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 OF AMICI CURIAE THE INNOCENCE NETWORK AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties have received notice of *amici curiae*'s intention to file this brief at least 10 days prior to the due date, and both parties have provided written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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

SUMMARY OF ARGUMENT

The Maryland Court of Appeals concluded that defense counsel did not competently represent the petitioner, Adnan Syed, when counsel failed to investigate an alibi witness who would have testified that she was with Mr. Syed during the 20-minute window when the State argued that Mr. Syed killed Hae Min Lee. The court found, however, that Mr. Syed was not prejudiced by that failure because the jury could have concluded that Mr. Syed killed Ms. Lee at a different time. But the State never argued that Ms. Lee could have been killed during any other time period. By focusing the prejudice analysis on a hypothetical theory the State never presented to the jury, the Maryland court departed from the approach taken by every federal court of appeals and every other state high court to have analyzed that issue. And it became the first court of which *amici* are aware to rule that a defendant was not prejudiced when counsel failed to present testimony from a credible, noncumulative, independent alibi witness.

The analytical approach to the prejudice inquiry adopted by the Maryland court is especially damaging for defendants with actual innocence claims. Inadequate representation—and, in particular, the failure to investigate alibi witnesses—is a prime contributor to wrongful convictions. But treating prejudice as a

question of whether the result would likely have been different in a hypothetical proceeding favorable to the prosecution, rather than in the actual proceeding that took place in the trial court, erects a nearly insurmountable barrier to such claims. And the effects of that approach to prejudice are not limited to the ineffectiveness context: the same prejudice standard applies to *Brady* claims and to various forms of state post-conviction relief. Moreover, the decision below may threaten the availability of federal habeas relief to the extent that the decision is read to create "fair-minded disagreement" regarding the prejudice standard. *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). This Court should grant the petition to address the clear split the decision below created and to preserve actually innocent individuals' ability to obtain meaningful post-conviction relief.

ARGUMENT

I. The Decision of the Maryland Court of Appeals Conflicts with the Uniform Approach to Prejudice Taken by Other Courts.

1. This Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), dictates that "a court hearing an ineffectiveness claim must consider the totality of the evidence *before the judge or jury*." *Id.* at 695 (emphasis added). Interpreting that direction, courts have—until the decision below—been uniform in analyzing prejudice by considering how counsel's errors affected what the "jury heard." *Elmore* v. *Ozmint*, 661 F.3d 783, 873 (4th Cir. 2011), *as amended* (Dec. 12, 2012). Courts have thus limited themselves to considering the evidence the government presented—not the evidence the government might have presented had defense counsel acted competently. See*, e.g.*, *Fisher* v.

Gibson, 282 F.3d 1283, 1309 (10th Cir. 2002) ("[W]e assume by the state's failure to present evidence * * * that it had no such evidence." (citing *Strickland*, 466 U.S. at 696)); see also *Strickland*, 466 U.S. at 696 (directing courts to "[t]ak[e] the unaffected findings as a given"). Similarly, courts have focused on the theory actually argued by the government, rather than "invent[ing] arguments the prosecution could have made if it had known its theory of the case would be disproved." *Hardy* v. *Chappell*, 849 F.3d 803, 823 (9th Cir. 2016); see, *e.g.*, *Skakel* v. *Comm'r of Correction*, 188 A.3d 1, 42 (Conn. 2018) (considering prejudice "in light of the theory the state advanced at trial").[2] Under that analysis, where defense counsel could have and should have introduced evidence that would have "refute[d]" a "central thesis of the state's case," a defendant can show prejudice, 188 A.3d at 38-39—regardless of whether the defendant could have been found guilty under some *other* "central thesis," see *id.* at 53-54.

Although *Strickland* demands a case-specific inquiry, that approach has yielded consistent results in

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[2] Courts' refusal to engage in that type of hypothetical 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.").

