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 The Innocence Network and the MacArthur Justice Center in Support of Respondent's Motion for Reconsideration

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INTRODUCTION

Amici the Innocence Network and the Roderick and Solange MacArthur Justice Center submit this brief in support of respondent's motion for reconsideration, which should be granted in light of the significant negative consequences of the Court's opinion (which the opinion does not address) and the opinion's material conflict with the prejudice analysis applied by other courts (including the U.S. Supreme Court). *See* Rule 8-605.

The Innocence Network is an association of organizations whose members provide pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. The Innocence Network represents hundreds of prisoners with innocence claims in all 50 states and the District of Columbia as well as in Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. The Innocence Network also seeks to prevent future wrongful convictions by researching the causes of such convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a non-profit, public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC is a proponent of positive reform of the criminal justice system. Attorneys at RSMJC have led civil rights cases in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The Innocence Network and RSMJC have an interest in this case because the Court's holding on the issue of prejudice would establish a substantial barrier to relief for actually innocent individuals seeking to secure their freedom and would have nationwide consequences. Such a barrier is at odds with a central goal of both organizations: ensuring that wrongfully convicted individuals have meaningful access to judicial relief.

ARGUMENT

I. The Opinion's Prejudice Analysis Is Fundamentally Flawed.

The analysis of the prejudice prong of the ineffective-assistance test in the Court's opinion rests on a mistake that this Court should grant reconsideration to correct. For purposes of determining the existence of prejudice here, the question is whether there is a "reasonable probability" that, had the alibi witness testimony been presented to the jury at the trial, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). But the opinion asked a different question: whether the testimony would have been significant to the jury if the prosecution had presented an entirely *different* theory of the case than the one actually advanced at trial. That approach cannot be reconciled with the reasonable probability standard that the U.S. Supreme Court has mandated.

Under governing precedent, the prejudice analysis must assess the effect that the alibi evidence might have had on a juror at the *actual* criminal trial that resulted in a conviction. *Strickland* explains that "a court hearing an ineffectiveness claim must consider the totality of the evidence *before the judge or jury*" along with the evidence that defense counsel failed to present. 466 U.S. at 695 (emphasis added); *see*, *e.g.*, *id.* (asking

whether there is a "reasonable probability that, *absent the errors*, the factfinder *would have had* a reasonable doubt respecting guilt") (emphasis added); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) ("[H]ad the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence."). And the Supreme Court has warned against "le[aving] the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell v. United States*, 369 U.S. 749, 768 (1962). That is why, despite an unbroken line of cases holding that "the failure to present the testimony of a credible, noncumulative, independent alibi witness" amounts to prejudice, *Skakel v. Comm'r of Corr.*, 188 A.3d 1, 42 (Conn. 2018), *cert. denied*, 139 S. Ct. 788 (2019), we are not aware of a single one that asks whether the State could have offered a new theory of the crime that would have rendered the alibi evidence irrelevant.[1] Rather, the Supreme Court and other courts have asked whether the evidence could have affected a juror's conclusion in light of the theory of the case the jury was asked to consider—*i.e.*, the theory the prosecution presented and had the burden of proving beyond a reasonable doubt at the trial. *See, e.g.*, *id.*; *Strickland*, 466 U.S. at 695; *Wiggins*, 539 U.S. at 536.

[1] Courts' refusal to engage in that type of inquiry is consistent with their general refusal to consider new theories advanced by the State in the post-conviction setting. *See, e.g.*, *People v. Davis*, 2012 IL App (4th) 110305, ¶ 56 (rejecting new theories Illinois offered to minimize post-conviction claims because they were "never presented to the jury" and are "mere speculation"); *Hildwin v. Florida*, 141 So.3d 1178, 1181 (Fla. 2014) ("The State cannot now distance itself from the evidence and theory it relied upon at trial by arguing that it could have still convicted Hildwin without any of the now-discredited scientific evidence. While that might be possible, we cannot turn a blind eye to the fact that a significant pillar of the State's case, as presented to the jury, has collapsed and that this same evidence actually supports the defense theory that Hildwin presented at trial.").

