No. 19-227

IN THE
Supreme Court of the United States

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

On Petition for a Writ of Certiorari
to the Maryland Court of Appeals

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (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. The Maryland Court of Appeals held that while Syed's trial

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner filed a letter with the Clerk granting blanket consent to the filing of *amicus curiae* briefs, and NACDL provided timely notice to Respondent, and Respondent has consented to the filing of this *amicus* brief.

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, governing precedent across the nation had held uniformly 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 Maryland Court of Appeals' decision will create a split where none otherwise existed. But the consequences would not be limited to this case or even cases within Maryland: The majority opinion could impair the ability to remedy ineffective assistance of counsel through the habeas process throughout the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Maryland Court of Appeals' decision is the first and only to hold that trial counsel's failure to investigate an unbiased and credible alibi witness is not prejudicial. Such an unforeseen decision will impact criminal defendants and, in particular, habeas petitioners, far beyond Maryland's borders.

Both state and federal courts across the country have found prejudice from trial counsel's failure to call a credible, non-cumulative, and neutral, alibi witness. Those courts have found prejudice even when the government relies on evidence that the alibi witness may not rebut. For example, courts have found trial counsel's failure to pursue an alibi witness prejudicial even when the government (1) introduced strong

evidence of motive, (2) relied on a sufficiently vague timeline of the crime that the alibi testimony may have been inconclusive, (3) offered testimony from an alleged accomplice, and (4) offered testimony from an alleged eyewitness. In other words, the loss of a potential credible alibi witness is so significant that even a very strong government case has not overcome this prejudice. As a result, habeas petitioners across the country have prevailed in seeking habeas relief where trial counsel failed to pursue a neutral and credible alibi witness. And federal courts have taken as "clearly established" under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 ("AEDPA"), the prejudice that arises from that failure. Every state court to reach a contrary conclusion has been held to unreasonably apply *Strickland*. Until now.

The decision below calls into question this "clearly established" legal precedent, impairing the ability to remedy nationwide these unique and meritorious ineffective assistance of counsel claims. As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL knows the cascading consequences the Maryland Court of Appeals decision—and a denial of Syed's petition for writ of certiorari—will have on the criminally accused and convicted across this country.

ARGUMENT

I. THE MARYLAND COURT OF APPEALS' DECISION CREATES A SPLIT WHERE COURTS OTHERWISE ARE UNIFORM.

Syed's ineffective assistance claim asserts that trial counsel was ineffective for failing to investigate and call a neutral alibi witness with no incentive to lie. That witness, Asia McClain, testified that she had spoken with Syed at the library precisely when the State alleges the murder took place miles away. Pet. App. 183a, 113a. And, as testimony in the Circuit Court showed, McClain's story was "[p]owerfully credible." Pet. App. 193a. After Syed told trial counsel and provided her with McClain's letters, trial counsel failed even once to contact McClain.

Trial counsel's failure to investigate and call McClain as an alibi witness is governed by the two-part test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Once a defendant shows that trial counsel's actions (or lack thereof) fall "outside the wide range of professionally competent assistance," *id.* at 690, he 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" is "a probability sufficient to undermine confidence in the outcome." *Id.*

Here, the Maryland Court of Appeals agreed that trial counsel's actions fell outside the wide range of professionally competent assistance. But unlike every other court to assess the failure to investigate and call a credible, non-cumulative, and neutral alibi witness, Maryland found that this error was not prejudicial. That is wrong.

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. Comm'r of Corr., 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—other than, now, Maryland. 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.[2] These cases come from both state and federal court, in states as diverse as California, Connecticut, Illinois, Mississippi, and Kentucky (among others).

In each of these decisions, the government made arguments similar to those in this case, attempting to refute prejudice by pointing to strong evidence of the defendant's motive to commit the crime, vagueness as to the timeline of the crime, or testimony from an alleged accomplice or eyewitness supporting the Government's case. Each time, the court reviewed the evidence and still found the failure to present the alibi testimony 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. As a result, 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 Syed's case

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[2] *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. Comm'r of Corr.*, 188 A.3d 1 (2018).

compelled a different result from the Maryland Court of Appeals.

First, even very strong evidence of motive will not defeat 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. That the prosecution presents evidence of motive simply cannot erase the prejudice from trial counsel's failure to call an alibi witness. *Contra* Pet. App 41a-42a (relying on evidence of Mr. Syed's motive as one reason trial counsel's failure to call 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 is 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 who could account for the defendant's whereabouts during only part of the time when the crime may have been committed was not prejudicial, concluding that the jury could have credited that "partial alibi." *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).

Maryland therefore stands alone, in stark contrast to how other courts have viewed prejudice under similar circumstances. *See* Pet. App. 37a (concluding that Syed failed to establish prejudice because "Ms. McClain's account was cabined to a narrow window of time . . . [and] would not have served to rebut the evidence the State presented relative to Mr. Syed's actions on the *evening* of January 13, 1999").

