performance to be adequate despite her failure to contact a known alibi witness. Similarly, the State failed to call *any* witness to counter David B. Irwin, who was admitted as an expert in criminal defense practice and who testified that "to meet the minimal objective standard of reasonable defense care[,]" trial counsel "had to go talk to Asia McClain." T. 2/5/16 at 148:18-149:4; *see also id.* at 123:25-124:11.

Instead, the State relies on assorted after-the-fact rationalizations for why trial counsel could have ignored Syed's request that she pursue the McClain alibi. According to the State, Syed must provide an explanation more plausible than the three urged by the

State. State's Cross-Appeal Br. at 37. But this is not the standard. Indeed, speculating now about why trial counsel acted a certain way years ago represents the kind of "retrospective sophistry" that the Circuit Court appropriately refused to countenance. *Griffin*, 970 F.2d at 1358; *see also* App-180. And no explanation can countermand the simple fact that trial counsel was aware of but nevertheless failed to contact McClain *at all*. Because the Circuit Court's determination of trial counsel's deficiency was based on that finding, the State's various speculative and self-serving theories are irrelevant.

In any event, the Circuit Court appropriately rejected them. ***First***, the State argues that trial counsel may have believed that the McClain alibi was fabricated. State's Cross-Appeal Br. at 31-32, 36-38.[2] No witness, expert or otherwise, testified in support of this argument at the February 2016 post-conviction hearing, so the State's theory rests primarily on McClain's March 2, 1999 letter. The State contends that the letter contains details that could only have come from Syed. State's Cross-Appeal Br. at 36-37. But the Circuit Court already considered—and rejected—this argument, explaining that the State's theory was "contrary to the facts" because the record evidence makes clear that those details were available from sources other than Syed. App-178. The State offers no legitimate basis to conclude that this finding was clearly erroneous.

[2] By quoting from the Circuit Court's *December 2013* decision, App.-139-40, the State suggests that the Circuit Court accepts this argument, State's Cross-Appeal Br. at 31-32. But the Circuit Court, in the decision under review, modified its prior ruling "[i]n light of the expanded record and the legal arguments presented at February 2016 post-conviction hearing[.]" App-173. It was at that hearing that the Circuit Court for the first time heard and considered Irwin's expert testimony regarding "the prevailing professional norms of the duty to contact a potential alibi witness." *Id*. at 183 n.12.

More fundamentally, trial counsel's duty of competence did not permit her, based simply on review of McClain's letter and other hearsay statements found in trial counsel's file, to completely ignore Syed's request that she contact McClain. *See Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990) (ruling that counsel improperly relied on hearsay to justify not investigating an alibi witness). As the Circuit Court explained, if trial counsel harbored doubts about McClain's letters or her credibility, she "could have spoken to McClain about these concerns instead of rejecting the potential alibi outright." App. 183; *see also Montgomery*, 846 F.2d at 412 (finding deficient performance where counsel failed to investigate an alibi because he "simply didn't believe" the defendant).

Second, the State posits that trial counsel may have decided that other investigations regarding Syed's whereabouts on January 13, 1999, obviated the need for her to contact McClain. State's Cross-Appeal Br. at 5-7, 32. Yet, the fact that "some inspection" was performed—mostly by Syed's bail counsel, Chris Flohr and Doug Colbert—is insufficient; a member of the defense team was required "to contact the potential alibi witness and investigate whether her testimony would aid" Syed's defense. App-182; *see also* T. 2/5/16 at 128:20-25 (Irwin testifying that he could not imagine a reason why counsel would "not need to contact the alibi witness"). It is undisputed that no one did so. And the State cites no case in which *other* investigations, even if they concerned the same subject matter, somehow formed an adequate substitute for interviewing an alibi witness.

Third, the State hypothesizes that trial counsel may have preferred to focus on Syed's habit of staying on campus after school until track practice. State's Cross-Appeal Br. at 34-35. This again misses the point. Trial counsel *could not* have reasonably weighed the advantages and disadvantages of two defenses without first contacting McClain. *See Griffin*, 970 F.2d at 1358 (counsel could not have made a reasonable strategic decision that an alibi would be harmful without speaking to the alibi witness); *see also* T. 2/5/16 at 125:11-15 (Irwin testifying that attorneys cannot "make strategic decisions without having first investigated").

