

No.

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**In the Supreme Court of the United States**

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**Christopher Mann,**

*Petitioner*

v.

**State of Maryland,**

*Respondent*

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

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**Petition for Writ of Certiorari**

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## **Question Presented**

Has the Maryland Court of Appeals abused its discretion by applying *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) to mandate looking at the strength of the prosecution's case as outcome determinative on the issue of *Strickland* prejudice? See, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

## **Parties and Related Cases**

The names of all parties appear in the caption of the case on the cover page.

There are no related proceedings.

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

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**Petition for Writ of Certiorari**

Petitioner Christopher Mann prays for the issuance of a Writ of Certiorari to review the Judgment of the Maryland Court of Appeals.

**Opinions Below**

The Opinion of the Maryland Court of Appeals appears at *Appendix A*, and it is reported. *State of Maryland v. Christopher Mann*, 466 Md. 473, 221 A. 3d 965 (2019). The Opinion of the Maryland Court of Special Appeals appears at *Appendix B*, and it is also reported. *State of Maryland v. Christopher Mann*, 240 Md. App. 592, 207 A.3d 653 (2019). The Circuit Court

for Baltimore City's Statement of Reasons and Order appears at *Appendix C*.

It is unpublished.

### **Jurisdiction**

On December 19, 2019 the Maryland Court of Appeals issued its Opinion. The Maryland Court of Appeals denied the Motion for Reconsideration on January 23, 2020. The Maryland Court of Appeals' Order denying rehearing appears at *Appendix D*.

On March 19, 2020 the Supreme Court order extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing. 589 U.S. \_\_\_\_; See Rules 13.1 and 13.3.

Jurisdiction of the Supreme Court arises pursuant to the United States Code, because the Supreme Court may review final judgments rendered by the highest court of a State by writ of certiorari, when any right is claimed under the Constitution of the United States. 28 U.S.C. § 1257(a).

Jurisdiction of the Maryland Court of Appeals arises pursuant to the Maryland Code (Cts. & Jud. Proc. Art. § 12-201), and jurisdiction in the Maryland Court of Special Appeals arises pursuant to the Maryland Code (Cts. & Jud. Proc. Art. §§ 7-109(a) and 12-301). Likewise, jurisdiction in the Circuit Court for Baltimore City was based upon Maryland Code (Cts. & Jud.

Proc. Art. §§ 1-501 and 7-102(a)), because Mr. Mann began a proceeding under Uniform Postconviction Procedure Act, challenging that the judgment and sentence were imposed in violation of the United States Constitution and the Constitution and laws of the State of Maryland; and that the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.

### **Constitutional and Other Provisions Involved**

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section One of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Criminal Pattern Jury Instruction 5:00. Alibi. provides:

You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with all other evidence in this case. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it.

### **Statement of the Case**

Petitioner Christopher Mann seeks review of the Maryland Court of Appeals' decision, reversing judgments by the Maryland Court of Special Appeals and the Circuit Court for Baltimore City that had granted him a new trial.

Ricky Prince was murdered on the evening of April 22, 2003. App'x A at 9. On January 2, 2004, the State charged appellant with kidnapping, first-degree felony murder, conspiracy, and handgun charges. App'x A at 2.

The State's theory was that petitioner and Tayvon Whetstone kidnapped Prince, because he had cooperated with authorities in two other criminal cases. App'x B at 1. Sometime during the evening of April 22, 2003, Whetstone shot Prince. App'x A at 2.

At trial, a detective read the jury a statement written by petitioner. Id at 5; App'x C at 8 – 9. On April 22, 2003 Christopher Mann drove his girlfriend to work at 11:00 or 11:30 in the morning. Id. Then, he visited his friend Jeffrey Johnson until about 1:45 or 2:00 in the afternoon. Id. Around 4:30 or 5 o'clock, Mr. Mann went to his mother's house. Id. About 6:30 or 6:45 p.m. Whetstone and Kenneth Fleet followed him to the Target, where his girlfriend worked, so that he could drop off her car. Id. Around 7:00 p.m., they arrived at McDonald's, where petitioner talked to Prince about Jerrard Bazemore. Id. While Mr. Mann was talking to Prince, Fleet got into Prince's vehicle and drove away. Id. Mr. Mann and Whetstone went to Mr. Mann's father's house for five or ten minutes, and then they went to Jeffrey Johnson's house. Id. After that, Johnson's girlfriend took Mr. Mann back to his mother's house. After his girlfriend finished work, she picked him up at his mother's

house, dropped a friend of hers off, and drove to Mr. Mann's father's house, where they spent the night. Id.

