IN THE UNITED STATES COURT OF APPEALS OF MARYLAND

September Term

No. 24

STATE OF MARYLAND, *Petitioner/Cross-Respondent*,

v.

ADNAN SYED, *Respondent/Cross-Petitioner*.

Appeal from the Court of Special Appeals of Maryland
September Terms, 2013, 2016
Case Nos. 1396, 2519

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT/CROSS PETITIONER'S MOTION FOR RECONSIDERATION

Elizabeth A. Franklin-Best*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
Telephone: (646) 292-8335
betsy@blumelaw.com

Jessica Ring Amunson
Counsel of Record for Amicus Curiae
Lindsay C. Harrison*
Caroline C. Cease*
JENNER & BLOCK LLP
1099 New York Ave., NW, Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
JAmunson@jenner.com

* Motions for admission *pro hac vice* pending.

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) submits this brief in support of respondent's motion for reconsideration. NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. These members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in federal and state courts, providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a strong interest in this case. This Court held that while Mr. Syed's trial counsel's failure to investigate Ms. McClain as an alibi witness amounted to deficient performance, that failure did not prejudice Mr. Syed's defense. Until this case, courts across the nation had held without exception that trial counsel's failure to introduce neutral, credible alibi testimony undermines

confidence in the verdict such that a reasonable probability exists that, but for trial counsel's error, the outcome would have been different. If allowed to stand, the majority opinion will make Maryland a national outlier. But the consequences would not be limited to this case or even this State: The majority opinion could impair the ability to remedy ineffective assistance of counsel through the habeas process throughout the country.

ARGUMENT

I. The majority opinion is out of step with other jurisdictions in the United States, which uniformly have found trial counsel's failure to investigate and introduce testimony from a credible, neutral alibi witness to be prejudicial.

The majority opinion is the first in the nation to hold that the failure to investigate and introduce testimony from a credible and unbiased alibi witness is not prejudicial. Nothing about the facts of this case or the State's arguments can explain this result. Under these extraordinary circumstances, the Court should reconsider its decision.

As the majority recognized, trial counsel's failure to investigate and call Ms. McClain as an alibi witness is governed by the two-part test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). That decision provides that a defendant is denied effective assistance of counsel when counsel's actions (or lack thereof) fall "outside the wide range of professionally competent assistance." *Id.* at 690. Once a defendant makes that showing, the defendant must establish a reasonable probability that

counsel's deficiency was prejudicial to his defense. To do so, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. A defendant must show only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" simply is "a probability sufficient to undermine confidence in the outcome." *Id.*

While this Court properly held that counsel's failure to investigate Ms. McClain's alibi testimony amounted to deficient performance under *Strickland*'s first prong, it erred by holding that this failure was not prejudicial under *Strickland*'s second prong. Others have and will discuss the ways this case cannot be reconciled with the Court's prior decision in *Parris W.* But even beyond the borders of this State, if the majority opinion stands, it will make Maryland a national outlier and will constitute the first and only decision to hold that trial counsel's failure to call an unbiased and credible alibi witness is not prejudicial.

Just last year, the Connecticut Supreme Court—faced with trial counsel's failure to call an alibi witness—stated:

> [I]t bears emphasis that our research has not revealed a single case, and the respondent has cited none, 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. 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 v. Commissioner of Correction, 188 A.3d 1, 42 (Conn. 2018) (collecting cases), *cert. denied*, 139 S. Ct. 788 (2019).

Confirming the Connecticut Supreme Court's research, NACDL's own review of the relevant precedent reflects that no court confronted with trial counsel's failure to call a neutral, credible alibi witness has found that failure non-prejudicial. By contrast, at least six jurisdictions in at least thirteen cases have held trial counsel's failure to call an alibi witness to be prejudicial.[1] These cases come from both state and federal court, in states as diverse as California, Connecticut, Illinois, Mississippi, and Kentucky (among others). In each one, the government made arguments similar to those in this case, attempting to refute prejudice by pointing to strong evidence of motive, vagueness as to the timeline of the crime, or testimony from an alleged accomplice or eyewitness. Each time, the court reviewed the evidence and still found the failure to present the alibi testimony to be prejudicial under *Strickland*. While those jurisdictions have little in common, they share an understanding that alibi testimony, particularly from a neutral and credible witness, is so powerful that the failure to investigate and present such testimony is almost inherently prejudicial. *See*

