No. _____

IN THE

Supreme Court of the United States

TAVON FULLWOOD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court held that the Court of Appeals of Maryland unreasonably denied post-conviction relief where trial counsel failed to investigate a viable mitigation case. Even after *Wiggins* and *Rompilla v. Beard,* 545 U.S. 374 (2005), Maryland courts have adhered to an unduly narrow view of attorneys' duty to conduct reasonable investigations. *Maryland v. Borchardt*, 914 A.2d 1126, 1157 (Md. 2007) (Bell, C.J., dissenting).

Here, the Maryland courts rejected an ineffective assistance claim based on trial counsel's failure to investigate an expert challenge to the State's forensic evidence—even though the evidence was key to the State's theory of attempted murder, the evidence was subject to easy challenge, and trial counsel testified he had no strategic reason not to pursue this defense. The opinions below did not cite *Wiggins*, *Rompilla*, or out-of-state decisions granting relief under similar circumstances. Maryland thus remains a persistent outlier on counsel's duty to investigate.

Is it ineffective assistance for defense counsel to fail to investigate a viable expert challenge to forensic evidence that is central to the prosecution's theory of the case?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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The Court of Special Appeals of Maryland's decision was reported at 234 Md. App. 57, 168 A.3d 1104 (2017). App. 1a. The trial court's memorandum opinion was unreported. App. 17a. The order of the Court of Appeals of Maryland denying certiorari, 456 Md. 507, 175 A.3d 143 (2017) (table), is at App. 36a.

JURISDICTION

The Court of Special Appeals entered judgment on August 31, 2017, and the Court of Appeals denied Fullwood's timely certiorari petition on December 15, 2017. On February 27, 2017, Fullwood applied to extend the time for filing a petition for a writ of certiorari in this Court until April 16, 2018 (17A939). The Chief Justice granted the application on March 9, 2018. Fullwood now invokes this Court's jurisdiction under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISIONS

The Assistance of Counsel Clause provides, in pertinent part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Fourteenth Amendment provides, in pertinent part, that "[n]o 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." U.S. Const. amend. XIV, § 1.

STATEMENT

Fullwood's trial counsel decided—without any investigation of the issue—not to present expert testimony challenging the prosecution's forensic evidence of sexual assault. This Court has directed reviewing courts, and the Maryland appellate courts in particular, to examine the reasonableness of the investigation supporting counsel's decision not to present a certain defense, *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), and has made clear that reviewing courts may not "assum[e] that the investigation was adequate." *Id.* at 528. The duty to investigate is especially serious when it comes to evidence defense counsel knows the prosecution intends to use and, in fact, is key to the prosecution's case. *Rompilla v. Beard*, 545 U.S. 374, 389 (2005). Nevertheless, even though defense counsel's decision was totally uninformed and not based on any investigation at all, the Maryland courts here excused counsel's decision as tactical and worthy of deference.

Fullwood was charged with attempted murder, rape, and related crimes. The State's theory of motive for the attempted murder was that the perpetrator was trying to get rid of the witness to the rape. The State's major evidence of rape was testimony from a sexual assault forensic examiner (SAFE) nurse. Fullwood's trial counsel did not even investigate a challenge to the SAFE nurse's testimony. Instead, he pursued the theory that Fullwood's cousin was the real perpetrator. Counsel later testified that there was no strategic reason not to pursue a challenge to the SAFE nurse's testimony, and that he would have presented such ev-

idence if he had had it. The Maryland courts disregarded this testimony, which was the only evidence on this point, and denied relief, without even acknowledging this Court's decisions in *Wiggins* and *Rompilla*.

Trial Proceedings

Early in the morning of March 15, 2001, police responded to a neighbor's call for unknown trouble and forcibly entered Cheri Luzer's apartment. They found Luzer in her bedroom, naked, with stab wounds to her chest, torso, and arms. When an officer asked her if she had been sexually assaulted, Luzer said no. Luzer later had no memory of the attack.

A SAFE nurse, Soraya Sina, examined Luzer at the hospital. Nurse Sina testified at trial that she identified contusions, tears, and abrasions; tears and swelling; and bruising, blood, and a small laceration, which indicated to her that a sexual assault had occurred. Nurse Sina was unable to complete her investigation because Luzer had to be rushed to surgery.

