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's Motion for Reconsideration

Andrew V. Jezic
JEZIC & MOYSE, LLC
2730 University Blvd. West #604
Wheaton, Maryland 20902
(240) 292-7200

Erica J. Suter
LAW OFFICES OF ERICA J. SUTER, LLC
6305 Ivy Lane, Suite 700
Greenbelt, Maryland 20770
(301) 880-7118

Rachel Marblestone Kamins
OFFIT | KURMAN
8171 Maple Lawn Blvd., Suite 200
Maple Lawn, Maryland 20759
(301) 575-0395

Steven M. Klepper
Louis P. Malick
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
(410) 539-1269 (facsimile)
sklepper@kg-law.com

Attorneys for Amici Curiae

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Amici's Identity and Interest

Amici are the Maryland Criminal Defense Attorneys' Association (MCDAA), the Maryland Office of the Public Defender (OPD), 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
Nancy S. Forster	Stanley J. Reed
Andrew Jay Graham	Stuart O. Simms
Andrew D. Levy	Joshua R. Treem
Timothy F. Maloney	Arnold M. Weiner
Paul F. Kemp	Douglas J. Wood

Amici, whose merits-stage brief addressed prejudice, seek to ensure that Maryland postconviction law is coherent, and that the courthouse doors remain open for wrongfully convicted Marylanders' *Strickland* and *Brady* claims.

Extraordinary Circumstances

Ordinarily, if an opinion has unintended consequences, the Court can correct course by granting certiorari in the next appeal raising the issue. Not so when the State prevails in a postconviction case. It is already rare for circuit courts to grant postconviction petitions, or for the Court of Special Appeals to grant leave to appeal. If the Court's opinion causes a circuit court to deny a meritorious

petition, and the Court of Special Appeals to deny leave to appeal, this Court will lack certiorari jurisdiction.[1] The Court thus ties its own hands going forward.

The stakes are extraordinary, because the same prejudice standard governs *Strickland* claims and *Brady* evidence-suppression claims. *See United States v. Bagley*, 473 U.S. 667, 682 (1985). Even in the age of DNA testing, *Strickland* and *Brady* remain the most common paths for the innocent to win their freedom.

Because the omission of alibi testimony is textbook prejudice, the Court's decision will make it harder to prove prejudice in a wide range of cases. Until March 8, 2019, there was not one "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 v. Comm'r of Correction*, 188 A.3d 1, 42 (Conn. 2018), *cert. denied*, 139 S. Ct. 788 (2019). Maryland law was in accord. *In re Parris W.*, 363 Md. 717 (2001). Now, the State will compare the facts of this case to the facts of future *Brady* and *Strickland* cases, to oppose postconviction petitions and applications for leave to appeal. Already, the State is citing the majority opinion to resist post-conviction relief outside the alibi context.[2]

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[1] *Stachowski v. State*, 416 Md. 276, 294-98 (2010) (Court of Appeals can grant certiorari in postconviction cases only when Court of Special Appeals grants leave to appeal and issues decision on the merits).

[2] See, e.g., *Govan v. State*, Anne Arundel County Circuit Court No. 02-K-14-000269, in which one of amici's counsel represents the petitioner.

The public interest favors, at a minimum, supplemental briefing and reargument directed to the prejudice question. In *Parris W.*, this Court ordered a new trial on direct appeal, even though the sufficiency of the State's evidence was unchallenged. Here, not even Judge Graeff's dissent disputed prejudice. The State's brief devoted just five pages to prejudice, citing only *Strickland* itself. Syed's response was proportional: a three-page argument that cited *Parris W.* and *Skakel*. The State's reply cited no authority on prejudice. The Court asked few questions about the issue on which it divided four-to-three.

A correctly calibrated prejudice standard is essential to keeping this Court's doors open for postconviction claims. The Connecticut Supreme Court granted a new trial on rehearing in *Skakel*, and this Court should do the same.

Before passing the point of no return, the Court should exercise its authority under Courts Article § 6-408 and Rule 8-605 to give the prejudice question the focus it deserves, and *Parris W.*'s prejudice analysis the consideration it deserves.