[1] *See Bigelow v. Haviland*, 576 F.3d 284 (6th Cir. 2009); *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008); *Harrison v. Quarterman*, 496 F.3d 419 (5th Cir. 2007); *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007); *Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006); *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003); *Brown v. Myers*, 137 F.3d 1154 (9th Cir. 1998); *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992); *Grooms v. Solem*, 923 F.2d 88 (8th Cir. 1991); *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985); *Caldwell v. Lewis*, 414 F. App'x 809 (6th Cir. 2011); *Skakel v. Commissioner of Correction*, 188 A.3d 1 (2018).

Harmon M. Hosch, et al., *Effects of an Alibi Witness's Relationship to the Defendant on Mock Jurors' Judgments*, 35 Law & Hum. Behav. 127, 136 (2011) (noting study finding a "22% reduction in jurors' belief that the defendant had actually committed the crime in the presence of a corroborating alibi witness. . . . Those jurors who heard an alibi witness testify were less likely to believe the defendant committed the crime . . . in comparison to those jurors who were not exposed to an alibi corroboration witness."); Scott E. Culhane & Harmon M. Hosch, *An Alibi Witness' Influence on Mock Jurors' Verdicts*, 34 J. Applied Soc. Psych. 1604, 1610-11 (2004) (noting significant and measureable influence of neutral alibi witness on likelihood of acquittal). Thus, across a range of different facts and circumstances, the outcome has always been the same: the failure to investigate and present a neutral, credible alibi witness is prejudicial. Nothing about this case compels a different result.

First, even very strong evidence of motive has never before defeated a defendant's ineffective assistance claim for failure to call a neutral, credible alibi witness. In *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007), for example, the Seventh Circuit found trial counsel's failure to call an unbiased alibi witness prejudicial despite evidence showing that the defendant had a strong motive to commit the crime—specifically, the fact that the victims were rival gang members. *Id.* at 959-60, 965. Notwithstanding that evidence, the court held that defense counsel's failure to call alibi witnesses (both biased and unbiased) was prejudicial,

and the Illinois courts' decision to the contrary was an objectively unreasonable application of *Strickland*. *Id.* at 965; *see also In re Parris W*, 363 Md. 717 (2001) (holding prejudicial defense counsel's failure to call an alibi witness despite evidence showing, among other things, that the victim had caused the defendant to face expulsion from school). The fact that the prosecution presents evidence of motive simply cannot erase the prejudice from trial counsel's failure to call an alibi witness. *Contra* Maj. Op. at 34-35 (relying on evidence of Mr. Syed's motive as one reason trial counsel's failure to call Ms. McClain was not prejudicial).

Second, even where the alibi witness's testimony is vague regarding when the defendant was with the witness in relation to the time of the crime, trial counsel's failure to call the witness has always before been found prejudicial under *Strickland*. For example, the Connecticut Supreme Court rejected the government's argument that trial counsel's failure to call an alibi witness was not prejudicial because the jury could have credited that "partial alibi"—*i.e.*, the alibi witness could not recall exactly when he was with the defendant—and still find the defendant guilty. *See, e.g.*, *Skakel*, 188 A.3d at 13, 37-42. The Connecticut Supreme Court concluded that "the petitioner's alibi, if believed, establishes that he was not at the crime scene when the substantial weight of the evidence indicates that the victim was murdered." *Id.* at 41; *see also Alcala v. Woodford*, 334 F.3d 862, 873 n.4 (9th Cir. 2003) ("Our determination of prejudice is not diminished by the fact that [the alibi witness]

indicated to a defense investigator that [the defendant] might have been at Knott's Berry Farm around 1:30 p.m. instead of 3:00 p.m. 'We have previously found prejudice when counsel failed to . . . present the testimony of alibi witnesses, even though their testimony was vague with regard to time.'" (quoting *Luna v. Cambra*, 306 F.3d 954, 961 (9th Cir. 2002) (alteration in original)); *Brown v. Myers*, 137 F.3d 1154, 1157-58 (9th Cir. 1998) (finding prejudice despite the alibi witness's testimony being "vague with regard to time" during which he was with the defendant). The majority opinion in this case therefore stands alone, in stark contrast to how other courts have viewed prejudice under similar circumstances. *See* Maj. Op. at 31, 34 (concluding that Mr. Syed had failed to establish prejudice because "the State did not rely on the time of the victim's murder" and Ms. McClain's testimony "was cabined to a narrow window of time"—that is, the time the State argued Mr. Syed murdered Ms. Lee).