Moreover, the purported advantages of the habit-and-routine defense—as compared to an actual alibi—do not withstand scrutiny. The State contends, for example, that this defense was consistent with what Syed told police. State's Cross-Appeal Br. at 34. Yet, given "the close proximity" of the school campus and the public library, testimony about Syed staying on campus could have been presented along with McClain's testimony about speaking with him in the library, with only "minor inconsistency." App-181. Moreover, even if Syed's recollection was "inconsistent" with the potential alibi, it would not have "relieve[d] the duty of Defense Counsel to investigate what Ms. McClain said[.]" T. 2/5/16 at 155:11-23.

The State also asserts that, if the jury had learned about Syed's habit of staying on campus, a departure from that habit necessarily would place him, not at the library, but at the Best Buy where the murder supposedly occurred. *See* State's Cross-Appeal Br. at 36. That is a wildly unsupported inference about what a hypothetical jury presented with this

hypothetical fact *necessarily* would have believed, and it represents exactly the type of retrospective speculation that courts reject. *See Griffin*, 970 F.2d at 1358.

In addition, the State argues that presenting McClain's alibi testimony would have precluded trial counsel from probing a weakness in the prosecution's case, *i.e.*, the uncertainty regarding how, if at all, Syed got into the victim's vehicle (where Wilds claimed to have later seen her body). State's Cross-Appeal Br. at 35-36. The State posits that, if Syed were at the library, this weakness would disappear because "students were regularly picked up" at the library. *Id*. at 35. Notably, the State cites no testimony confirming that trial counsel ever actually tried to exploit this vulnerability. In any event, regardless of whether McClain would have testified, Inez Butler and Debbie Warren, the two witnesses on whom the State relies, presumably would have affirmed that they saw the victim by herself after school, State's Cross-Appeal Br. at 35—meaning that trial counsel still would have had the opportunity to exploit the dearth of evidence placing Syed and the victim together on the day in question.

Finally, the State contends that the habit defense accounted for a longer period of Syed's time on January 13, 1999—a supposed advantage given that the prosecution did not settle on a timeline for the murder prior to trial. *Id*. at 38. But, five months *before* trial, the prosecution disclosed that the victim was murdered "shortly after[] she would have left school for the day[.]" Am. State's Disclosure ¶ 15, July 8, 1999. If any further precision were required, the prosecution provided it in the opening statement of Syed's first trial. *See* T. 12/10/99 at 137:1-4 (opining that, after receiving a call at about "2:30, 2:40," Wilds meet Syed and saw the victim's body). Even then, trial counsel had more

than a month to contact McClain before the January 21, 2000 start of the trial that led to Syed's conviction. *See Grooms*, 923 F.2d at 91 (counsel "should have contacted the witnesses" regarding potential alibi even after learning of it "on the first day of trial").

In sum, the Circuit Court correctly found trial counsel's performance to be deficient. The State's theories about why trial counsel failed to do so are nothing more than irrelevant speculation, conjured up years after the fact.

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

McClain was a disinterested witness whose testimony would have provided Syed with an alibi for the entire period when, according to the State, the murder took place. It is inconceivable that trial counsel's failure to contact her and present her testimony to the jury could not have "undermine[d] confidence in the outcome" of Syed's trial, as is sufficient to demonstrate *Strickland v. Washington* prejudice. 466 U.S. 668, 694 (1984).

The State makes no attempt—none—to defend the Circuit Court's prejudice analysis with respect to Syed's McClain alibi claim. That speaks volumes. So, too, does the fact that the State devotes less than one page of its brief to discussing the prejudice prong of that claim. And so, too, does the fact that the State fails to cite even *a single case* where counsel's failure to investigate a witness who would have provided an alibi accounting for the time of the crime was nevertheless deemed "not prejudicial." Nor does the State even attempt to address any of the cases Syed cited in which courts reached precisely the opposite conclusion. *See* Syed's Br. at 42-44 (citing *Grooms*, 923 F.2d at 91; *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir. 2004); *In re Parris W.*, 363 Md. at

729; *Raygoza v. Hulick*, 474 F.3d 958, 965 (7th Cir. 2007)). The State's lack of support for its argument is not surprising; the Circuit Court offered none, either.