Luzer's neighbors saw the shadows of one or two people jumping from Luzer's second-floor bedroom window. Blood stains on a stair railing led police to the apartment Fullwood's cousin, Melvin Fullwood, shared with his girlfriend, Chantal Veanie, in a neighboring building.

Melvin and Veanie gave inconsistent accounts of what happened on March 15, but both implicated Fullwood. Each testified that Fullwood was in Veanie's apartment the evening of the assault; that

he left at some point and later returned, seemingly upset; and that, upon returning, he went to Veanie's second-floor bathroom. Melvin also testified that Fullwood asked him for a change of clothes.

Fullwood testified differently. He agreed that he had been at Melvin and Veanie's apartment that evening, but he said that Melvin had taken him to Luzer's building and brought him inside Luzer's apartment. Fullwood had never been inside Luzer's apartment before, and he had no idea who lived there. He waited in the living room while Melvin went into the bedroom at the rear of the apartment. Fullwood heard moaning and thumping coming from the back room. The noises soon turned to screams, prompting him to go and look. He found Melvin, who was wearing gloves, on top of a woman. When Fullwood saw Melvin stab the woman, he pushed Melvin off of her. Melvin fled through the bedroom window. Fullwood started to call the police but, frightened he would be blamed, followed Melvin out of the window.

Fullwood then ran back to Melvin and Veanie's apartment, by which time Melvin was showering in the upstairs bathroom. Fullwood washed up downstairs and never entered the upstairs bathroom. Melvin gave Fullwood a change of clothes and took his bloody clothes from him.

DNA confirmed that Fullwood had been in Luzer's apartment, as he admitted. Melvin's DNA was not recovered from the scene, but Fullwood testified Melvin wore gloves. Blood samples from the master bedroom of Veanie's apartment tested positive for

Luzer's DNA. Fingernail cuttings and scrapings from Fullwood's hands tested negative for Luzer's DNA. No condoms were recovered from the scene, and no semen was detected on any of the items tested, including swabs and combings from Luzer's body. Luzer's fingernail cuttings contained neither Fullwood's nor Melvin's DNA. Two swabs of blood recovered from Veanie's master bathroom were not initially selected for DNA testing but were analyzed after trial. This excluded Fullwood as a source. The sample taken from the master bathroom's light switch tested positive for both Melvin's and Luzer's DNA.

At trial, the State argued rape was the motive for the attack, with the attempted murder being an effort to "get rid of the witness." The jury convicted Fullwood of first-degree attempted murder, first-degree rape, first-degree sexual offense, and attempted sodomy. He received a life sentence for the attempted murder, a consecutive life sentence for rape and sexual offense, and a concurrent ten years for attempted sodomy.

After his convictions were affirmed on direct appeal, Fullwood sought state post-conviction review.

Post-Conviction Proceedings

Suzanne Rotolo, Ph.D., who was accepted as an expert in sexual assault forensic examination, testified at the post-conviction hearing. She reviewed Nurse Sina's trial testimony, Nurse Sina's SAFE report, and the SAFE exam photographs. Dr. Rotolo made several findings that discredited Nurse Sina's trial testimony.

Specifically:

- some areas where Nurse Sina found injuries were "absolutely free of injury";
- Nurse Sina testified to six injuries, but three were not identified at all in her written report, and two were inadequately documented;
- a contusion identified by Nurse Sina was precisely where a catheter had been inserted;
- Nurse Sina testified to a certain linear tear, but the only thing resembling a tear in the photograph of this area was a normal part of the female anatomy;
- contrary to Nurse Sina's testimony, there were "no signs of injury whatsoever" to another area;
- contrary to Nurse Sina's trial testimony, Nurse Sina had marked "no" in the section of the report that asked about tears to the hymen;
- Nurse Sina did not photograph some of the alleged bruises and lacerations, preventing meaningful evaluation of that testimony;
- there were no signs of certain swelling to which Nurse Sina testified; and
- Nurse Sina's finding of other tearing resulted from misinterpreting the toluidine blue dye.

Fullwood's trial counsel, Kenneth Ravenell, admitted that if he had obtained an opinion similar to Dr. Rotolo's, he "absolutely" would have presented

it to the jury, and that there was no strategic reason not to do so. He agreed that the SAFE nurse's testimony was the "lion's share" of the State's sexual assault evidence, which depended on the SAFE nurse's credibility. An opinion like Dr. Rotolo's could be used to attack the credibility of the State's entire case, "particularly when the victim says [she] was not raped." As to attempted murder, there was no evidence to support any credible motive other than rape. But Ravenell conducted no pretrial investigation on this issue and did not hire a SAFE nurse. His only explanation was his focus on other evidence suggesting that Melvin was the perpetrator.

