In the

Court of Appeals of Maryland

September Term, 2018

No. 24

State of Maryland,

Petitioner,

v.

Adnan Syed,

Respondent.

On Certiorari to the
Court of Special Appeals of Maryland

Brief of Amici Curiae Maryland Criminal Defense Attorneys' Association, Maryland Office of the Public Defender, and Individual Criminal Defense Attorneys in Support of Respondent
(Filed with the Consent of All Parties)

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Amici's Identity and Interest

Amici are the Maryland Criminal Defense Attorneys' Association (MCDAA),[1] the Maryland Office of the Public Defender (OPD),[2] and the following individual attorneys, who are experienced in criminal defense and who served as defense counsel, professors, or administrators during the 1999 to 2000 period:

William C. Brennan, Jr.	Prof. Michael Millemann
Prof. Emeritus Jerome E. Deise	William H. "Billy" Murphy, Jr.
Paul B. DeWolfe	Larry A. Nathans
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Amici have an interest in addressing misunderstandings, at the core of the State's brief, regarding criminal defense attorneys' duties to their clients. In 1999, Adnan Syed's parents retained Cristina Gutierrez to defend their 17-year-old son

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[1] MCDAA's mission includes research, education, and advocacy relating to criminal defense practice, the proper administration of justice, and the protection of individual rights. *See* https://mcdaa.org/about.php.

[2] OPD's mission is to provide superior legal representation to indigent defendants in the State of Maryland. OPD represented Syed in his direct appeal, which concluded in 2003.

against first-degree murder charges. The facts, as found by the circuit court, are that Syed forwarded Gutierrez two letters from a potential alibi witness five months before trial, but she took no action to contact the witness. David Irwin, Esquire, a member of the MCDAA, provided expert testimony that this omission fell below the standard of care. The State has not found any criminal defense lawyer to testify that such a decision could satisfy an attorney's duty to conduct a reasonable investigation. By the State's argument, it is a defense attorney's prerogative to decide not to take the brief time necessary to contact a willing, available alibi witness identified by the client. That idea, if accepted, would undermine criminal defense attorneys' foundational responsibilities to their clients and erode basic principles of the attorney-client relationship.

Argument

A. It is an omission, not a reasonable strategy, when a defense attorney does not contact an alibi witness identified by the client.

In holding that Gutierrez provided deficient representation, the circuit court credited the expert testimony of David Irwin, Esquire. His opinion drew upon the American Bar Association's Standards for Criminal Justice.[3] *T.2/5/2016 at 125*; *T.2/8/2016 at 129*. Rather than present a competing expert at the post-conviction hearing, the State attempted to poke holes in Irwin's testimony. The State's position, like the dissent below, would require Syed to disprove that Gutierrez consciously refrained from contacting McClain, without properly assessing whether such a decision could be objectively reasonable. An attorney's failure to contact a potential alibi witness, identified by the client five months before trial, is antithetical to the ABA Standards. Thus, there are only two possible explanations: it was either an oversight or an objectively unreasonable decision.

The Supreme Court uses the ABA Standards as "guides to determining what is reasonable" under the Sixth Amendment. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). A lawyer's duty is to "conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case." *Id.* (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1982

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[3] Except where otherwise indicated, "ABA Standards" or "Standards" refers to the third edition, ABA STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1993).

Supp.)). "Facts form the basis of effective representation," which "consists of much more than the advocate's courtroom function per se." ABA STANDARDS 3D 181 (4-4.1 commentary). "The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role." *Id.* at 183.

These duties stand in contrast to the State's five hypotheses why Gutierrez could have concluded it was unnecessary to contact McClain:

> [1] the alibi proposed by McClain was inconsistent with what Syed had told police[;]
>
> [2] it was unnecessary to investigate a witness who could not testify to Syed's daily habits and routine[;]
>
> [3] part of Gutierrez's strategy was to challenge the State's evidence as to when Hae Min Lee was killed, not to accept the State's proposed timeline and craft an alibi accordingly[;]
>
> [4] talking to a witness who placed Syed at the public library was unnecessary because putting Syed at that location would have ironed out a wrinkle in the State's case that Gutierrez intended to exploit[; or]
>
> [5] she reasonably believed that McClain was offering to falsify an alibi for Syed, that Syed was colluding with McClain to do so, or that the prosecution would use Syed's and McClain's communications with one another against Syed at trial.

State's Br. 34–42.

Even if Gutierrez somehow made such conscious decisions, they could not have been reasonable under *Rompilla* and Standard 4-4.1, without first *contacting* the alibi witness identified by the client. There may be reasons—after a thorough

pretrial investigation that includes interviewing the witness—to decide against calling a witness to *testify* at trial. But an attorney is in no position to settle on a trial strategy without a diligent pretrial investigation. ABA STANDARDS 3D at 183.