Instead, the State offers two arguments. First, it contends that prejudice "cannot be shown" in this case because the evidence of guilt was overwhelming. State's Cross-Appeal Br. at 38 (emphasis added).[3] While that argument is a favorite among prosecutors, it borders on the absurd in this case, because it requires the assumption that testimony from a credible and disinterested witness[4] that Syed *could not have committed the crime* because he was with her when it supposedly occurred would not have been enough to sow any doubt with the jury. That is nonsensical. At the very least, there is a reasonable probability that a credible alibi witness's testimony would have "create[d] a reasonable doubt as to [Syed's] involvement," which is enough to demonstrate *Strickland* prejudice. *In re Parris W.*, 363 Md. at 729. That is particularly true in light of the fact that no physical evidence connected Syed to the crime, nobody saw Syed and the victim get into a car together, there was no confession, and the State's case rested heavily on the testimony of a single, problematic witness. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97,

[3] The State's recitation of the evidence against Syed, State's Cross-Appeal Br. at 38-40 is misleading at best. The following are just a few examples: (1) the State cites to the 2012 postconviction hearing to argue that Syed never attempted to contact Lee after she went missing, but the record does not support that contention and, regardless, evidence from the postconviction proceeding is irrelevant when assessing the strength of the State's case at trial; (2) the State contends that Syed was overheard asking Lee for a ride on the day she went missing, but the record does not contain testimony of any witness overhearing such a request; and (3) the fact that Syed's palm prints were found in Lee's car is unremarkable, given that he had been in her car many times over the course of their relationship.

[4] Syed also presented testimony from Irwin that, in his expert opinion, McClain was a highly credible witness. T. 2/5/16 at 149:6-10.

113 (1976) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

Second, the State argues that because there is a chance that McClain might have presented false testimony, failure to present her testimony was not prejudicial. This argument is baseless, for several reasons. As an initial matter, as discussed *supra* at 4-9, trial counsel's ineffectiveness in this case lay not only in her failure to present McClain as a witness, but in her abject failure to even contact McClain. Additionally, as discussed *supra* at 5, the record simply does not support the State's contention that the testimony McClain was prevented from giving due to trial counsel's deficient performance would have been false. As the Circuit Court found, adopting the State's theory would "require the Court to retroactively apply reasoning that is contrary to the facts and the law." App-178.

This case thus stands in stark contrast to the two cases the State cites in support of its argument. In *Nix v. Whiteside*, the Supreme Court addressed the question whether an attorney renders ineffective assistance in "refus[ing] to cooperate with the defendant in presenting perjured testimony at his trial." 475 U.S. 157, 158 (1986). The witness in *Nix* had told counsel before trial that he was planning to perjure himself. That extreme case is obviously not relevant here, where (1) trial counsel did not even *contact* the potential witness and (2) an unrebutted expert opined that the potential witness was highly credible. *See* T. 2/5/16 at 149:6-10. The State's reliance on *Lockhart v. Fretwell*, a case about counsel's failure to make an objection in a sentencing proceeding, is even more puzzling. 506 U.S. 364, 366 (1993). That case has no bearing whatsoever on whether the

failure to investigate an alibi witness is prejudicial. These were the two cases the State was able to muster in support of its contention that no prejudice resulted from a failure to investigate a time-of-the-crime alibi witness. It is telling, and instructive, that both cases are completely inapposite.

To sum up: trial counsel's failure to investigate a witness who swears she would have provided an alibi for the period the State says the crime took place cannot possibly be *not prejudicial*. Even the State apparently agrees that the Circuit Court's rationale for its holding—that the crux of the State's murder case against Syed was somehow not the crime itself—is indefensible, because the State does not defend it. But its attempts to piece together alternative bases for that holding are equally infirm. The Circuit Court's finding that trial counsel's failure to investigate the McClain alibi was not prejudicial should be reversed and a new trial granted on this basis as well.

