

Filed

STATE OF MARYLAND,
Petitioner,
v.
ADNAN SYED,
Respondent.

IN THE
COURT OF APPEALS
OF MARYLAND
September Term, 2018
Petition Docket No. 120

JUN 18 2018
Bessie M. Decker, Clerk
Court of Appeals
of Maryland

REPLY TO ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND ANSWER TO CONDITIONAL CROSS-PETITION

The State of Maryland, Petitioner, by its attorneys, Brian E. Frosh, Attorney General of Maryland, and Thiruvendran Vignarajah, Special Assistant Attorney General, herein replies to Respondent's Answer in Opposition to Petition for Writ of Certiorari and briefly addresses Respondent's Conditional Cross-Petition.

QUESTIONS PRESENTED

The State's Petition

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

Respondent's Conditional Cross-Petition

Whether the Court of Specials properly concluded that clear limits set by statute on the number and timing of post-conviction petitions cannot be set aside by artfully reframing an ineffective counsel claim.

PERTINENT STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS

United States Const., Amend. VI

STATEMENT OF FACTS

For present purposes, the State incorporates its Statement of Facts from its Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S ANSWER

Respondent's Answer to the Petition for Certiorari rests on a series of erroneous and misleading statements. In this short reply, we focus only on clarifying a few concerning claims and reiterating the importance of review.

A. Respondent mischaracterizes the context of this case to try to diminish the broader implications of the decision below.

Respondent mischaracterizes the factual context of the case and the state of the lower court decisions. Respondent asserts that "the State's case against Syed relied primarily on the story of one witness — Jay Wilds — and cell phone records." *Respondent's Answer in Opposition to Petition for Writ of Certiorari with Conditional Cross-Petition ("Respondent's Answer")* at 3. The Court of Special Appeals, however, notes more than a dozen witnesses, latent fingerprints, extensive phone records, and other relevant tangible evidence. *Syed v. Maryland*, Nos. 2519, 1396, Slip Op. 1 (Md. Ct. Spec. App. Mar 29, 2018) ("Op.").

Respondent's mischaracterization is an effort, with regard to the legal question, to amplify the importance of the supposed alibi witness and to minimize the novelty of the duty being imposed upon counsel by the decision of the Court of Special Appeals. Indeed, Respondent makes no mention of the fact that Respondent's attorney provided to the State a list of 80 potential alibi witnesses prior to trial.

Thus, in practice, the decision of the Court of Special Appeals threatens to impose upon defense counsel a significant burden never contemplated by *Strickland v. Washington*, 466 U.S. 668, 690 (1984), requiring attorneys to try to contact every conceivable alibi witness that arises, no matter the risks and benefits of that potential witness, no matter how incompatible the testimony with the defendant's own statements, and no matter what other resources have been spent pursuing alternate defenses and alibis.

In a case where counsel investigated and produced a list of 80 alibi witnesses premised on a superior alibi theory, this new rule would require a defense attorney to chase leads, no matter the quality or relevance, because of what that lead could have meant looking back at the trial after conviction. This is exactly the kind of analysis forbidden by *Strickland* and turns on its head the "strong" legal presumption established by *Strickland* that "counsel's conduct falls within the wide range of reasonable professional assistance."

Respondent also attempts to mask the lack of clarity produced by the lower court decisions in this case. *See Respondent's Answer* at 5. While the Court of Special Appeals granted the same relief as the postconviction court in its second decision, it granted relief on fully different grounds. In fact, three decisions have been issued during postconviction proceedings: an initial opinion by the postconviction court denying all bases for relief; a second decision by that same court, this time granting relief on the basis of ineffective assistance of counsel related to cross-examination of an expert (Mem. Op. II); and a decision by the Court of Special Appeals, reversing the lower court's opinion and denying relief based on the claim of ineffective assistance of counsel related to the cross-examination of an expert, while also reversing the lower court's decision that there was no prejudice and therefore granting post-conviction relief based on ineffective counsel for failure to call a potential alibi witness. These three lower court opinions do not follow the same logic or reach the precise same result. Only by ignoring the manifest fault lines among the prior decisions can respondent contend that review by this Court would not provide correction and clarity.