Third, courts have found trial counsel's failure to call an unbiased, credible alibi witness prejudicial even where the defendant's alleged accomplice testifies against him. The Seventh Circuit, for example, held that a defendant had demonstrated that trial counsel's failure to call an alibi witness was prejudicial even where the State's "chief witness"—the defendant's half-brother—testified at trial that the defendant committed the crimes with him. *Montgomery v. Petersen*, 846 F.2d 407, 408-09, 415-16 (7th Cir 1988); *see also Nealy v. Cabana*, 764 F.2d 1173,

1179-80 (5th Cir. 1985) (finding prejudice where "[t]he verdict against [the defendant] rests primarily on the testimony of [the defendant's alleged accomplice], and is only weakly supported by other evidence"); *Caldwell v. Lewis*, 414 F. App'x 809, 812-13, 818-19 (6th Cir. 2011) (holding that trial counsel's failure to call alibi witnesses was prejudicial despite a codefendant's trial testimony inculpating the defendants as having helped him commit the crime). The majority opinion in this case is therefore out of step with all of the other cases in finding no prejudice based on the testimony of an accomplice. *See* Maj. Op. at 34 (relying on Mr. Wilds's testimony—which was inconsistent with what he had initially told police officers—to support its conclusion that trial counsel's failure to call Ms. McClain as an alibi witness was not prejudicial to Mr. Syed's defense).

Fourth, courts have found prejudicial trial counsel's failure to call an alibi witness even where the victim or another eyewitness has identified the defendant—evidence that was noticeably absent in this case. For example, in *Raygoza*, the Seventh Circuit held that, despite eyewitness identification of the defendant, the state court had unreasonably applied *Strickland*'s prong when finding that trial counsel's failure to call alibi witnesses was not prejudicial. 474 F.3d at 965 (noting that the evidence at trial against the defendant included "eyewitness identification from rival gang members" as well as a "passerby who . . . was able to give a general description of the clothing the perpetrators were wearing"). The Fourth Circuit has also found

prejudice from trial counsel's failure to call alibi witnesses despite two eyewitness identifications of the defendant as the perpetrator. *See Griffin v. Warden*, 970 F.2d 1355, 1359 (4th Cir. 19992); *see also Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008) (finding prejudice from counsel's failure to call an alibi witness despite admittedly weak eyewitness testimony identifying the defendant offered at trial); *Stewart v. Wolfenbarger*, 468 F.3d 338, 360-61 (6th Cir. 2006) (holding that trial counsel's failure to call an alibi witness was prejudicial despite eyewitness testimony at trial identifying the defendant as the perpetrator).

Here, the majority opinion discounted the significance of Ms. McClain's testimony by suggesting that it covered a narrow time period and that "the State presented a relatively weak theory as to the time of the murder." Maj. Op at 34. The Court suggested that the conviction rested on "substantial circumstantial evidence that pointed to Mr. Syed's motive and his transportation and burial of the victim's body to establish his guilt." Maj. Op at 34. This Court, of course, was referring to Mr. Wilds's testimony. But if the jury, or indeed any juror, believed Ms. McClain's alibi testimony—had she been able to provide it at trial—that juror would likely have questioned the veracity of Mr. Wilds's testimony. Specifically, Ms. McClain claims to have been with Mr. Syed in the library from between 2:30 and 2:40 on the afternoon of the murder. Maj. Op. at 28. Mr. Wilds testified that Mr. Syed called him from a payphone that very afternoon at 2:36, which was, according to the post-

conviction court, corroborated by the cell phone records. Either Ms. McClain's alibi testimony or Mr. Wilds's testimony is true. The question of whom to believe—as well as the State's assertion on appeal that Mr. Syed could have murdered Ms. Lee at a time different than what that evidence showed—is one for a jury to resolve. Trial counsel's failure to introduce Ms. McClain's alibi testimony was prejudicial to Mr. Syed in that it raises a "reasonable probability"—that is, simply "a probability sufficient to undermine the confidence in the outcome"—that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Because that failure undermines confidence in the outcome of Mr. Syed's convictions, the Court should conclude—as every other court, including this Court in *Parris W.*, confronted with a similar set of facts has concluded—that trial counsel's failure was prejudicial. This Court should grant Mr. Syed's petition for reconsideration and affirm the Court of Special Appeals' decision granting Mr. Syed a new trial.