The circuit court denied post-conviction relief. After granting leave to appeal, the Court of Special Appeals affirmed in a reported opinion. The Court of Appeals denied certiorari.

REASONS FOR GRANTING THE PETITION

It is ineffective assistance when defense counsel fails to investigate a viable expert challenge to forensic evidence that is key to the prosecution's theory.

In denying post-conviction relief, the Maryland courts ignored this Court's clear precedents that effective assistance of counsel includes the duty to make a reasonable pretrial investigation of challenges to the prosecution's evidence or make a reasonable (and informed) decision that such investigation would be fruitless. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). Maryland courts thus continue to fall further and further out of step with this Court, the

federal courts of appeals, and other states on this issue. Certiorari is necessary to correct Maryland's interpretation of the Sixth Amendment and bring Maryland back into line with this Court's own decisions and those of other courts around the country.

Fullwood's trial counsel performed deficiently in conducting no pretrial investigation into expert testimony that would have rebutted the State's forensic evidence of sexual assault, and he testified freely that there was no strategic reason not to do so. As the forensic evidence was the prosecution's key evidence of rape, and rape was critical to the prosecution's theory of motive for attempted murder, not challenging this evidence obviously prejudiced Fullwood's defense. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). This Court should grant certiorari and reverse.

A. Despite *Wiggins*, Maryland remains an outlier on deficient-investigation claims.

This Court issued clear guidance in a series of cases that defense counsel has a pretrial duty to investigate challenges to the prosecution's case. This duty derives from *Strickland* itself, where the Court stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," 466 U.S. at 690–91, and it has been refined in more recent decisions. The federal courts of appeals and appellate courts in other states have applied these precedents without problem, but Maryland has developed a pattern of being an outlier on this issue.

In *Wiggins v. Smith*, 539 U.S. 510 (2003), on federal habeas review, this Court held that the Maryland Court of Appeals unreasonably applied clearly established federal law in rejecting an ineffective assistance claim in a capital case. There, trial counsel "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources," did not order a social history report, and put on almost no evidence in mitigation at sentencing. *Id.* at 524–27.[1] Although this "fell short of the professional standards that prevailed in Maryland" at the time, the Court of Appeals justified this as a strategic choice without conducting an assessment of whether trial counsel's decision to stop their investigation when they did "actually demonstrated reasonable professional judgment." *Id.* at 524, 527–28. That court's "assumption that the investigation was adequate thus reflected an unreasonable application of *Strickland*." *Id.* This Court made clear that "a reviewing court must consider the reasonableness of the investigation said to support [trial counsel's] strategy." *Id.* at 527.

In *Rompilla v. Beard*, 545 U.S. 374, 377 (2005), this Court held that the pretrial investigation duty includes "reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Defense counsel was on notice that the prosecution intended to introduce at

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[1] The Court earlier had held that attorneys have an "obligation to conduct a thorough investigation of the defendant's background" with regard to presenting a mitigation case at sentencing. *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

sentencing Rompilla's prior conviction for rape and assault as evidence of aggravation, and part of a transcript of the victim's testimony in the earlier case as evidence of the prior crime's "violent character." *Id.* at 383–84. Nevertheless, defense counsel did not obtain the file of the prior crime, which was available in the same courthouse as the trial, and, "even after obtaining the transcript of the victim's testimony on the eve of the sentencing hearing, counsel apparently examined none of the other material in the file." *Id.* at 385. The Court discounted any argument that not investigating was a strategic choice, because "looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce." *Id.* at 389.

But Maryland's appellate courts have a pattern of resisting this Court's holdings in *Wiggins* and *Rompilla* that the decision not to present or pursue certain evidence is objectively unreasonable when that decision is based on an unreasonable pretrial investigation, *Wiggins*, 539 U.S. at 528, or, as in this case, no investigation at all.