cases involving alibi witnesses. An alibi witness is one who offers testimony that "tend[s] to prove that it was impossible or highly improbable that the defendant was at the scene of the crime when it was alleged to have occurred." Pet. App. 15a (citation omitted). An alibi witness thus generally "refute[s] th[e] central thesis of the state's case," *Skakel*, 188 A.3d at 38-39—that the defendant could have been the one to commit the crime. For that reason, prior to the decision below, every decision of which *amici* are aware has held that "the failure to present the testimony of a credible, non-cumulative, independent alibi witness" is prejudicial under *Strickland*, *Skakel*, 188 A.3d at 42—that is, that there is a "reasonable probability" that the jury would have reached a different result had the alibi evidence been presented. *Strickland*, 466 U.S. at 695; see, *e.g.*, *Davis* v. *Lafler*, 658 F.3d 525, 541 (6th Cir. 2011) (explaining that "[t]his court has repeatedly found prejudice resulting from trial counsel failing to investigate or present favorable witnesses" and citing decisions involving failure to present and to investigate alibi witnesses); *Caldwell* v. *Lewis*, 414 F. App'x 809, 818 (6th Cir. 2011) ("[W]hen trial counsel fails to present an alibi witness, 'the difference between the case that was and the case that should have been is undeniable.'" (citation and alteration omitted)); *Raygoza* v. *Hulick*, 474 F.3d 958, 965 (7th Cir. 2007) (finding prejudice where defense counsel failed to call alibi witnesses who could have corroborated another alibi witness's testimony); *Alcala* v. *Woodford*, 334 F.3d 862, 873 (9th Cir. 2003) (defendant prejudiced by failure to present "alibi evidence [that] would have given the jury a choice between believing the testimony of apparently disinterested employees * * * or that of" a witness who made an identification that was "confident" but "not unimpeachable"); *Brown* v. *Myers*, 137 F.3d 1154, 1158 (9th

Cir. 1998) (finding prejudice where alibi witnesses' testimony would have "buttressed [defendant's] account" regarding his whereabouts at the time of the crime); *Grooms* v. *Solem*, 923 F.2d 88, 91 (8th Cir. 1991) (finding prejudice where uncalled witness's "testimony, if believed, would have supported [defendant's] alibi defense"); see also *Harrison* v. *Quarterman*, 496 F.3d 419, 427-428 (5th Cir. 2007) (agreeing with "[o]ur sister circuits [that] have held that counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence").

2. The prosecution's theory in this case was that Mr. Syed murdered Ms. Lee sometime between 2:15 p.m. and 2:36 p.m. See Pet. App. 33a-34a (acknowledging that the State's timeline rested on Mr. Syed killing Ms. Lee by 2:36 p.m.). Effective defense counsel would have presented testimony from a witness named Asia McClain, who was prepared to testify that she spoke to Mr. Syed at the library, far from the alleged scene of the crime, during that precise time period. The omission of that evidence is unquestionably prejudicial if the State's case is taken "as a given," *Strickland*, 466 U.S. at 696: Ms. McLain's testimony directly and independently contradicts the State's claim that Mr. Syed was with Ms. Lee at the time the State claimed she was killed.[3]

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[3] 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.

Rather than ask how the alibi evidence would have affected the case the government presented, the Maryland Court of Appeals posited an alternative theory: that Mr. Syed killed Ms. Lee *after* 2.40 p.m. Pet. App. 34a. If a juror had credited *that* theory, the court reasoned, the alibi evidence would not have been significant to that juror. But the prosecution did not pursue any such theory at trial. In "invent[ing] arguments the prosecution could have made if it had known its theory of the case would be disproved," *Hardy*, 849 F.3d at 823, the Maryland court broke with the approach of at least seven federal circuits and three state high courts, see Pet. 14-21.[4] And, as noted, the court became the first, to *amici*'s knowledge, to hold that defense counsel's failure to present credible, noncumulative, independent alibi testimony did not prejudice the defendant.

Beyond that square conflict, the decision below guts this Court's Sixth Amendment precedent. The Maryland court's approach, taken to its logical conclusion, would make the prejudice prong nearly impossible to establish, because the only evidence that could be the basis for a successful claim of ineffective assistance is evidence the absence of which would be prejudicial under every possible hypothetical theory of a case. Practically speaking, having to demonstrate that omitted evidence would be prejudicial under

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[4] That the Maryland Court of Appeals framed its holding as a conclusion that the jury could have made up its own theory of the crime—rather than that the State could have presented a different theory—is immaterial. *Amici* are not aware of any decision in which a "reviewing court has deemed itself free to adopt a theory of the case that was expressly rejected by the state at trial, and then assume that the jury could have found the defendant guilty on the basis of that theory." *Skakel*, 188 A.3d at 54.

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. See 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 that this Court set forth in *Strickland*.

Only this Court can return uniformity to the law and ensure that *Strickland*'s commands are not disregarded in the lower courts. This Court's review would ensure that criminal defendants whose cases have been affected by the errors of constitutionally ineffective counsel would have an equal opportunity to establish prejudice in every jurisdiction in the nation.

