No. 19-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court evaluating prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), must take the State's case as it was presented to the jury, as ten state and federal courts have held, or whether the court may instead hypothesize that the jury may have disbelieved the State's case, as the Maryland Court of Appeals held below.

PARTIES TO THE PROCEEDING

Adnan Syed, petitioner on review, was the appellee below.

The State of Maryland, respondent on review, was the appellant below.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *State* v. *Syed*, No. 199103042-046 (Md. Cir. Ct. June 6, 2000), *aff'd*, No. 923, Sept. Term, 2000 (Md. Ct. Spec. App. Mar. 19, 2003), *cert. denied*, No. 107, Sept. Term, 2003 (Md. June 20, 2003) (reported at 376 Md. 52)
- *Syed* v. *State*, No. 10432 (denied Md. Cir. Ct. Dec. 30, 2013), *stayed by* No. 2519, Sept. Term, 2013 (Md. Ct. Spec. App. May 18, 2015); *remanded to* No. 10432 (Md. Cir. Ct. June 30, 2016) (reported at 2016 WL 10678433), *aff'd*, No. 1396, Sept. Term, 2016 (Md. Ct. Spec. App. Mar. 29, 2018) (reported at 236 Md. App. 183), *rev'd*, No. 24, Sept. Term, 2018 (Md. Mar. 8, 2019) (reported at 463 Md. 60)

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Adnan Syed respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals in this case.

OPINIONS BELOW

The Maryland Court of Appeals' opinion is reported at 204 A.3d 139 (2019). Pet. App. 1a-102a. That court's order denying reconsideration is not reported. Pet. App. 103a-104a. The Maryland Court of Special Appeals' opinion is reported at 181 A.3d 860 (2018). Pet. App. 105a-257a. The Circuit Court for Baltimore City's opinion is not reported but is available at 2016 WL 10678434 (June 30, 2016). Pet. App. 258a-332a.

JURISDICTION

The Maryland Court of Appeals entered judgment on March 8, 2019. Petitioner filed a timely motion for reconsideration, which was denied on April 19, 2019. Chief Justice Roberts granted a 30-day extension of the period for filing this petition to August 19, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, 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 defence.

INTRODUCTION

Petitioner Adnan Syed was a 17-year-old high school senior when he was charged with the murder of Hae Min Lee. He hired Cristina Gutierrez, a well-known Baltimore attorney, to prepare his defense. His attorney faced a significant challenge: Prosecutors alleged that Syed killed Lee right after school, between 2:15 and 2:35 p.m. But few of Syed's classmates could remember Syed's activities right after school on the day Lee was killed. Indeed, only two

teenagers could testify on that issue: The first—Jay Wilds—said that Syed showed him Lee's body in the trunk of a car shortly after school. The second—Asia McClain—said that she talked to Syed at the library adjacent to the high school between 2:15 and 2:35 p.m. that day, and that others could corroborate her story.

In a normal case, it would be left to the jury to determine who is credible: Wilds or McClain. In this case, however, the jury never heard McClain's testimony. Unbeknownst to Syed, Gutierrez failed to contact McClain and never followed up on McClain's offer to identify other witnesses who saw Syed at the library at the time of the murder. Instead, Gutierrez argued that because Syed attended track practice on most days after school, he likely did the same on the day that Lee was killed. The jury was unconvinced, and it convicted Syed of murder.

The facts of this case are eye-catching: One high school student murdered and another sentenced to life in prison. A prosecution witness with an inconsistent story and an alibi witness who never testified at trial. Syed's case has inspired podcasts, a documentary, and countless news articles. This petition, however, is about a straightforward legal issue: the proper standard for evaluating prejudice under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984).