The author of the Court of Special Appeals' decision in this case was a retired Court of Appeals judge sitting by designation. She was a member of the majority in the *Wiggins* decision that this Court overruled in 2003, *Wiggins v. Maryland*, 724 A.2d 1 (Md. 1999). She also joined the majority opinion in *Evans v. Maryland*, 914 A.2d 25 (Md. 2006), in which the Court of Appeals found it unnecessary to evaluate the reasonableness of trial counsel's investigation in preparing a mitigation case. And she au-

thored the majority opinion in another post-*Wiggins* failure-to-investigate case, *Maryland v. Borchardt*, 914 A.2d 1126 (Md. 2007).

Then-Chief Judge Robert Bell, who dissented in *Wiggins v. Maryland*, again dissented in *Evans* and *Borchardt*. He admonished his colleagues for resisting this Court's rulings in *Wiggins* and *Rompilla*. In *Evans*, the Court of Appeals failed to appreciate that "presenting a mitigation case without an adequate and full investigation, or without considering how what is presented can be used against the defendant and whether it may have the opposite effect, very well may aggravate, rather than mitigate, the defendant's case." 914 A.2d at 104 (Bell, C.J., dissenting). And, in *Borchardt*, the Court of Appeals misconstrued *Wiggins* and *Rompilla* by asking only "whether the attorney's actions, viewed from his perspective, were reasonable under the circumstances," without even considering "whether a reasonable lawyer, under similar circumstances, would have done more." 914 A.2d at 1157–58 (Bell, C.J., dissenting).

Maryland took a step further away from *Wiggins* and *Rompilla* in this case. A member of the *Wiggins v. Maryland*, *Evans*, and *Borchardt* majorities, sitting by designation, authored a precedential opinion that did not even cite *Wiggins* or *Rompilla*—and that cited, in their place, a treatise on post-investigation trial strategy. The Court of Appeals denied certiorari, leaving the Court of Special Appeals opinion in place as controlling precedent for Maryland post-conviction proceedings.

B. Courts outside Maryland have uniformly recognized counsel's duty at least to investigate challenges to forensic evidence.

Maryland is now at odds with federal courts of appeals and other states on this important federal constitutional question. At least four federal courts of appeals and three state appellate courts have ordered habeas or post-conviction relief based on similar failures to investigate potential experts.

For example, in *Dugas v. Coplan*, 428 F.3d 317, 325 (1st Cir. 2005), trial counsel testified that he did not consult with an expert to challenge the prosecution's expert testimony that a fire had been intentionally set, though he had no justifiable reason for not doing so, there was no risk in doing so, and there was money available for an expert. Instead, he accepted the prosecution's expert's opinion as to the cause. *Id.* at 326. As the First Circuit summarized, counsel's investigation consisted of "his own visual assessment of the fire scene, his conversations with the state's experts, some limited reading, and his conversations with other defense attorneys after work." *Id.* at 328. Thus, as in *Wiggins*, he "abandoned [his] investigation … after having acquired only rudimentary knowledge of [the issues] from a narrow set of sources," *id.* (quoting *Wiggins*, 539 U.S. at 524), but determined to mount a "not arson" defense without consulting an arson expert or learning "how to effectively use the terminology and techniques of arson investigation from his own research." *Id.*

The First Circuit found that counsel's investigation was constitutionally deficient because, among other things, the arson evidence was the "cornerstone of the state's case" and challenging the state's arson case was indeed critical to the defense because, in a striking similarity to this case, other than creating reasonable doubt as to the state's arson evidence, "Dugas's only defense was that 'someone else did it'—a defense that is often difficult to mount and fraught with evidentiary problems[.]" *Id.* at 329. As in this case, the "'not arson' defense did not conflict with the 'other perpetrator' defense"; rather, they "offered alternative grounds for reasonable doubt." *Id.*

Similarly, the Sixth Circuit found in *Richey v. Bradshaw*, 498 F.3d 344, 362–64 (6th Cir. 2007), that a lawyer rendered ineffective assistance where he hired an expert to review the prosecution's arson evidence but "did not conduct the investigation that a reasonably competent lawyer would have conducted" before deciding not to challenge the evidence when his expert agreed with the prosecution. On federal habeas review, two experts provided testimony that, as in this case, "would have severely undermined the State's case." *Id.* at 364. Unlike the expert on whom trial counsel had relied without sufficiently investigating for himself, the new experts would have attacked the prosecution expert's analysis as "unsound and out of step with prevailing scientific standards"; disputed the prosecution's conclusion that samples contained accelerants; testified that burn patterns the prosecution focused on "were just as consistent with a naturally occurring fire"; rejected the prosecution's contention that the

fire's speed indicated arson, because "modern furnishings cause fires to burn more rapidly"; and would have testified the most likely cause of the fire was a cigarette left smoldering in couch cushions. *Id.* Thus, the Ohio state courts unreasonably applied federal law in denying relief. *Id.*