Contacting potential witnesses is among defense counsel's fundamental responsibilities. When a defense attorney undertakes a representation, he or she knows that "[c]onsiderable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it." ABA STANDARDS 3D at 182. Whatever the bounds of reasonable efforts that counsel must exhaust, Standard 4-4.1 required Gutierrez to contact McClain, who provided her home telephone number; expressed a clear desire to speak with defense counsel; identified two other witnesses who may have seen Syed at the library; and suggested there may have been library security camera footage corroborating her memory.

There is no gray area. Counsel has a duty, not a choice, to make a diligent effort to contact the witness under such circumstances. The question of "what witnesses to call" is a decision that "should be made by defense counsel *after consultation with the client* where feasible and appropriate," including ABA STANDARDS 3D 4-5.2 (emphasis added). The "feasible and appropriate" language reflects that counsel often must make lightning-fast decisions during trial. *Id.* at 202 (4-5.2 commentary). Here, Syed told Gutierrez of McClain's letter—an

indication he considered her testimony significant—nearly five months before trial. *Syed v. State*, 236 Md. App. 183, 258 (2018). Even if Gutierrez harbored the kind of doubts the State attributes to her, her responsibility was to contact McClain and, if the conversation substantiated those purported doubts, to consult with Syed during the months before trial.

It makes no difference that, as the State posits, defense counsel may perceive a potential witness' testimony as inconsistent with what the client has told the police or counsel. The duty to investigate is so fundamental that it "exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."[4] *Rompilla*, 545 U.S. at 387 (quoting ABA STANDARDS 2D 4-4.1). Here, Syed maintained his innocence and needed help remembering the events of January 13, 1999. The police did not speak with Syed until January 25, when the investigation was still a missing-person case. Hae Min Lee's body was not found until February 9, and Syed was arrested on February 28. In such a situation, it is imperative for defense counsel to

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[4] In *Pennsylvania v. Rainey*, 928 A.2d 215, 233 (Pa. 2007), on which the State relies, the defendant had admitted his presence at the crime scene to the police. The attorney therefore decided to challenge whether the facts amounted to first-degree murder, without interviewing family members who volunteered that they could provide alibi testimony. Particularly given the problems of confessions, *Rainey* is in tension with Standard 4.4-1. Regardless, because the State's theory is that Gutierrez presented an alibi strategy, *Rainey* does not bear on the question of whether the alibi investigation was adequate.

identify potential witnesses to help refresh the client's recollection and potentially provide alibi testimony at trial. Declining to interview a witness, based on the reasons hypothesized by the State, is incompatible with ABA Standard 4-4.1.

Even great lawyers can make grave mistakes. That truth does not diminish the fact that Gutierrez was a trailblazer who, at her peak, was one of Maryland's finest criminal defense attorneys.[5] Although the State has suggested that Irwin's testimony is a "smear" upon her memory, *T.2/9/2016 at 58*, the true attack on any criminal defense lawyer's reputation is to suggest he or she would consciously decline to contact an alibi witness identified by the client. Calling such a mistake reasonable, moreover, would undermine the duty of diligence, a pillar of the

[5] The testimony from William Kanwisher and Phillip Dantes provided ample reason to believe that declining health transformed Gutierrez into a shell of her former self by the time of Syed's trials. Although the State ultimately convinced the circuit court not to consider the evidence of Gutierrez's illness and sixteen attorney grievance proceedings, the State has argued in other proceedings that it is appropriate for a state post-conviction court to take judicial notice of the fact that Gutierrez "consented to disbarment and the Client Securities Trust Fund asserted claims of $325,000 in fees that Ms. Gutierrez accepted from clients and gave no service to in return." *Merzbacher v. Shearin*, 732 F. Supp. 2d 527, 539 (D. Md. 2010) (quoting circuit court opinion that relied on newspaper coverage of ethical charges); *see* State's Opening Brief, *Shearin v. Merzbacher*, No. 10-7118 (4th Cir. filed May 4, 2012), at 34 n.4 ("Gutierrez's status with the Maryland bar was the subject of a reported Court of Appeals' opinion, *In re Application of Maria C.*, [294 Md. 538 (1982)], and was the type of evidence that has been found to be subject to judicial notice"). Amici see no contradiction, only tragedy, in the notion that a leading lawyer could fall into such a downward spiral.

attorney-client relationship. *See* Md. Rule 19-301.3. To accept those arguments would do a disservice to defense attorneys and their clients throughout Maryland.