Here, the majority opinion evaluated the effect of the alibi evidence not on the prosecution's actual presentation at trial but rather on hypothetical prosecution theories that the State had never espoused at trial. Indeed, the ruling that prejudice did not exist here rests on the conclusion that the testimony of the alibi witness might not have been important if a juror rejected the State's entire theory of when Mr. Syed killed Ms. Lee. *See* Opinion at 28–29 ("[The] alibi does little more than to call into question the time that the State claimed Ms. Lee was killed."). The prosecution's theory of the case was that Mr. Syed murdered Ms. Lee sometime between 2:15pm and 2:36pm. *See id.* at 28–29 (acknowledging that the State's timeline rested on Mr. Syed killing Ms. Lee by 2:36pm). The opinion posits an alternative theory: that Mr. Syed killed Ms. Lee *after* 2.40pm. *Id.* at 29. But the prosecution did not pursue any such theory at trial. The omission of the alibi evidence is unquestionably prejudicial under the theory that the prosecution actually presented to the jury, because that evidence directly and independently contradicts the State's claim that Mr. Syed was with Ms. Lee at the time the State claimed she was killed.[2]

While the majority opinion suggests that the prosecution's theory of the case would have been stronger had the State set forth a different timeline regarding Ms. Lee's murder, *see* Opinion at 25, 34, the fact is that the prosecution did not advance any such timeline in support of its assertion of Mr. Syed's guilt. Of course, the State would have the opportunity, at any new trial, to attempt to convince a jury of a timeline in which the murder

[2] It is thus largely beside the point that the State presented *other* evidence that it relied on to argue that Mr. Syed may have killed Ms. Lee. None of that evidence could establish guilt beyond a reasonable doubt on the murder charge if Mr. Syed was not with Ms. Lee during the *only* time period in which the State claimed she was murdered.

occurred later than 2:36 pm. But this Court should not apply a prejudice analysis that bypasses that process and allows the State to save a conviction on the basis of hypothetical theories never actually presented to the jury.

Such an approach, taken to its logical conclusion, would make the prejudice prong nearly impossible to establish, because only evidence the absence of which would be prejudicial under *every possible hypothetical* theory of a case could be the basis for a successful claim. Practically speaking, having to demonstrate that omitted evidence would be prejudicial under every possible theory of guilt that can be dreamed up after the fact is tantamount to requiring a defendant to show that the evidence is so conclusive that it is more likely than not to result in an acquittal—a standard that *Strickland* expressly rejected. 466 U.S. at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). And at the very least, such a standard places a far higher burden on the defendant than the "reasonable probability" standard set forth in *Strickland*.

II. If Left In Place, The Prejudice Holding Would Severely Limit the Ability of Actually Innocent Individuals to Challenge Their Convictions.

The majority's holding that the failure to investigate an alibi witness did not amount to prejudice will have substantial ripple effects, with particularly devastating consequences for actually innocent individuals seeking to obtain justice. This Court has granted reconsideration on several occasions upon recognizing that its decision could have significant unintended consequences. *See, e.g.*, *In re Adoption/Guardianship of C.E.*, No. 77 Sept. Term, 2017, 2018 WL 6288264 (Md. Dec. 3, 2018); *Tracey v. Solesky*, 427 Md.

627, 664–68 (2012), *as amended on reconsideration* (Aug. 21, 2012); *cf., e.g.*, *Exxon Mobil Corp. v. Ford*, 433 Md. 493 (2013) (supplementing opinion upon denial of reconsideration). The same course is appropriate here.