In *Gersten v. Senkowski*, 426 F.3d 588 (2d Cir. 2005), the court affirmed the district court's finding of ineffective assistance where defense counsel conducted only a limited investigation concerning the prosecution's expert testimony on sexual assault, which hampered his cross-examination, and did not consult an independent medical expert. *Id.* at 605. After noting that "the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel" in sexual abuse cases, *id.* at 607, the Second Circuit found that the decision not to investigate was not objectively reasonable, because "no facts known to defense counsel at the time that he adopted a trial strategy that involved conceding the medical evidence [of sexual abuse] could justify that concession." *Id.* at 609. The court remarked that "Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence." *Id.* at 610.

In *Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008), the court noted that "when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." *Id.* at 1235. Defense counsel in that case failed to

consult a serology expert to rebut the prosecution's expert or even to help him understand the prosecution's blood sample evidence. He provided no explanation for this failure and "did not advance a strategic or tactical reason" for it. *Id.* at 1236. This was deficient performance insofar as it related to the jury's finding of a "special circumstance," that a robbery-murder had taken place. *Id.* at 1234.

State courts have reached similar conclusions. In *Arizona v. Dentz*, 306 P.3d 98 (Ariz. Ct. App. 2013), trial counsel accepted the prosecution's three medical experts' opinions in a child physical abuse case without seeking any independent expert evaluation. *Id.* at 101. The court rejected counsel's view that he could pursue the alternative defense that the child's injuries were accidental by cross-examining the prosecution's experts as a "strategic" or "reasoned decision," because he did not seek the advice of an independent expert. *Id.* at 104. And, the independent expert testimony presented in the post-conviction proceeding "would have directly contradicted much of [the prosecution's] medical evidence." *Id.*

In *New Hampshire v. Whittaker*, 973 A.2d 299 (N.H. 2009), defense counsel in a vehicular homicide case did not consult any experts because he believed, incorrectly, that an accident reconstruction expert's opinion that was based on assumptions about how an accident happened would have been speculative and inadmissible. *Id.* at 309. If he had consulted an expert, he would have learned another theory of defense: that the accident would have been unavoidable even if his client had not been impaired. *Id.* at 309–10. Thus, "because he knew

that the State's case relied upon expert testimony that used certain assumptions, it was constitutionally deficient performance for trial counsel not to consult with an expert to learn what the expert could conclude based upon these same or similar assumptions." *Id.* at 310. "'[F]ailing to present exculpatory evidence is not a reasonable trial strategy.'" *Id.* (quoting *Gersten*, 426 F.3d at 611).

And, in *Landry v. Utah*, 380 P.3d 25 (Utah Ct. App. 2016), the court concluded that "trial counsel's failure to engage an expert of her own, at least to advise and possibly to testify, was … objectively unreasonable." *Id.* at 35. There were "inadequacies" in the prosecution's arson experts' work, "of which trial counsel would have learned had she more thoroughly investigated the State's experts with the assistance of her own expert—an expert who could then have testified on behalf of Landry at trial." *Id.* at 36. Trial counsel relied only on her own limited knowledge of arson science and "forwent the opportunity to pursue a more effective trial strategy, instead pursuing theories that were much weaker." *Id.* at 37.

While these courts have been faithful to *Wiggins* and *Rompilla*, Maryland has not. Neither the State nor the courts below have cited any cases denying habeas relief on similar facts.

C. This case highlights Maryland's peculiar resistance to *Wiggins* and *Rompilla*'s holdings.

In this case, fourteen years after *Wiggins*, the Maryland courts made virtually the same "assumption" without evaluation that this Court rejected.