B. Few errors are more prejudicial than the failure to contact a non-family alibi witness identified by the client.

Section II of the State's brief cites only *Strickland v. Washington*, 466 U.S. 668 (1984), without discussing any case applying *Strickland*'s prejudice standard in the context of witnesses who could provide or corroborate an alibi. It does not cite *In re Parris W.*, 363 Md. 717 (2001) (Raker, J.), which collected authorities finding prejudice under analogous circumstances. Amici see no way to reconcile those authorities with the State's argument regarding prejudice.

Irwin testified that "a credible alibi witness" is "the best possible defense you can have," short of documentary proof the defendant was not the perpetrator. *T.2/5/2016 at 125–26*. Apparently acknowledging the special power of an alibi, the State argues that Gutierrez chose to investigate and present one alibi strategy over another. But the State's theory at most establishes only that Gutierrez made the egregious error of presenting a poorly investigated alibi through a family member, without speaking with a third-party witness to supplement or corroborate that alibi. *Skakel v. Comm'r of Correction*, 188 A.3d 1, 42 (Conn. 2018), *cert. pet. pending*, U.S. S. Ct. No. 18-185; *Henry v. Poole*, 409 F.3d 48, 65 (2d Cir. 2005).

Syed's only direct evidence of his whereabouts after school on January 13, 1999, was his father's testimony that Syed arrived at mosque around 7:30 p.m. for

an 8:00 p.m. prayer. *State's Br. 23.* From there, the State asserts that Syed tried to fill the gap between 2:15 p.m. and 7:30 p.m. with an "alibi by routine," with Gutierrez cross-examining witnesses to establish where Syed would have been if he had followed his normal after-school schedule.[6] There are three clear prejudicial deficiencies in that alibi:

1. Gutierrez presented no testimony as to Syed's actual whereabouts, only his potential whereabouts, during the time when Syed allegedly murdered Hae Min Lee;
2. the State offered cell phone records allegedly proving that Syed was not at the mosque when his father said he was, *T.2/25/2000 at 119;*[7] and

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[6] A Westlaw search for the phrase "alibi by routine" returns zero results; the State appears to have coined the phrase for this case. An alibi refers to evidence that a defendant was so far from the crime scene that it would have been impossible for him to commit the crime. *Schmitt v. State*, 140 Md. App. 1, 32 (2001) (Moylan, J.). Syed's routine was at most an explanation for where he could have been between 2:15 and 7:30. That evidence, if believed, did not make it impossible for Syed to have been at Best Buy if he had (as the State argued) deviated from his routine to commit a premeditated murder. Because the State's "Question Presented" depends in large part on the faulty premise that an "alibi by routine" is an alibi, one potential resolution of this case would be to dismiss certiorari.

[7] The Court of Special Appeals did not reach the merits of the circuit court's holding that Gutierrez was ineffective in failing to cross-examine the State's expert regarding the cell records' clear disclaimer that "[o]utgoing calls only are reliable for location status. Any incoming calls will NOT be reliable information for location." *Cir. Ct. Op. 40.*

3. most importantly, as discussed below, juries are particularly likely to doubt alibi testimony from family members.

The Court's *Parris W.* decision highlights the prejudice from presenting an accused's father as the only alibi witness. In *Parris W.*, the juvenile's father testified that his son accompanied him on his delivery route and was not at school during an alleged assault on a classmate. 363 Md. at 722–23. Defense counsel intended to call five witnesses to corroborate various parts of the father's testimony, but he subpoenaed them for the wrong day. *Id.* at 727. This error allowed the State to argue that the father, like any parent, had an incentive to provide a false alibi for his son. *Id.* at 723.

This Court held that the prejudice in *Parris W.* was so clear that it was reviewable on direct appeal, without any post-conviction hearing to test the absent witnesses' testimony. 363 Md. at 726–27. It collected and discussed federal cases finding prejudice from the failure to investigate or call third-party alibi witnesses, including cases where the failure left only the uncorroborated alibi testimony of a family member or girlfriend. *Id.* at 730–36 (collecting cases). The Court recognized that the finder of fact might have adjudicated the juvenile responsible, even with the additional witnesses. Three could testify only regarding the morning delivery route, before the afternoon assault. *Id.* at 729–30. Testimony from two other witnesses was more helpful, but they were family friends. *Id.* at 730. Still, "they

were *less interested* parties in [the juvenile's] proceedings than his father." *Id.* (emphasis added). Thus, the Court found a substantial possibility that the less-interested witnesses would have created reasonable doubt, requiring a new trial. *Id.* at 729.