C. The Circuit Court Erred by Assessing the Prejudice Resulting from Trial Counsel's Failure to Investigate in Isolation.

The Circuit Court failed to assess the cumulative prejudicial effect of trial counsel's multiple deficiencies, as required by the ineffective-assistance standard articulated by the Supreme Court.

The State in response does not dispute that the Circuit Court erred by evaluating the prejudice from each of trial counsel's deficiencies in isolation. State's Cross-Appeal Br. at 42-43. Instead, the State argues that Syed has waived this argument. That is wrong, because the error at issue is based on the Circuit Court's 2016 ruling. Thus, this appeal was the first time when the issue could have been raised—and it was.

The cases cited by the State in support of its waiver argument are inapposite. The petitioners in those cases raised a freestanding due-process claim that multiple, disparate errors at their trials combined to render their trials unfair—a claim which may be analyzed separately for purposes of the federal habeas exhaustion requirement. *See, e.g.*, *Nickleson v. Stephens*, 803 F.3d 748, 751-53 (5th Cir. 2015) (addressing "the cumulative error doctrine [which] provides that an aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair trial." (internal quotation marks omitted)); *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 533, 540-43 (3rd Cir. 2014) (cumulative prejudice of "ineffective assistance, combined with alleged errors of the trial court").

But Syed is not making an independent "cumulative error" *claim*. Rather, Syed argues that the Circuit Court failed to apply the correct legal standard in evaluating the prejudice prong of his claim of ineffective assistance of counsel. That standard, as articulated in *Strickland*, requires courts to consider "the cumulative effect of all errors" by counsel—not the effect of each error in isolation, as the Circuit Court did here. *Schmitt v. State*, 140 Md. App. 1, 19 (2001); *see also Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) (the consequences of attorney errors must be considered "in the aggregate"). Because this argument could not have been raised before the Circuit Court's June 2016 decision, there is no waiver.

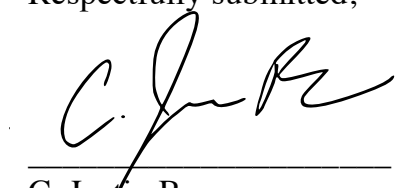
When assessed cumulatively, moreover, the prejudice to Syed from trial counsel's deficiencies is even more apparent than when evaluated in isolation. Had trial counsel contacted McClain *and* challenged the State's expert about cell phone location evidence,

Syed could have persuasively undermined the State's entire theory of the case, not to mention further undermining the narrative of its star but utterly unreliable witness Jay Wilds—attacking both the time of the murder and Syed's whereabouts after the fact. The Circuit Court's failure to consider the aggregate effect of trial counsel's deficiencies is thus an independent basis for reversal.

CONCLUSION

For the foregoing reasons, and those in Syed's opening submission on his conditional cross-appeal, the Circuit Court's decision to grant Syed a new trial can be affirmed on the alternative basis that Syed's counsel rendered constitutionally ineffective assistance in failing to investigate a time-of-the-crime alibi witness.

Respectfully submitted,



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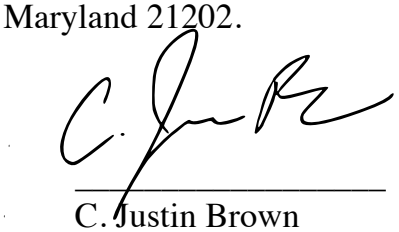
CERTIFICATION OF WORD COUNT AND COMPLIANCE

This Brief of Appellee/Cross-Appellant contains 3,898 words, excluding the parts of the brief exempted from the word count by Maryland Rule 8-503.

Pursuant to Maryland Rules 8-112(c) and 8-504(a)(9), I hereby certify that this Reply Brief of Appellee/Cross-Appellant was prepared in Times New Roman proportionally spaced 13-point font with double spacing between the lines.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2017, a copy of this Brief was mailed, first-class postage paid, to Thiruvendran Vignarajah, DLA Piper LLP (U.S.), 100 Light Street, Suite 1350, Baltimore, Maryland 21202.



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