To evaluate *Strickland* prejudice, at least ten state and federal courts apply a simple approach: They compare the case that the State actually presented at trial with the case that the defendant would have presented if his attorney had been effective. *See, e.g.*, *Henry* v. *Poole*, 409 F.3d 48, 65-66 (2nd Cir. 2005);

Grant v. *Lockett*, 709 F.3d 224, 236-238 (3d Cir. 2013); *Elmore* v. *Ozmint*, 661 F.3d 783, 868-871 (4th Cir. 2011); *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006); *Stitts* v. *Wilson*, 713 F.3d 887, 888, 894-895 (7th Cir. 2013); *Hardy* v. *Chappell*, 849 F.3d 803, 823 (9th Cir. 2016), *as amended* (Jan. 27, 2017); *Fisher* v. *Gibson*, 282 F.3d 1283, 1309-10 (10th Cir. 2002); *Skakel* v. *Comm'r of Corr.*, 188 A.3d 1, 70 (Conn. 2018); *Adams* v. *State*, 348 P.3d 145, 152 (Idaho 2015); *In re Sharrow*, 175 A.3d 1236, 1241 (Vt. 2017).

Under this majority approach, Gutierrez's deficient performance prejudiced Syed. The case that the State presented at trial repeatedly pinned the time of death to a narrow window between 2:15 and 2:35 p.m. to fit Wilds' testimony and Syed's cell phone records. The case that Syed would have presented at trial had his counsel been effective included testimony from McClain, who testified in post-conviction proceedings that she spoke with Syed at the library during the exact time that the State alleged Lee was killed. Had these conflicting narratives been presented to the jury, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

In the decision below, however, the Maryland Court of Appeals rejected this majority approach. Instead of analyzing the case that the State actually presented at trial, the court hypothesized a *different* case, one where the jury rejected the State's theory of the time of Lee's death in favor of some unpresented and unknown alternative timeline. According to the Maryland Court of Appeals, because McClain's

testimony did not undermine *this* hypothetical case—where Lee's death might have occurred later in the day—the failure to present McClain's testimony about Syed's activities after school did not prejudice Syed's defense. The Court buttressed that conclusion with references to the State's evidence of Syed's alleged activities *after* the murder occurred. *But see Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (holding that murder conviction cannot rest solely on evidence suggesting that the defendant "may have been involved in events related to the murder *after* it occurred").

This case presents a clean vehicle to address an important question that now divides the state and federal courts: whether courts must take the State's case as it was presented to the jury when evaluating *Strickland* prejudice. The answer to that question is yes. Under *Strickland*, courts must evaluate prejudice in light of the case the State actually introduced at trial, not a hypothetical case that sidesteps the weaknesses in the State's presentation of the evidence. The Court should grant certiorari and reverse.

STATEMENT

A. Factual Background

Hae Min Lee, a student at Woodlawn High School in Maryland, disappeared on the afternoon of January 13, 1999. Pet. App. 261a. Nearly a month later, her body was found partially buried in Baltimore City's Leakin Park. *Id.* The cause of death was strangulation. *Id.* Following an anonymous tip, police arrested Syed and charged him with murder, among other charges. *Id.*

At the time, Syed was 17 years old and a student at Woodlawn High School. Lee and Syed had dated on and off, and prosecutors believed that Syed had killed Lee in retribution for ending their relationship. *Id.* at 112a. Prosecutors alleged that shortly after school on January 13, Syed had driven Lee to a Best Buy, killed her in the parking lot between 2:15 and 2:35 p.m., and left her body in the trunk of the car. *Id.* at 112a-113a; *see id.* at 215a-216a. Prosecutors further alleged that Syed and Wilds had buried Lee's body later that night in Leakin Park. *Id.* at 113a.

Syed hired Gutierrez as his attorney. *Id*. at 109a n.2. In preparing Syed's defense, Gutierrez confronted a significant obstacle: Few of Syed's classmates had any memory of Syed's whereabouts right after school on the day Lee was murdered. Syed's classmate Asia McClain was the exception: She remembered speaking with Syed at the library between 2:15 and 2:35 p.m. on the day Lee disappeared. *See id.* at 183a-184a. McClain sent two letters to Syed stating that she could provide an alibi, that other people also remembered seeing Syed at the library, and that the library had a surveillance system. *See id.* at 184a-189a. In the letters, McClain included her phone number and address, and said that she would be willing to speak with Syed's attorney. *See id.* Syed told Gutierrez about McClain's letters and asked that she contact McClain. *See id.* at 179a. Gutierrez never did. *See id.* at 180a.