The State presented no eyewitnesses or DNA evidence linking petitioner to the crime. App'x C at 3. The State's case was based on hearsay from a detective about what Derrick Harper was supposed to have written and said in an interview about what petitioner was supposed to have said in the days after the murder. Id. However, when Harper testified, he disavowed, could not remember, or denied much of what he was supposed to have discussed in his interview. Id.

The Medical Examiner estimated that the time of death was roughly on the evening of April 22, 2003, because there were "just too many variables to say an exact hour." App'x A at 9. Dr. Titus cautioned that he could only make a general approximation about the time of death. Id.

Mr. Mann called four alibi witnesses his friend Jeffrey Johnson, his girlfriend Tanea Jenkins, her friend Nikita Peay, and his cousin Rhonda Harper, who testified to his whereabouts on April 22, 2004, in an effort to show that he was not present when Mr. Prince was kidnapped and murdered. App'x A at 9 – 10; App'x B at 1; App'x C at 9 – 10. Despite this, Mr. Mann's trial counsel did not request an alibi jury instruction. App'x B at 1 – 2; App'x C at 2.

On August 11, 2004 the Circuit Court granted judgment of acquittal on the handgun charges. A jury convicted of the remaining charges on August 12, 2004. App'x A at 12.

At sentencing the Circuit Court merged kidnapping into the charge of felony murder (App'x B at 2, n. 1), imposed imprisonment for life, and it imposed a term of twenty years for conspiracy to run consecutively for a total sentence of life plus twenty years. *Id.* at 2.

On direct appeal the Maryland Court of Special Appeals considered (1) whether delays in the Circuit Court had violated the right to a speedy trial, and (2) whether the evidence was sufficient to convict, and it affirmed in an unreported opinion. *Christopher Mann v. State*, Md. Ct. of Spec'l App., No. 1895, Sep. Term, 2004.

On June 9, 2014, Christopher Mann filed a petition for post-conviction relief. App'x C at 1. At the hearing on the post-conviction petition, Mr. Mann's trial counsel testified that there was no strategic reason not to request the alibi instruction. App'x A at 12 – 13 and App'x B at 2.

On February 12, 2018 the Circuit Court issued a Statement of Reasons and Order, granting a new trial that included addressing the factual and procedural history, the *Strickland* standard (See, App'x C at 5 – 7, 11 – 12; See also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), and discussing the its analysis with citations to the record and

the law. App'x C. It supported the finding that trial counsel's failure to request an alibi jury instruction or object to its absence was not and could not have been the result of reasonable professional judgment; and that given the circumstances of the case, his omission fell below objective professional norms. App'x C at 12. In addition, the Circuit Court reasoned that without either the alibi instruction or another instruction fairly covering the purpose and substance of the alibi instruction, it is reasonably possible that the jury might have placed the burden on the defense to prove the alibi, which is an incorrect interpretation of the law, because alibi is not an affirmative defense. App'x C at 12.

The Circuit Court also concluded that it is reasonably probable that the jury may not have considered, because they were not instructed to do so, the defense theory of the case at all, which was manifestly detrimental and prejudicial to Christopher Mann. App'x C at 12 – 13.

The State filed an Application for Leave to Appeal to the Maryland Court of Special Appeals on March 12, 2018, which was granted. App'x B at 1. The Court of Special Appeals affirmed the Circuit Court's ruling granting Christopher Mann a new trial that included addressing the factual and procedural history, the *Strickland* standard (See, App'x B at 3, 4, 6, 8, 9; See also, *Strickland, supra*), and discussing the its analysis with citations to the

record and the law. App'x B; *State of Maryland v. Christopher Mann*, 240 Md. App. 592 (2019).

It reasoned first, there is a strong concern that a jury will shift the burden of proof to a defendant, who introduces alibi evidence, even if the word “alibi” is never used. App'x B at 12. Second, when a defendant introduces alibi evidence, the State must still overcome that evidence with prove beyond a reasonable doubt that the defendant committed the crime. Id. By giving an alibi instruction, the court relieves these concerns. App'x B at 12. When the alibi instruction was not given, because trial counsel failed to request it; there is “a substantial or significant possibility that the jury’s verdict was affected.” Id. Christopher Mann was prejudiced, because he did not receive the benefit of the alibi instruction as a result of his counsel’s failure to request it. Id.

The State filed a Petition for a Writ of Certiorari in the Maryland Court of Appeals, which was granted. App'x at A; See, *State of Maryland v. Christopher Mann*, 464 Md. 588, 212 A.3d 396 (2019). On December 19, 2019 The Court of Appeals, citing the *Strickland (supra)* standard, reversed the judgments by the Maryland Court of Special Appeals and the Circuit Court for Baltimore City that had granted Christopher Mann a new trial. See, App'x A at 1, 17, 18, 27, 28, 33; *State of Maryland v. Christopher Mann*, 466 Md. 473 (2019). The dissenting opinion also cited the *Strickland* standard. See, App'x A Dissenting Op. at 1 – 2.