A. *Unintended Consequences in Ineffective-Assistance Cases*

As an initial matter, the prejudice holding here will affect not only Mr. Syed but also countless innocent individuals who did not receive a fair trial because of constitutionally deficient counsel. Studies have shown time and again that inadequate representation is a prime contributor to wrongful convictions. *See, e.g.*, Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 75 & n.195 (2005) ("Poor lawyering was a major cause in almost a quarter of the cases in which innocent people were exonerated by DNA."); Emily M. West, Innocence Project, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases* (Sept. 2010), *available at* https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf. The National Registry of Exonerations reports that, of the 2,417 known exonerees from 1989 to the present, 614 (25%) received an inadequate legal defense. *See* http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Apr. 8, 2019). That finding is consistent with longstanding recognition of the "harsh reality" that "[t]he mounting evidence of wrongful convictions" has provided "undeniable proof" that inadequate representation has led to "innocent persons being sent to jail." *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, ABA Standing Comm. on Legal Aid and Indigent Defendants 3 (Dec. 2004), *available at* https://www.americanbar.org/

content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

A particular problem is the failure of counsel to investigate and present alibi evidence. For example, a review of 200 persons exonerated by DNA evidence found that 29% raised claims of ineffective assistance of counsel, the majority of which were based on counsel's failures relating to important evidence such as "alibi witnesses." Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008). In still other cases, exonerees were able to secure their freedom without DNA testing on the ground that their counsel failed adequately to investigate an alibi. *See, e.g.*, *Schulz v. Marshall*, 528 F. Supp. 2d 77 (E.D.N.Y. 2007) (granting relief where defense counsel failed to call an alibi witness whose testimony could have contradicted the State's theory that Stephen Schulz was guilty of robbery), *aff'd*, 345 F. App'x 627 (2d Cir. 2009); *Garcia v. Portundo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006) (granting relief where defense counsel failed to introduce evidence that Jose Garcia was in the Dominican Republic on the day that the State claimed he committed murder in the Bronx). In short, the Sixth Amendment's guarantee of effective representation has played a critical role in assuring that the innocent can vindicate their right to a fair trial. Indeed, for some wrongfully convicted individuals, asserting an ineffective assistance of counsel claim may be their only opportunity to obtain relief.

If the Court were to leave the majority opinion in place, however, it would effect a sea change in Sixth Amendment law, severely limiting the utility of an ineffective-assistance claim for the actually innocent. Although the Court may have intended its decision to be factbound—turning on the unique facts of this case with little application

outside of it—the decision actually may have much broader effects. Until this decision, there had not been "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." *Skakel*, 188 A.3d at 42. This Court's decision is now that single case.

By breaking new ground in this way, the decision erects a novel barrier for innocent defendants to overcome. Under that decision, it would no longer be enough to show that counsel failed to investigate an alibi witness whose testimony flatly contradicts the State's theory of the case. Defendants would instead have to meet the far higher burden of proving that, if the alibi witness had testified, the State could not have changed its story to justify its prosecution in a new way. Put another way, defendants would need an alibi witness who could offer testimony that refutes every conceivable theory the State could create, including theories the State did not present (and possibly rejected) at trial. As some commentators have noted, that new burden "will have ramifications beyond this one notorious case"—making it harder for all innocent defendants to secure a new, fair trial. Mark Joseph Stern, *Adnan Syed Deserves a New Trial*, Slate (Mar. 11, 2019), *available at* https://slate.com/news-and-politics/2019/03/adnan-syed-serial-new-trial-maryland-asia-mcclain.html (explaining that the majority opinion has unfortunately "bolstered courts' ability to concoct some fanciful reason why a lawyer's error didn't *really* matter, because a jury surely would've found its way to a conviction anyway"). However one thinks a jury might resolve Mr. Syed's particular case, the only way to maintain the Sixth Amendment protections for innocent defendants is to provide Mr. Syed with a new trial—one where the

State can pick its theory of the case, and Mr. Syed can defend against it with constitutionally adequate counsel.