539 U.S. at 528. Here, similar to *Wiggins*, trial counsel had tunnel-vision. He focused his efforts on one method of showing that Fullwood's cousin framed him for attempted murder. He conducted no investigation on potential challenges to a forensic nurse examiner, whose testimony was key to the State's proof of rape. The State's sole theory for attempted murder, moreover, was that Fullwood was trying to cover up the rape. That theory involved a pattern known for inflaming prejudices—a black man raping a white woman. For no good reason, defense counsel never even investigated an easily mounted, devastating challenge to the State's key evidence that a rape had occurred.

Nevertheless, the Maryland Court of Special Appeals justified this uninformed decision as a tactical decision entitled to deference. App. 14–16a. Although Fullwood included *Wiggins* in his brief, as well as reported decisions from federal courts of appeals and other states granting habeas or post-conviction relief where trial counsel failed to conduct a reasonable pretrial investigation regarding potential forensic experts, the Court of Special Appeals did not acknowledge *Wiggins* or these other decisions in its opinion. Instead, it relied on a trial practice guide[2]—that neither party had cited—for the proposition that trial counsel reasonably could have decided that challenging the sexual assault was a weaker argument and thus chosen to "focus squarely on a stronger argument challenging who

[2] Herbert J. Stern & Stephen A. Saltzburg, *Trying Cases to Win in One Volume* 40 (2013).

committed the crimes" as a matter of trial strategy. App. 15a.

Of course, this was remarkably off point, because a decision about what evidence to present at trial is entirely distinct from the decision whether to undertake a pretrial investigation, and a trial decision made without any pretrial investigation on the issue is objectively unreasonable. Because trial counsel had conducted no investigation on this issue, he could not reasonably have concluded that rebutting the State's forensic evidence of sexual assault would have been a stronger or weaker argument. Fullwood's trial counsel plainly failed in his pretrial "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521. A decision without such investigation cannot be exalted as "tactical" and it is not entitled to deference.

In fact, the Court of Special Appeals' opinion reflects that trial counsel denied making the very strategic choice it ascribed to him:

> [Counsel] testified that he did not conduct any pre-trial investigation into the sufficiency of the State's sex crime evidence. He acknowledged that Ms. Sina provided much of the State's evidence as to the sexual assault and "the bulk of the State's evidence and the rape case" depended on the credibility of the SAFE nurse. Trial counsel admitted if he had had similar testimony as the SAFE expert retained for the

> post-conviction hearing he "absolutely" would have presented it to the jury and there was "no strategic reason" not to. Trial counsel explained how the evidence could be used to attack the credibility of the State's case by undermining the theory that rape was the motive for the attack. Trial counsel testified as to his belief that undermining the State on one issue can diminish its credibility on other issues.

App. 7–8a. The closest the court came to addressing this point was to emphasize later that trial counsel could "think of no strategic reason not to use expert testimony … *if he had obtained it,*" App. 14a (emphasis in original), and that the expert testimony was not actually in front of him. But the reason the evidence was not in front of him was that he conducted no investigation at all. App. 7a.

Importantly, neither the circuit court nor the Court of Special Appeals doubted trial counsel's credibility or expressed any reason to doubt him when he testified that an attack on the SAFE nurse would have been perfectly consistent with his trial strategy. The circuit court cited non–existent testimony by him that "the defendant did not have the money to pursue this [*sic*] issues." App. 24a. That was not counsel's testimony, and neither the State nor the appellate court attempted to justify affirmance on that ground.[3] Instead, the Court of Spe-

[3] Evidence at the post-conviction hearing established that an expert to rebut the SAFE nurse's testimony would have

cial Appeals found it "highly significant" that Fullwood "testified at trial that he heard moaning prior to entering Ms. Luzer's bedroom and, therefore, attacking the sexual assault evidence may have been considered inconsistent with appellant's testimony." App. 15–16a.

It is difficult to follow the court's logic on this point. Was it suggesting that Luzer was "moaning" because she was being raped? Moaning would suggest *consensual* foreplay or sex before the stabbing. Fullwood never testified that he saw Melvin raping anyone, only that he saw Melvin on top of Luzer. Trial counsel did not put Fullwood on the stand to suggest Melvin sexually assaulted Luzer; during Fullwood's trial testimony, counsel never asked whether he saw Melvin raping Luzer; and Fullwood never told trial counsel at any point that he had witnessed a sexual assault.