The Maryland Court of Appeals denied the Motion for Reconsideration on January 23, 2020. App'x at D.

On March 19, 2020 the Supreme Court order extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing. 589 U.S. \_\_\_\_; See Rules 13.1 and 13.3.

### **Reasons for Granting the Petition**

**The Maryland Court of Appeals Has Again Decided an Important Federal Question about *Strickland* Prejudice in a Way that Conflicts with Relevant Decisions of this Court.**

Five of seven Maryland Court of Appeals judges have held that while trial counsel's failure to request an alibi jury instruction constituted deficient performance under *Strickland*, it fails to establish prejudice, because none of four alibi witnesses' testimony completely foreclosed the possibility that petitioner could have been at murder scene when Price was killed, and because the trial court instructed the jury on State's burden to prove guilt beyond a reasonable doubt. App'x A; See also, *Strickland*, 466 U.S. 668.

The record lacks any strategic reason for not requesting an alibi instruction. App'x A Dissenting Op. at 2; *State v. Mann*, 240 Md. App. 592, 601, 207 A.3d 653, 658 (2019).

There is a strong risk that a jury will assume that a criminal defendant bears some burden of proof by introducing alibi evidence, even if no one uses

the word alibi. App'x A Dissenting Op. at 2; *State v. Mann*, 240 Md. App. 592, 605 – 6, 207 A.3d 653, 661 (2019). When the court gives the jury an alibi instruction, it addresses these concerns. *Id.* When the jury does not have the alibi instruction, because trial counsel does not ask for it, there is a ‘substantial or significant possibility that it affected the verdict. App'x A Dissenting Op. at 2.

At trial, the State did not pinpoint the time when Mr. Prince died. App'x A at 2, 9 and Dissenting Op. at 2. The defense presented four alibi witnesses, accounted for some of Mr. Mann’s whereabouts on the evening in question. App'x A at 9 – 10 and Dissenting Op. at 2.

With an alibi instruction to help the jury weigh credibility and the evidence, a jury could have determined that Mr. Prince was killed during the times accounted for by the alibi witnesses. App'x A Dissenting Op. at 2. Without that, even one juror could have incorrectly shifted the burden to the defense to prove what even one of the alibi witnesses said, and that is a reasonable probability that the verdict was affected. *Id* at 2 – 3. Accordingly, Mr. Mann was prejudiced by his trial counsel’s failure to ask for the alibi jury instruction. *Id* at 3 – 4.

In addition, the reasonable doubt instruction does not fairly cover alibi. App'x A Dissenting Op. at 3. The Court of Appeals majority conflated an alibi

instruction with another instruction addressing the burden of proof and reasonable doubt. App'x A Dissenting Op. at 3.

When the defense offers an alibi to show that it was impossible or improbable that the defendant was at the scene of the crime when it was alleged to have happened, the State still must bear the burden to prove beyond a reasonable doubt that the defendant was actually at the scene of the crime when it happened and that the defendant committed the crime. *Id.* In other words, the State must disprove the alibi beyond a reasonable doubt. *Id.*

The purpose of an alibi jury instruction is to avoid confusing the jury on who bears the burden of proof and prevent the jury from shifting that burden in a criminal case. *Id.* Regardless of whether the jury received some information from other general instructions, the jury must consider a separate alibi instruction when the evidence generates it. *Id.* It clarifies the burden of proof when the defense presents alibi evidence. *Id.*

Despite this, the Maryland Court of Appeals has been applying *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), as mandating a minority approach that looks to the strength of the prosecution's case as outcome determinative on the issue of prejudice. *State v. Syed*, 204 A.3d 139 (Md. 2019), *cert. denied*, \_\_\_ U.S. \_\_\_ (Nov. 15, 2019) (counsel's failure to investigate an alibi witness was deficient, but that the "substantial direct and circumstantial evidence pointing to Mr. Syed's guilt" precluded a finding of prejudice); *Ramirez v.*

*State*, 212 A.3d 363 (Md. 2019), *cert. denied*, \_\_\_ U.S. \_\_\_ (Feb. 24 2020) (“generally, a petitioner fails to prove that his or her trial counsel’s performance prejudiced him or her where, at trial, the State offered strong evidence of the petitioner’s guilt,” and that the “strength of the State’s case against Ramirez leads to the conclusion that there is no substantial or significant possibility that the outcome of the trial would have been different had Juror 27 not served on the jury.”).

Shortly before the *Syed* decision, the Connecticut Supreme Court noted that it was unable to find “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 under Strickland’s second prong.” *Skakel v. Comm’r of Correction*, 188 A.3d 1, 42 (Conn. 2018), *cert. denied*, 139 S. Ct. 788 (2019). Maryland became the first state to do so.