Syed's first trial ended in a mistrial, and the State tried Syed again. *See id.* at 112a n.5.[1] At his second trial, just like the first, the State's theory of the case was that Syed killed Lee within a 20-minute window after school on January 13. *See id.* at 112a-113a; *see also id*. at 216a. The State alleged that Syed left school with Lee shortly after classes ended at 2:15 p.m., drove in her car to the parking lot of a Best Buy, and then killed her. *Id.*; *see also id.* at 271a. The State claimed that Syed then called Wilds at 2:36 p.m.—just 20 minutes later—and asked to be picked up. *Id.* at 271a. Based on this timeline, the State argued to the jury that Lee was dead by sometime "between 2:15 p.m. and 2:35 p.m." *Id.* at 113a.

The State repeatedly emphasized this timeline to the jury. In its opening statement, the State theorized that Lee was killed around "2:35, 2:36" when Wilds received a call from Syed asking him to come to the Best Buy. *Id.* at 221a; *see also id.* at 271a n.9. The State was equally explicit at closing: Lee "was dead 20 to 25 minutes from when she left school" at around 2:15 p.m. *Id.* at 272a n.9; *see also id.* at 222a ("Ladies and gentlemen, she's dead within 20 minutes."). Not once during trial did the State present evidence—or even bare argument—that Lee had died later that day. *See id.* at 99a-100a (Hotten, J., concurring in part and dissenting in part).

At Syed's trial, the State relied on Wilds, an admittedly "problematic" witness, to corroborate its theory

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[1] At Syed's first trial, a juror overhead the judge, during a bench conference, refer to Syed's trial counsel as a "liar," and the judge declared a mistrial. *See* Pet. App. 345a.

of the case. *Id.* at 226a-227a & n.41. Before trial, Wilds gave police multiple, inconsistent statements about the day Lee disappeared. *See id.* at 226a-227a. And at trial, Wilds admitted under oath that he had repeatedly "lied" to police. *Id.* at 340a-343a (transcript of Wilds' testimony).[2] Wilds ultimately testified that on January 13, "Syed had complained of Ms. Lee's treatment of him and said that he intended 'to kill that bitch.' " *Id.* at 36a; *see also id.* at 30a. Wilds testified that Syed called him in the afternoon on January 13 and asked for a ride, and that when he arrived at the Best Buy parking lot, Syed showed him Lee's body in the trunk of her car. *Id.* at 30a-31a, 36a. And Wilds testified about what happened next: According to Wilds, he and Syed buried Lee's body in Leakin Park around 7 p.m. *See id.* at 119a-121a.

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[2] Q. "Okay. Now, let us then go back to the first interview, the one where there was no tape. Did you provide them information about the location of the car?" A. "No, ma'am." Q. "Now, so you sort of lied by omitting it, did you not?" A. "Yes, ma'am." Q. "Okay. And did you provide them information about seeing the body in the trunk?" A. "I don't believe so." Q. "You don't believe so. So, you lied about that too, right?" A. "Yes, ma'am." Q. "Okay. And or at least what you said at first was very different then what you said next, right?" A. "In the second time." Q. "And in fact, you first told them nothing about Jen Pusateri, right?" A. "Yes, ma'am." * * * * Q. "So you continued – and that was a lie, right?" A. "No, it was not the truth, you're right." Q. "It wasn't, so yes it was a lie?" A. "Yes, ma'am." Q. "Okay. And so you lied in the first statement about that and you continued to lie in the second statement about the same thing, right?" A. "Yes, ma'am." Pet. App. 340a-341a.

In addition to Wilds' testimony, the State presented evidence that Syed's hand print was found on a map book in Lee's car. The page from the map book containing Leakin Park had been ripped out. *See id.* at 36a. The State also introduced records of incoming cell phone calls that, according to the State, showed that Syed was within the vicinity of Leakin Park around 7 p.m. *See id.* at 29a-30a.[3] A number of witnesses testified to seeing Wilds and Syed together, or speaking with them by cell phone, on the day Lee disappeared. *See id.* at 36a.