Argument

The Prejudice Holding Does Not Account for, or Square With, *Parris W.*

Six members of this Court agreed trial counsel's performance was deficient. *Parris W.*, including its survey of outside authority, was at the center of that deficiency analysis. Maj. Op. 10, 12, 13, 17; Diss./Concur. Op. 2. But the majority, in its prejudice analysis, did not discuss *Parris W.*, or the decisions cited in *Parris*

W., even though those decisions bear directly on prejudice. Maj. Op. 23-35. Reconsideration is necessary to square the Court's decision with *Parris W.*

This Court unanimously found prejudice in *Parris W.* on direct appeal, without remanding for a hearing to test the absent alibi witnesses' testimony. 363 Md. at 726–27. The juvenile's father testified that his son accompanied him on his delivery route and was not at school during an assault on a classmate. *Id.* at 722–23. Defense counsel subpoenaed five corroborating witnesses for the wrong day. *Id.* at 727. 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. Although the fact-finder still might have adjudicated the juvenile responsible, even with the additional witnesses, the Court ordered a new trial because there was a substantial possibility that the witnesses would have created reasonable doubt. *Id.* at 729. *Parris W.* cuts against the majority's prejudice holding here in four ways.

First, the majority put undue weight on the sufficiency and substantiality of the State's evidence. It "depart[ed] from the view of the Court of Special Appeals that the State's evidence failed to establish Mr. Syed's criminal agency," observing "without further comment that Mr. Syed did not challenge on direct appeal the sufficiency of the evidence of the State's case against him." Maj. Op. 35. It held that the "State's case against Respondent could not have been substantially

undermined merely by the alibi testimony of Ms. McClain because of the substantial direct and circumstantial evidence pointing to Mr. Syed's guilt." *Id.*

But in *Parris W.* the juvenile did "not challenge the sufficiency of the evid-ence to support his conviction, and the [fact-finder] was not bound to accept [his] alibi testimony." 363 Md. at 729. Still, the Court granted a new trial because of the "substantial possibility that, had the [fact-finder] heard the proffered testimony of the five subpoenaed witnesses, corroborating substantial portions of [father's] testimony, [it] might have harbored a reasonable doubt." *Id.*

Second, the majority put undue emphasis on the limited time-frame that Ms. McClain's testimony covered, from 2:30 p.m. to 2:40 p.m. That period, although short, covered the time that the State told the jury Syed killed Hae Min Lee. Even if the evidence did not preclude an "opportunity to kill Ms. Lee after 2:40 p.m.," Maj. Op. 29, McClain's testimony did not need to cover the entire opportunity window. In *Parris W.*, "none of the three [impartial witnesses] could testify to Appellant's whereabouts in the afternoon when the assault was committed," but "they could all provide independent corroboration that Appellant accompanied his father on his delivery route on the day of the assault, which in turn would have tended to strengthen [his father's] claim that Appellant was with him all day." *Id.* at 730. The Court cited *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355 (4th Cir. 1992), which "specifically reject[ed] the district court's conclusion that the

evidence would not have established an alibi because it did not cover the period of the robbery based on the full chronology that the witnesses established." *Parris W.*, 363 Md. at 731.

Third, the majority overlooked *Parris W.*'s guidance regarding the consequences if the jury had believed Ms. McClain over Jay Wilds. The majority emphasized Wilds' testimony and the corroboration from the cell phone records. If believed, Wilds' testimony is of course damning for Syed. Discrediting Wilds was critical. It is undisputed that Wilds' trial testimony conflicted with his original recorded police interview. On February 28, 1999, Wilds told police that Syed called him from Franklintown and Edmondson Avenue. In his second recorded interview, on March 15, 1999, Wilds told police that the first account was a lie, and that Syed called him from a pay phone at the Best Buy parking lot. He repeated it at trial, and the State pointed to the 2:36 call as corroborating the chronology presented at trial. If Syed was in the library with Ms. McClain until 2:40, it would strengthen the inference that *both* of Wilds' accounts were lies—that he was seeking to escape criminal liability for his admitted drug-dealing by reverse-engineering his testimony to fit the State's reading of the cell phone records.[3]

[3] Jennifer Pusateri stated in her police interview, and at trial, that she identified January 13, 1999 because the police showed her phone records for that date.