B. The scope of a defense attorney's constitutional obligations relating to investigation of defenses are of public importance.

Respondent attempts to frame this decision as limited to only this case and implying nothing more for other cases. Yet, the Court of Special Appeals

itself shared its opinion that it was entering uncharted territory and framed the dispute as a general question about the scope of defense obligations with respect to potential alibi witnesses. *See Op.* at 78 (“Our research has revealed no Maryland case that has addressed directly the issue of a defense counsel’s failure to investigate a potential alibi witness in the context of an ineffective assistance of counsel claim.”). This is of even greater public importance because the Court of Special Appeals’ decision has introduced specific constitutional obligations with potentially far-reaching consequences that are unmoored from prevailing Sixth Amendment law. The new requirement implicates the scope of defense counsel’s Sixth Amendment obligations to investigate specific avenues that are different from, and potentially incompatible with, other potential defenses selected by seasoned counsel, threatening to dramatically broaden the work required by the Constitution of defense counsel and stripping them of the discretion and presumption of reasonableness with respect to which leads they pursue and which they forego.

Sturdivant v. Maryland Dep’t of Health & Mental Hygiene, 436 Md. 584, 589, 84 A.3d 83, 86 (2014) (certiorari was appropriately granted when the case raises a legal question of public importance). The Court of Appeals should provide the requisite clarity to directly address the issue presented.

ANSWER TO CONDITIONAL CROSS-PETITION

The State's original petition addresses the sole ground on which the Court of Special Appeals granted relief and asks this Court to review and reverse that decision. Respondent has filed a conditional cross petition asking this Court to review the Court of Special Appeals' decision reversing the postconviction court's decision granting relief on a separate ground. The State respectfully submits that this part of the Court of Special Appeals' decision was correctly decided and that the appellate court relied on clear precedent and statutory history to conclude that Respondent is not entitled to circumvent established limits on post-conviction petitions by asserting a new ground of ineffective assistance of counsel that could have been asserted earlier. And, the lower court's error in failing to apply clear restrictions on the number and timing of post-conviction petitions does not create new law; it simply applies existing rules from which the post-conviction court improperly departed and accordingly further review by this Court is unwarranted.

Respondent, indeed, makes no effort to address controlling decisions like *Wyche v. State*, 53 Md. App. 403, 407 (1983) (citing the footnote, "if an allegation concerning a fundamental right has been made and considered at a prior proceeding, a petitioner may not again raise the same allegation in a subsequent post-conviction petition by assigning new reasons as to why the right had been violated, unless the court finds that those new reasons could

not have been presented in the prior proceeding”), or *Arrington v. State*, 411 Md. 524 (2009) (where the Court of Appeals upheld a dismissal of new claims of ineffective assistance of trial counsel as waived because ineffective assistance of counsel under different grounds was already litigation in post-conviction court). With regard to the Court of Special Appeals’ decision precluding Respondent from overriding clear limits set by statute, recognized by precedent, and consistent with practice, its decision is straightforward and sound and does not require confirmation by this Court given its clear, prior pronouncements.

The Court of Special Appeals, therefore, should deny Respondent’s conditional cross-petition.

CONCLUSION

The State of Maryland respectfully asks the Court to grant its petition for a writ of certiorari and deny Respondent's cross petition.

Dated: June 18, 2018

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland


THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202
(410) 580-3000(O)
(410) 580-3001(F)
thiru.vignarajah@dlapiper.com

Counsel for Petitioner

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

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Md. Rule 8-112; and contains 1,350 words.


Thiruvendran Vignarajah
THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202
(410) 580-3000(O)
(410) 580-3001(F)
thiru.vignarajah@dlapiper.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on this day, June 18, 2018, a copy of the foregoing "Petition for Writ of Certiorari" was mailed by first-class U.S. Postal Service, postage prepaid, to C. Justin Brown, Esquire, Law Office of C. Justin Brown, 231 East Baltimore Street, Suite 1102, Baltimore, Maryland 21202.


Thiruvendran Vignarajah
THIRUVENDRAN VIGNARAJAH
Special Assistant Attorney General

DLA Piper LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202
(410) 580-3000(O)
(410) 580-3001(F)
thiru.vignarajah@dlapiper.com

Counsel for Petitioner