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).

Maryland therefore is out of step with all of the other cases in finding no prejudice based on the testimony of an accomplice. *See* Pet. App. 37a-38a (relying on 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 McClain as an alibi witness was not prejudicial to 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 second 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, 1359-60 (4th Cir. 1992); *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 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); *Blackmon v. Williams*, 823 F.3d 1088, 1106 (7th Cir. 2016) (finding defense counsel's failure to call additional alibi witnesses prejudicial despite two eyewitnesses' high degree of confidence that they accurately identified the defendant).

II. BY CREATING THIS SPLIT ON AN ISSUE WHERE COURTS OTHERWISE ARE UNIFORM, THE DECISION BELOW RISKS CASCADING CONSEQUENCES FOR HABEAS CLAIMS ACROSS THE NATION.

Because of how Congress in AEDPA has framed habeas relief, the decision below could have consequences well beyond this particular case.

State prisoners seeking federal court postconviction relief must show that their claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States" or that it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

When determining whether a challenged state court application of federal law was unreasonable under § 2254, courts look not only to Supreme Court precedent, but also to state court and lower federal court decisions. *See, e.g.*, *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003) ("This was not an *objectively unreasonable* application of clearly established law as defined by this Court. Indeed, numerous other courts have refused to find double jeopardy violations under similar circumstances." (citing as support certain state court decisions)); *see also Garrus v. Sec'y of Pa. Dep't Corr.*, 694 F.3d 394, 408 (3d Cir. 2012) (noting "even cases that are not binding might be relevant to the consideration of whether a state court decision is objectively unreasonable"); *Lowe v. Swanson*, 663 F.3d 258, 263 (6th Cir. 2011) (explaining that a "split of authority" and "disagreement" among courts supported the conclusion that the state court "did not unreasonably apply clearly established federal law").

Because habeas determinations about the reasonableness of an application of law can depend on

the consistency—or lack thereof—of state court decisions, the consequences of the Maryland Court of Appeals' decision will extend well beyond Syed's case. Until now, petitioners have prevailed in their habeas corpus claims because courts have viewed the existence of prejudice from the failure to present alibi testimony as "clearly established" under AEDPA such that any decision to the contrary is "unreasonable." *See*, *e.g.*, *Raygoza*, 474 F.3d at 963, 965; *see also Blackmon*, 823 F.3d at 1105 (holding unreasonable state court's finding that trial counsel's failure to investigate alibi witnesses was not prejudicial under *Strickland*); *Washington v. Smith*, 219 F.3d 620, 631-32 (7th Cir. 2000) (state court's conclusion that trial counsel's failure to secure appearance of credible alibi witness was not prejudicial was an "unreasonable application of *Strickland*'s prejudice component" (internal quotation marks omitted)); *Harrison v. Cunningham*, 512 F. App'x 40, 42 (2d Cir. 2013) (state court unreasonably applied *Strickland* when it held not prejudicial trial counsel's failure to notify prosecution of two alibi witnesses, which prevented those witnesses from testifying); *Gregg v. Rockview*, 596 F. App'x 72, 78-79 (3d Cir. 2015) ("Given the weakness of the Commonwealth's case, the central importance of the alibi defense, and the clear damage stemming from the introduction of Gregg's criminal record, we believe that fairminded jurists would not disagree that there is a reasonable probability the alibi testimony of Jones and Ms. Fitzgerald would have changed the jury's verdict. We conclude, therefore that the PCRA Court unreasonably applied the second *Strickland* prong as well.").

In NACDL's view, those decisions are correct. Even cases cited favorably by the Maryland Court of Appeals in its analysis under *Strickland*'s first prong show just how clearly established the prejudice caused by the failure to examine an alibi witness is. Pet. App. 16a-17a (citing *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992)); *id.* at 18a-19a (citing *Grooms v. Solem*, 923 F.2d 88 (8th Cir. 1991)); *id.* at 19a-20a (citing *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988)). But the Court of Appeals' decision may change that analysis for future petitioners: Its creation of a split in authority where none previously existed increases the likelihood that courts will find it not clearly established that a defendant is prejudiced by the failure to call an unbiased and credible alibi witness.

The decision below will have broad and irreparable impact on habeas petitioners nationwide. It has consequences not only for Syed, but for all defendants with counsel who fail to investigate and present testimony from a neutral, credible alibi witness. If this outlier decision stands, it will frustrate the ability of courts around the country to remedy trial counsel's prejudicial errors. Given these high and nationally-important stakes, NACDL respectfully requests that this Court grant Syed's petition for a writ of certiorari.

CONCLUSION

This Court should grant Syed's petition for a writ of certiorari.

Respectfully submitted,

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