The State thus highlights prejudice, rather than disputing it, when it argues that Gutierrez provided an alibi through Syed's father and evidence of Syed's routine. The Connecticut Supreme Court recently held that "our research has not revealed a single case ... in which the failure to present the testimony of a credible, noncumulative, independent alibi witness was determined not to have prejudiced a petitioner under *Strickland*'s second prong." *Skakel*, 188 A.3d at 42. There "are many cases, however, in which counsel's failure to present the testimony of even a questionable or cumulative alibi witness was deemed prejudicial in view of the critical importance of an alibi defense." *Skakel*, 188 A.3d at 42 (collecting authorities, including the Court of Special Appeals opinion below). When defense counsel presents alibi testimony only from family members, the jury is more inclined to doubt that testimony and take it as a conscious admission of guilt. *Id.*

Overall, the State's no-prejudice argument depends on a misunderstanding of the concept of "overwhelming evidence of guilt." *State's Br. 50.* As Judge Charles Clark, joined by Judge Learned Hand, observed: "surely, the evidence of guilt is not 'overwhelming' where ... not only is the testimony in sharp conflict, but the

government's case depends in considerable part on testimony of accomplices." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 654 (2d Cir. 1946). Here, the State's statement of facts and its Section II refer repeatedly to the accomplice testimony of Jay Wilds, whose various accounts of January 13 were themselves in sharp conflict. *State's Br. 5–10, 51, 53; see Syed*, 236 Md. App. at 283 & n.41. To attack the Court of Special Appeals' reference to the State's "strong circumstantial case," the State accuses the majority of "ignor[ing] Wilds' testimony that Syed confessed to strangling Hae and discussed the murder at length with him."[8] *State's Br. 53.* McClain's testimony would have further complicated the time-line that the State sought to establish through Wilds, bolstering the overall argument that Syed was not at the crime scene.

The State's arguments focus on the strengths of its case, without addressing the significant vulnerabilities that the Court of Special Appeals identified:

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[8] During the 2016 post-conviction hearing, the State argued that because the jury chose to convict Syed in the face of contradictions in Wilds' varying accounts, additional attacks would not have made a difference. The next month, the Supreme Court rejected that theory of harmlessness. In *Wearry v. Cain*, 136 S. Ct. 1002 (2016), the prosecution's star accomplice witness admitted on cross-examination that "he had changed his account several times." *Id.* at 1003. The Supreme Court held that, given the importance of an accomplice witness' credibility, it could not say with sufficient confidence that the jury still would have convicted if presented with additional evidence challenging his testimony. *Id.* at 1006–07. Consistent with *Wearry*, the State's brief does not raise this particular no-prejudice argument.

> With little forensic evidence, the case was largely dependent on witness testimony of events before and after Hae's death. Testimony of these witnesses often conflicted with the State's corroborating evidence, i.e., the cell phone records and the cell tower location testimony by its expert, Waranowitz. The State's key witness, Wilds, also was problematic; something the State readily admitted during its opening statement. Wilds had given three different statements to police about the events surrounding Hae's death.
>
> The State's case was weakest when it came to the time it theorized that Syed killed Hae. As the post-conviction court highlighted in its opinion, Wilds's own testimony conflicted with the State's timeline of the murder. Moreover, there was no video surveillance outside the Best Buy parking lot placing Hae and Syed together at the Best Buy parking lot during the afternoon of the murder; no eyewitness testimony placing Syed and Hae together leaving school or at the Best Buy parking lot; no eyewitness testimony, video surveillance, or confession of the actual murder; no forensic evidence linking Syed to the act of strangling Hae or putting Hae's body in the trunk of her car; and no records from the Best Buy payphone documenting a phone call to Syed's cell phone. In short, at trial the State adduced no direct evidence of the exact time that Hae was killed, the location where she was killed, the acts of the killer immediately before and after Hae was strangled, and of course, the identity of the person who killed Hae.

Syed, 236 Md. App. at 283–84. The dissent below did not take issue with this holding regarding prejudice. *Id.* at 286–306 (addressing only first *Strickland* prong).

McClain's testimony, which accentuated the weaknesses in the State's circumstantial case, is precisely the kind of evidence that raises a substantial possibility of a different result, which is all that the Sixth Amendment requires for a new trial. The State expresses confidence that a jury still would have convicted Syed, perhaps using a different time-line that the State presented at the post-

conviction hearing. *See Cir. Ct. Op. 11 n.9.* But the place to test these fundamental jury questions, consistent with the Sixth Amendment and *Parris W.*, is on retrial.

Conclusion

For these reasons, amici urge the Court to affirm.

Certification of Word Count and Compliance With Rule 8-112

1. This brief contains 3,369 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Steven M. Klepper

Dated: September 20, 2018

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Certificate of Service

I hereby certify that, on September 20, 2018, two copies of the Brief of Amici Curiae Maryland Criminal Defense Attorneys' Association and Individual Criminal Defense Attorneys in Support of Respondent were sent by first-class mail, postage prepaid, to:

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