The State unwittingly highlighted this point below, noting counsel's "tepid mention [during closing argument] of the victim's purported statement of 'no' in response to whether a sexual assault had occurred." State's Br. at 20 n.9. In other words, challenging whether a sexual assault had occurred was perfectly consistent with trial counsel's defense strategy. He raised the point but did a poor job of it. *See Wiggins*, 539 U.S. at 526 ("counsel put on a halfhearted mitigation case, taking precisely the type of 'shotgun' approach the Maryland Court of Appeals concluded counsel sought to avoid").

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cost less than $3,000, a fraction of the $20,000 Fullwood's father paid trial counsel.

Even the best attorney can succumb to tunnel-vision and conduct a deficient investigation. *Wiggins* dealt with this problem. 539 U.S. at 517 (counsel decided to "focus their efforts" on one strategy without reasonably investigating another). The Court of Special Appeals here, like the Court of Appeals in *Wiggins*, went too far in "assum[ing] that the investigation was adequate." *Id.* at 528. Certiorari is warranted.

The prejudice from trial counsel's failure to investigate is obvious. The main thrust of the State's case went unchallenged, though effective challenges were available, and the decision not to challenge the State's SAFE nurse evidence at trial was not based on any pretrial investigation.

Fullwood faced, and received, a life sentence for the rape charge alone. Rape was, in turn, the State's theory of motive for the stabbing. As the Court of Special Appeals recognized, Luzer "said no" when police "asked if she had been sexually assaulted"—plus, there "were no condoms at the scene and no semen was detected." App. 3a, 6a. Trial counsel "did not conduct any pre-trial investigation into the sufficiency of the State's sex crime evidence," even as he "acknowledged that Ms. Sina provided much of the State's evidence as to the sexual assault and 'the bulk of the State's evidence and the rape case' depended on the credibility of the SAFE nurse." App. 7a. And yet the court's reported opinion found no obligation even to *investigate* a potential expert challenge to the SAFE nurse's testimony. App. 2a.

Moreover, the link between the State's forensic evidence of sexual assault and the State's proof of attempted murder was clear—by the State's admission, refutation of the SAFE nurse's testimony "affected the nature and extent of the crime." State Br. 6. On the sex charges, for which Fullwood received a life sentence consecutive to his life sentence for attempted murder, forensic testimony would have directly attacked whether the charged crimes had occurred at all.[4] After all, rape was the only motive that the State posited for attempted murder.

And, the State's proof of rape was highly prejudicial. Indeed, the evidence was as inflammatory as it gets—a charge that a black man raped a white woman. Such allegations, which spawned lynch mobs for a century after the Civil War, still have unique power to stir conscious or unconscious bias. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 211 (2001).

Finally, the State did not claim, and the appellate court did not find, overwhelming evidence of guilt.[5] Either Fullwood or his cousin could have

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[4] *See, e.g.*, *Gersten*, 426 F.3d at 612 ("Counsel's decision not to consult with or call an expert precluded counsel from offering a potentially persuasive affirmative argument that the alleged victim's condition was not indicative of or consistent with forced sexual penetration.").

[5] This case is not like *Harrington v. Richter*, 562 U.S. 86, 112–13 (2011), where the Court found, on deferential review, that the California courts' conclusion of no prejudice was not unreasonable. As Justice Ginsburg separately remarked,

been the perpetrator. There was no sign of forced entry. Melvin, unlike Fullwood, lived in the building neighboring the victim's building. These facts support a plausible inference that Melvin already knew her (thereby enabling him to enter her apartment) and had some motive other than rape. If the jury disbelieved the SAFE nurse's testimony, there was much more reason to disbelieve Melvin's explanation for how the victim's blood came to be in his apartment. Fullwood was prejudiced by counsel's deficient performance, and this Court should grant certiorari.

* * *

This case presents an excellent vehicle for this Court to address Maryland's nonconformity with *Wiggins* and *Rompilla* and with how courts across the country have interpreted those precedents. Because this case is on appeal from a state post-conviction proceeding, not a deferential federal habeas proceeding, the Court can squarely address Maryland's outlier jurisprudence. Even a per curiam summary reversal would send a strong message to Maryland's courts that compliance with *Wiggins* and *Rompilla* is not optional. The Court should act to safeguard the uniformity of Sixth Amendment law and bring Maryland in line with its sister jurisdictions.

"[t]he strong force of the prosecution's case … was not significantly reduced by the affidavits offered in support of Richter's habeas petition." *Id.* at 113–14 (Ginsburg, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

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