B. *Unintended Consequences in Other Contexts*

The unintended consequences of the Court's decision unfortunately cannot be limited to the ineffective-assistance context alone. The same prejudice inquiry on which this case turned—*i.e.*, whether there was a "reasonable probability" of a different result based on the evidence at issue, *Strickland*, 466 U.S. at 694—is a necessary element in at least two other critical contexts. First, defendants bringing claims under *Brady v. Maryland*, 373 U.S. 83 (1963), that the government improperly suppressed exculpatory evidence must meet the *Strickland* "reasonable probability" standard in showing that the suppressed evidence would have been material. *See Ware v. State*, 348 Md. 19, 44–45 (1997) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Second, Maryland defendants petitioning for a writ of actual innocence based on newly discovered evidence must satisfy a prejudice standard that is "essentially the same" as the one governing ineffective-assistance claims. *State v. Seward*, 220 Md. App. 1, 19 n.13 (2014), *rev'd on other grounds*, 446 Md. 171 (2016); *see Bowers v. State*, 320 Md. 416, 426–27 (1990). In both of those contexts, the dramatic shift in prejudice law effected by this Court's decision could severely limit the ability of defendants to vindicate their innocence.

Consider, first, the *Brady* context. Like ineffective counsel, the improper suppression of exculpatory evidence is a leading contributor to wrongful convictions of actually innocent individuals. The National Registry of Exonerations reports that official misconduct (including but not limited to *Brady* violations) was involved in the cases of

1,295 exonerees—more than half of the total number of exonerees since 1989. *See* http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Apr. 8, 2019). Studies have likewise found that "*Brady* violations played a major role in the wrongful conviction" of many persons who were later "exonerated by DNA evidence" or by other "postconviction reinvestigations of old cases." Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 429 & nn. 60–61 (2010); *cf.* Jerome Johnson, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5352 (describing the conviction of a Baltimore man, Jerome Johnson, who was exonerated after 30 years in a case in which the police failed to disclose critical exculpatory evidence). Under the logic of this Court's opinion, however, innocent defendants who have fallen victim to official misconduct would need to not only unearth previously suppressed evidence but also show how that evidence meets the opinion's far harsher prejudice standard. Indeed, they would have to show that the suppressed evidence would have likely changed the result at the trial that actually happened as well as some unknown hypothetical trial with potentially unknown and untested evidence. The problem would be particularly acute in cases in which the prosecution has suppressed a potential alibi witness. Unlike before, prejudice would not be a practically foregone conclusion in such cases. Instead, the defendant would need to anticipate every possible theory of the murder that the State could propose and defend against those unknown hypotheticals in a post-conviction proceeding.

The logic of this Court's decision also potentially would give rise to dire consequences in cases involving newly discovered evidence that could not previously have been found through the exercise of due diligence. Maryland law provides a means for innocent defendants who find such evidence to receive a new trial: they may file a petition for a writ of actual innocence under Criminal Procedure Section 8-301. That statute is critical because, while "questions of guilt or innocence cannot be raised in petitions for postconviction relief," section 8-301 "provides a defendant an opportunity to seek a new trial based on newly discovered evidence that speaks to his or her actual innocence." *Douglas v. State*, 423 Md. 156, 175–76 (2011). But because Section 8-301, like *Brady*, includes a prejudice standard like *Strickland*'s, the analysis in this Court's decision would substantially limit the statute's potential to achieve justice.

The case of George Seward is illustrative. More than thirty years after he was convicted of rape and assault with intent to murder, Mr. Seward filed a petition for a writ of actual innocence based on the discovery of employment records that provided him with an alibi. In considering the petition, the circuit court easily found that there was prejudice, stating that there was "no question" that the prejudice prong was "clearly met" based on the new alibi evidence. *State v. Seward*, No. 84-CR-3827, 3–4 (Md. Cir. Ct. July 30, 2012), *available at* https://perma.cc/Y5BS-5G86. The decision of the Court in this case, however, has now called into question whether noncumulative, independent, and credible alibi

evidence is so clearly sufficient to establish prejudice—a conclusion that no court had ever rejected until now.[3]

C. *Nationwide Consequences*

Finally, if this Court were to fail to grant reconsideration, the majority's prejudice holding could well reverberate far beyond the State of Maryland. For example, the decision undoubtedly would be used against innocent individuals petitioning for habeas relief in federal court. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal habeas petitioner generally cannot receive relief unless the state court decision at issue "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). States could point to the Court's decision here to show that there is "fairminded disagreement" on whether prejudice results from the failure to investigate, or the suppression of testimony from, a credible, noncumulative, independent alibi witness—thereby cutting off any possibility of federal habeas relief in such cases.