II. By creating a split on an issue where courts are otherwise uniform, the majority opinion risks cascading consequences for habeas claims around the nation.

The consequences of finding no prejudice here could extend well beyond this case. Until now, petitioners have prevailed in habeas corpus claims because courts have viewed the existence of prejudice from the failure to present alibi testimony as "clearly established" under AEDPA. *See, e.g.*, *Raygoza*, 474 F.3d at 965. In

NACDL's view, those decisions are correct. But this case may change that analysis for future petitioners: as the Supreme Court has explained, a split among courts on the resolution of an issue may be evidence that it has not been clearly established by the Supreme Court. *See Carey v. Musladin*, 549 U.S. 70, 76 (2006) (noting that divergent treatment by different courts may "[r]eflect[] the lack of guidance from [the Supreme] Court"). Thus, courts will deny habeas petitions by noting that a split of authority conclusively establishes the absence of clearly established law. *See, e.g.*, *Grim v. Fisher*, 816 F.3d 296, 309 (5th Cir. 2016) (explaining that "disagreement among courts...supports the conclusion that the Supreme Court has not clearly established" a rule); *Lowe v. Swanson*, 663 F.3d 258, 263 (6th Cir. 2011) (citing split of authority to rule that state court decision was not contrary to clearly established law under AEDPA); *Ponce v. Felker*, 606 F.3d 596, 605-06 (9th Cir. 2010) (explaining that "conflicting cases weigh very strongly against a conclusion" that a principle was clearly established); *see also Caspari v. Bohlen*, 510 U.S. 383, 393-96 (1994) (relying on divergent state and federal court decisions to conclude that a rule was new, and therefore the law was not clearly established and thus not retroactively applicable under *Teague*).

Accordingly, this decision will have consequences not only for Mr. Syed, but for all defendants with counsel who fail to investigate and present testimony from a neutral, credible alibi witness. Until now, it has been considered clearly established

that such a failure is not only prejudicial, but an objectively unreasonable application of the Supreme Court's decision in *Strickland*. If the majority opinion in this case stands, it could provide ammunition for states to oppose habeas petitions from defendants who were undoubtedly prejudiced by their counsel's lack of diligence or poor judgment with respect to alibi witnesses. By creating a split where one never before has existed, this outlier decision could therefore frustrate the ability of courts around the country to remedy prejudicial error by trial counsel. Given the stakes, NACDL respectfully suggests that extraordinary circumstances exist warranting reconsideration.

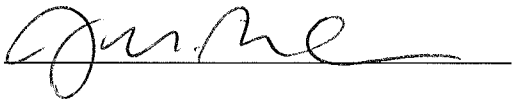
CONCLUSION

This Court should grant Mr. Syed's petition for reconsideration and affirm the Court of Special Appeals' decision granting Mr. Syed a new trial.

Dated: April 8, 2019

Respectfully submitted,

JENNER & BLOCK LLP



Jessica Ring Amunson
Counsel of Record
Lindsay C. Harrison*
Caroline C. Cease*
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
JAmunson@jenner.com
Counsel for Amicus Curiae

Elizabeth A. Franklin-Best*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
Telephone: (646) 292-8335
betsy@blumelaw.com
Counsel for Amicus Curiae

* Motions for admission *pro hac vice* pending.

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

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Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
JAmunson@jenner.com
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, a copy of this proposed brief was sent by UPS overnight mail to:

Thiruvendran Vignarajah, Esq.
DLA PIPER LLP (US)
100 Light Street, Suite 1350
Baltimore, Maryland 21202

Brian E. Frosh
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

Counsel for Petitioner

C. Justin Brown, Esq.
BROWN LAW
231 East Baltimore Street, Suite 1102
Baltimore, Maryland 21202

Catherine E. Stetson
James W. Clayton
Kathryn M. Ali
W. David Maxwell
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

Counsel for Respondent

Dated: April 8, 2019

Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
JAmunson@jenner.com
Counsel for Amicus Curiae