Syed's attorney never interviewed McClain, and thus did not present her testimony at trial. Syed's trial counsel instead relied on evidence of Syed's typical school day to argue that he was at track practice and then his mosque on the afternoon Lee was killed. *See id.* at 266a-267a. Syed's counsel also argued at trial that Syed and Lee ended their relationship amicably, and that the police had wrongly focused on Syed without pursuing evidence that would have shown his innocence. *See id.* at 266a. The jury did not credit these arguments, and it convicted Syed of Lee's murder. *Id.* at 267a. Syed was sentenced to life in prison. *Id.*

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[3] In the proceedings below, Syed argued that his attorney was ineffective for failing to challenge the cell tower records, which stated on the cover page that incoming calls did not provide accurate location information. *See* Pet. App. 307a-308a. The Circuit Court agreed and granted a new trial on this basis. *See id.* at 328a. The Maryland Court of Appeals, however, held that Syed waived this claim by failing to raise it earlier. *See id.* at 49a-51a.

B. Procedural History

Syed challenged his conviction through post-conviction proceedings, which were initially unsuccessful. *See id.* at 108a-110a. In 2015, however, the Circuit Court for Baltimore City reopened those proceedings to take evidence on two issues: (1) whether Syed's trial counsel was ineffective for failing to contact McClain, and (2) claims related to the reliability of using records of Syed's incoming cell phone calls as evidence of his location. *See id.* at 109a.

McClain testified at an evidentiary hearing, stating that "she saw Petitioner at the Woodlawn Public Library on January 13, 1999 at about 2:15 p.m. and spoke to him for about twenty minutes before leaving with her boyfriend." *Id.* at 287a; *see also id.* at 336a-338a (transcript of McClain's testimony). According to McClain, then, she was with Syed *at the exact time* that the State alleged that Lee was killed. *See id.* at 287a; *see also id.* at 113a.

In response to McClain's testimony, the State presented—for the first time—a new theory of Lee's death. According to the State's newly revised timeline, Syed could conceivably have committed the murder *after* 2:35 p.m. and then called Wilds later in the afternoon to pick him up from the Best Buy parking lot. *See id.* at 271a-272a n.9. The Circuit Court rejected the State's attempt to change the timeline, explaining that the "trial record is clear" that the State committed to its theory that Lee died between 2:15 and 2:35 p.m., and that Syed called Wilds at 2:36 p.m. from the Best Buy parking lot to request a ride. *Id*. The court explained that the "State's newly adopted timeline" is "incongruent"

with the evidence it presented at trial, including Wilds' testimony about the events following the murder. *Id*.

The Circuit Court found that Syed's counsel was deficient for failing to contact McClain, but it found no prejudice. According to the court, "the crux of the State's case" was that Syed "buried the victim's body in Leakin Park at approximately 7:00 p.m." *Id*. at 289a. Because McClain's testimony did not undermine *this* aspect of the case, the court held that trial counsel's deficient performance did not prejudice Syed. *Id*. at 289a-290a. The court ultimately granted Syed a new trial, however, finding that his attorney was ineffective for failing to challenge as unreliable the location evidence from Syed's incoming cell phone calls. *See id.* at 328a.

The Maryland Court of Special Appeals granted review. The court agreed that Syed's trial counsel was deficient for failing to contact McClain. *Id*. at 216a-217a. It concluded, however, that this constitutionally incompetent performance *had* prejudiced Syed's defense. The court explained that McClain's "testimony would have directly contradicted the State's theory of when Syed had the opportunity and did murder" Lee. *Id.* at 228a. The court "analyze[d] the prejudice prong relating to McClain's alibi testimony based on the State's timeframe of [Lee's] murder: between 2:15 p.m. and 2:35 p.m. on January 13, 1999." *Id.* at 224a. As the court explained, "McClain's testimony, if believed by the trier of fact, would have made it impossible for Syed to have murdered" Lee. *Id.* at 230a. The Court of Special