Under *Parris W.*, the Court must account for that larger impact on Wilds' credibility if the jury believed Ms. McClain. In *Parris W.*, the State had direct eyewitness testimony from the victim himself, who "identified Appellant as his assailant and testified that he recognized Appellant from the side and back and by Appellant's clothing." 363 Md. at 208. Still, the Court found prejudice, because the omitted testimony could have undermined the victim's identification. *Id.* at 209. The Court cited favorably to a federal case where testimony from a disinterested witness would have "directly contradicted the state's chief witness," an alleged co-conspirator, regarding the time-line he presented at trial, and therefore "had a direct bearing on [his] veracity, a witness upon whose testimony the state depended in order to secure a conviction." *Id.* at 732 (quoting *Montgomery v. Petersen*, 846 F.2d 407, 415 (7th Cir. 1988)).

That analysis comports with the Supreme Court's recent decision in *Wearry v. Cain*, 136 S. Ct. 1002 (2016).[4] There, the prosecution's star accomplice witness admitted on cross-examination that "he had changed his account several times." *Id.* at 1003. The Supreme Court rejected the view, advanced by two dissenting

[4] *Wearry* reversed on the petitioner's *Brady* claim, which is subject to the same prejudice analysis that governs a *Strickland* claim. *See Bagley*, 473 U.S. at 682. The Supreme Court did not reach his *Strickland* claim, predicated on the failure to investigate and call witnesses who could corroborate his alibi. *Wearry*, 136 S. Ct. at 1005 ("his attorney undertook no effort to locate independent witnesses from among the dozens of guests who had attended the wedding reception").

justices, that prejudice was questionable because the jury convicted despite hearing "quite serious strikes against [the accomplice's] credibility." *Id.* at 1010 (Alito, J., dissenting). Rather, a new trial was necessary because the State's case was "built on the jury crediting [the accomplice's] account rather than [the defendant's] alibi." *Id.* at 1006. The witness' "credibility, already impugned by his many inconsistent stories, would have been further diminished." *Id.* Regardless of whether the jury "*could* have voted to convict" in the face of further credibility challenges, the Supreme Court summarily reversed the Louisiana courts because it could not say with sufficient confidence that the jury still would have convicted. *Id.* at 1006–07.

In this case, there is a substantial possibility that, for at least one juror, McClain's independent testimony would have been the tipping point, indicating that Wilds was saying whatever the police wanted to hear to match the cell phone records. 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).

Fourth, the majority gave undue weight to the circuit court's finding of no prejudice. Prejudice is a mixed question of fact and law, requiring the Court to

conduct an "independent examination of the case" and "re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Coleman v. State*, 434 Md. 320, 331 (2013) (Greene, J.) (quoting *Harris v. State,* 303 Md. 685, 698 (1985)). In *Parris W.*, the Court made original findings of deficiency and prejudice on direct appeal. And in *Wearry*, where the Louisiana courts denied appellate review, the Supreme Court directly reversed the trial court's finding of no prejudice.

Parris W. put Maryland in the mainstream, but the majority opinion here has made Maryland an outlier. Without reconsideration, there is a grave risk that lower courts will deny meritorious claims based on an unduly narrow conception of prejudice, that the Court of Special Appeals will deny leave to appeal, and that this Court will be powerless to grant certiorari.

Conclusion

For these reasons, amici urge the Court to grant reconsideration.

Certification of Word Count and Compliance With Rule 8-112

1. This brief contains 2,104 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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Steven M. Klepper

Dated: April 8, 2019

Certificate of Service

I hereby certify that, on April 8, 2019, two copies of the foregoing brief were sent by first-class mail, postage prepaid, to:

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

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

____
Steven M. Klepper