*Weaver* did not mandate looking to the strength of the prosecution’s case as outcome determinative on the issue of prejudice. *Weaver*, 137 S. Ct. 1899. Instead, the Supreme Court held that *Strickland* prejudice is context dependent, and that there was no prejudice from the closure of the courtroom without evidence of an effect on the judge or jury’s neutrality. *Id.*

To the contrary, in *Strickland* the Supreme Court considered and rejected requiring a defendant to show that counsel’s deficient conduct more likely than not altered the outcome in the case, even though it would define

the inquiry in a way familiar to courts, reflect the importance of finality, and comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. *Strickland*, 466 U.S. at 693 – 694.

In *Strickland* the Supreme Court noted that the Constitution's Sixth Amendment protects the right to counsel, in order to protect the fundamental right to a fair trial. *Id* at 684; See, U.S. Const. amend. VI; *See also, Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Sixth Amendment defines the basic elements of a fair trial, including the right to counsel, and the Constitution's Due Process Clauses guarantee a fair trial. *Strickland* at 684 – 685; See, U.S. Const. amend. V and XIV. Just having a person, who happens to be a lawyer, present alongside the accused is not enough. *Strickland* at 685. The right to the assistance of counsel means assistance by an attorney, who plays the role necessary to ensure that the trial is fair, because that role that is critical to the ability of the adversarial system to produce just results. *Id*. Accordingly, the Court has recognized that the right to counsel means the right to the effective assistance of counsel. *Id* at 686; See, *McMann v. Richardson*, 397 U. S. 759, 771, n. 14 (1970).

Evaluating claims of ineffectiveness involves two steps. *Strickland* at 686. First, the defendant must show that counsel's performance was deficient,

which requires showing that counsel did or failed to do something so serious that counsel was not functioning as guaranteed by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance caused prejudice, which requires showing that counsel's failure was so serious that it deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 686. That is whether the defendant really did not have the assistance necessary to justify reliance on the outcome of the proceeding, because counsel undermined the proper functioning of the adversarial process. *Id.*

Representing criminal defendants has certain basic duties, including "the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id* at 688; See, *Powell v. Alabama*, 287 U.S. at 68 – 69.

Sometimes prejudice is presumed, such as when a criminal defendant has been denied the right to counsel at all or when the state interferes with it. *Strickland* at 692; See, *United States v. Cronic*, 466 U.S. 648 at 659 and n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Prejudice is so likely in these circumstances that case-by-case inquiries are not justified. *Id* at 658. In addition, it is easy to identify and prevent. *Id.* Similarly, when a defendant shows that counsel actively represented conflicting interests and that it adversely affected counsel's performance of interest, then prejudice is presumed. *Id*; See, *Cuyler v. Sullivan*, 446 U.S. 335, at 348, 350, 100 S. Ct.

1708, 64 L. Ed. 2d 333 (1980). Generally, defendants have to prove prejudice, because there are an infinite variety of attorney errors, which might be harmless or prejudicial, depending on the case. *Strickland*, 466 U.S. at 693. Errors cannot be classified by likelihood to cause prejudice, and they cannot be defined well enough to inform defense attorneys precisely what not to do. *Id.* An act or omission that is unprofessional in one case might be the opposite in another. *Id.*

A defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* at 686. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

The court must consider the totality of the evidence before the jury. *Id.* at 695. Some factual findings might have been unaffected, and the ones that are affected might have been affected in different ways. *Id.* Some errors will have a pervasive effect on inferences drawn from the evidence, changing everything, and some might have an isolated effect. *Id.* at 695 – 696.

In addition, the effect is greater when the verdict or conclusion is only weakly supported by the record than when it is overwhelming. *Id.* at 696.

When making a prejudice inquiry, the court must consider what findings are unaffected, and the court must consider the due effect of counsel's error on the remaining findings. *Id.* Then the court must ask

whether the defendant has shown a reasonable likelihood that the decision would have been different without counsel's error. *Id.* A defendant does not have to show that the error more likely than not altered the outcome in the case. *Strickland*, 466 U.S. at 693.

Although these principles guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding. *Id* at 696. In every case despite the presumption of reliability, the court must be concerned with whether the result the proceeding is unreliable, because the adversarial process broke down. *Id.* Ensuring a fair trial is the guide, because that is what the Constitution requires. *Id* at 686.

### **Conclusion**

The failure to request an alibi instruction after testimony from four alibi witnesses and without any strategic was deficient performance under *Strickland*. A general jury instruction regarding the burden of proof in a criminal case does not ensure that the jury does not improperly place the burden of proving the alibi on the defense when it presents an alibi defense. Accordingly, Mr. Mann was prejudiced.

The Court should grant a writ of certiorari.

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