II. The Prejudice Holding Severely Limits the Ability of Actually Innocent Individuals to Challenge Their Convictions.

If left undisturbed, the approach to prejudice taken by the Maryland Court of Appeals would have substantial ripple effects, with particularly devastating consequences for actually innocent individuals seeking to obtain justice. This Court's review is warranted for that reason as well.

A. The decision below erects an untenably high bar to ineffectiveness claims.

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.[5] 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 2,492 known exonerees from 1989 to the present, 649 (26%) received an inadequate legal defense. See http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Sept. 18, 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

[5] Maryland, like a number of States, treats its state constitution's guarantee of effective assistance of counsel as coextensive with that in the federal Constitution. See *Newton* v. *State*, 168 A.3d 1, 13 (Md. 2017); see also, *e.g.*, *Commonwealth* v. *Burno*, 94 A.3d 956, 972 (Pa. 2014); *In re Ringler*, 605 A.2d 522, 523 (Vt. 1992). Accordingly, the decision below is not limited to the Sixth Amendment—it drastically curtails Maryland defendants' ability to secure all post-conviction relief based on their counsel's errors. And, were other jurisdictions to adopt that approach, defendants could similarly be barred from obtaining relief under both federal and state law.

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. *Portuondo*, 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 the only opportunity to obtain relief.

The Maryland Court of Appeals' decision effects a sea change in Sixth Amendment law that severely limits the utility of an ineffective-assistance claim for the

actually innocent. As explained, under that decision, it is not enough to show that counsel failed to investigate an alibi witness whose testimony flatly contradicts the State's theory of the case. Defendants instead need an alibi witness who can offer testimony that refutes every conceivable theory the State could imagine, including, as here, theories the State did not present (and possibly rejected) at trial.

That prejudice analysis may 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 excuse counsel's inadequate representation.

The potential effect of the Maryland court's decision is particularly significant given that relying on alternative, hypothetical theories is a well-documented practice by which prosecutors attempt to save a conviction 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, 853-859 (2015) (describ-

ing several cases in which prosecutors advanced alternative theories of the case in order to try 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, 825-827 (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 843-844 (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 Maryland Court of Appeals' approach blesses such efforts.

B. The consequences of the decision below will extend beyond *Strickland* claims brought by Maryland defendants.

The consequences of the Maryland Court of Appeals' mistaken approach are not limited to the ineffective-assistance context or to Maryland's geographical boundaries. The same prejudice inquiry on which this case turns—*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 a number of other critical contexts.

First, defendants bringing claims that the government improperly suppressed exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), must meet

the *Strickland* "reasonable probability" standard in showing that the suppressed evidence would have been material. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (citing *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in judgment)). 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 1,343 exonerees nationwide—more than half of the total number of exonerees since 1989. See http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Sept. 18, 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 approach of the court below, innocent defendants who have fallen victim to official misconduct would need not only to unearth previously suppressed evidence, but also to show how that evidence meets a heightened 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 at some 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 in other jurisdictions, 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 hypotheticals in a post-conviction proceeding.

Second, many states look to the *Strickland* prejudice standard as the guidepost for other issues of state law in the post-conviction context. For example, 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*, 102 A.3d 798, 809 n.13 (Md. 2014), *rev'd on other grounds*, 130 A.3d 478 (Md. 2016); see *Bowers* v. *State*, 578 A.2d 734, 739 (Md. 1990). Other States require a defendant seeking DNA testing to show that favorable results would lead to a "reasonable probability" of a different outcome, tying that "reasonable probability" test to the prejudice analysis in *Strickland*. See, *e.g.*, *Lambert* v. *State*, 435 P.3d 1011, 1020 (Alaska Ct. App. 2018) ("reasonable probability" under state DNA testing statute "is the same" as the *Strickland* "prejudice test"); *State* v. *Dupigney*, 988 A.2d 851, 859 (Conn. 2010) (looking to "well settled meaning" of "reasonable probability" under *Strickland* and *Brady* to determine meaning under state DNA testing statute). The approach taken by the court below would substantially limit those state statutes' 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, a Maryland circuit court easily found 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 Maryland Court of Appeals in this case, however, has 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.

Third, although the Maryland Court of Appeals stands alone in its prejudice analysis, the effect of the decision below cannot be cabined to the State of Maryland. Under the Antiterrorism and Effective Death Penalty Act, 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*, 562 U.S. at 103. States will inevitably point to the decision here to undermine the clarity of the law and to argue 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 obstructing federal habeas relief. This Court should not permit one State's manifestly incorrect decision to imperil habeas petitioners nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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