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[3] It is also possible that the decision in this case could limit new trials based on new DNA tests. Defendants can move for a new trial based on such tests, or other evidence that a conviction was based on "unreliable scientific identification," if a "substantial possibility exists that the petitioner would not have been convicted without the evidence." Criminal Procedure § 8-201(c). Although this Court has not expressly analogized this "substantial possibility" inquiry to the *Strickland* standard, the language of the statute is strikingly similar to section 8-301. *Compare id.* § 8-301(a)(1)(i) ("substantial or significant possibility that the result may have been different"). Indeed, this Court has likened the language in these two statutes in other contexts. *See Jamison v. State*, 450 Md. 387, 413 (2016). It is therefore possible that, if the opinion in this case remains unaltered, even new scientific evidence that refutes the State's theory at trial would not be enough to warrant relief.

More generally, the prejudice analysis in the majority decision would embolden States to prolong litigation in an effort to justify convictions and avoid the perceived embarrassment of having those convictions overturned. It is an unfortunate reality that some prosecutors zealously seek to block post-conviction relief even in cases in which the evidence of guilt has been wholly undermined. *See* Lara Bazelon, *The Innocence Deniers*, Slate (Jan. 10, 2018), *available at* https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html. The decision here provides a new basis for doing so. It opens the door to newly concocted theories of how the crime occurred that were never submitted to a jury, but rather were presented for the first time in post-conviction proceedings in an attempt to render a constitutional violation non-prejudicial.

The potential effect of this decision is particularly significant given that prosecutors' attempts to save a conviction by relying on alternative, hypothetical theories is a well-documented practice after exculpatory evidence is produced. *See* Jacqueline McMurtrie, *The Unindicted Co-Ejaculator and Necrophilia: Addressing Prosecutors' Logic-Defying Responses to Exculpatory DNA Results*, 105 J. CRIM. L. & CRIMINOLOGY 853, 853–59 (2015) (describing several cases in which prosecutors advanced alternative theories of the case in order to save convictions notwithstanding exonerating DNA evidence); Hilary S. Ritter, Note, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 825–27 (2005) (describing the case of Roy Criner, who was pardoned on the basis of exonerating DNA evidence after ten years of imprisonment,

despite the State proffering in post-conviction proceedings *multiple* alternative theories of the crime that had not been presented to the jury); *id.* at 843–44 (describing another example of theory-switching in light of exonerating DNA evidence in which "prosecutors hypothesize[d] about the existence of 'unindicted co-ejaculators' to explain how a defendant is guilty, even though the results of post-conviction DNA testing indicate that another man's sperm was found in the victim"). The opinion here would bless such efforts, which—as discussed above—constitute an unprecedented limitation of the prejudice analysis laid out in *Strickland* and applicable to evidence suppression and actual innocence claims.

This Court should reconsider a holding that unintentionally encourages such unjust practices and effectively forecloses the actually innocent from obtaining relief. Rather, this Court should maintain the law's longstanding recognition that there is a reasonable probability that a jury's verdict would have been affected by testimony of a credible, noncumulative, and independent alibi witness.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant reconsideration.

Respectfully submitted,

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RULE 1-313 CERTIFICATE OF ADMISSION

In accordance with Maryland Rule 1-313, I, Dila (Dahlia) Mignouna, hereby certify that I am licensed to practice law in the State of Maryland. I was admitted before the Maryland Court of Appeals on January 5, 2017.

Dila (Dahlia) Mignouna

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,884 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.

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Dated: April 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on April 8, 2019, two copies of the foregoing proposed brief were sent to:

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