Appeals affirmed the Circuit Court's judgment on that basis.[4]

The Maryland Court of Appeals granted review. In a 4-to-3 decision, it reversed. A majority of the court agreed that Syed's trial counsel was deficient for failing to contact McClain, but it found no prejudice. *Id*. at 25a-27a, 37a. Instead of evaluating the State's case as it was presented to the jury—which repeatedly placed Lee's time of death between 2:15 and 2:35 p.m.—the Maryland Court of Appeals held that "the jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m." *Id.* at 33a-34a. The court concluded that McClain's testimony would not have undermined this hypothetical case, where the jury did not believe the State's evidence with respect to the time of death but still believed that Syed committed murder, because McClain's alibi did not account for "Syed's whereabouts after 2:40 p.m." *Id.* at 34a. The majority also emphasized that McClain's testimony did not rebut evidence of "Syed's actions on the *evening* of January 13," when the State alleged that Syed and Wilds had buried Lee's body. *Id.* at 37a.

Three judges dissented. The dissent emphasized that under *Strickland*, the majority should have analyzed the State's case as it was presented to the jury, rather than hypothesizing that the jury may have accepted a theory of the case that the State never presented. As the dissent explained, the "State posited that Ms. Lee was killed between

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[4] The Court of Special Appeals held that Syed had waived his claim with respect to the cell-tower evidence by failing to raise it earlier. Pet. App. 169a-170a. The Maryland Court of Appeals agreed with that conclusion. *See id*. at 49a-50a.

2:15PM and 2:35PM." *Id.* at 97a (Hotten, J.). The majority's prejudice analysis, in contrast, rested on its assumption that "the jury could still conclude that Mr. Syed killed Ms. Lee, but at a different time." *Id.* at 99a (Hotten, J.). This assumption "blatantly conflicts with the post-conviction court's holding" that the State was not free to adopt a new timeline after trial. *Id.* at 99a-100a (Hotten, J.). More importantly, "[t]he possibility that Ms. Lee was killed at a different time was not offered before the judge and jury during trial." *Id.* The dissent criticized the majority's "unsubstantiated opinion that the jury could create and believe a timeline other than the original one posited to them at trial," and that it was proper to use such a timeline when analyzing *Strickland* prejudice. *Id.* at 100a (Hotten, J.) (quoting *Strickland*, 466 U.S. at 695, for the proposition that the court must analyze "the totality of the evidence *before the judge or jury*" (emphasis added)).

The Maryland Court of Appeals denied Syed's motion for reconsideration. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CLEAR SPLIT AMONG ELEVEN STATE AND FEDERAL COURTS.

The decision below creates a clear split. At least ten state and federal courts analyze *Strickland* prejudice by leaving "undisturbed the prosecution's case" and "analyzing the evidence that would have been presented had counsel not performed deficiently." *Hardy* v. *Chappell*, 849 F.3d 803, 823 (9th Cir. 2016), *as amended* (Jan. 27, 2017); *see also Henry* v. *Poole*, 409 F.3d 48, 65-66 (2nd Cir. 2005); *Grant* v.

Lockett, 709 F.3d 224, 236-238 (3d Cir. 2013); *Elmore* v. *Ozmint*, 661 F.3d 783, 868-871 (4th Cir. 2011); *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006); *Stitts* v. *Wilson*, 713 F.3d 887, 888, 894-895 (7th Cir. 2013); *Fisher* v. *Gibson*, 282 F.3d 1283, 1309-10 (10th Cir. 2002); *Skakel* v. *Comm'r of Corr.*, 188 A.3d 1, 70 (Conn. 2018); *Adams* v. *State*, 348 P.3d 145, 152 (Idaho 2015); *In re Sharrow*, 175 A.3d 1236, 1241 (Vt. 2017).

In contrast, the Maryland Court of Appeals holds that a court is *not* required to "leave undisturbed the prosecution's case," *Hardy*, 849 F.3d at 823, but may instead assume when assessing *Strickland* prejudice that the jury *disbelieved* the State's case. *See* Pet. App. 34a-35a. Under such a standard, prejudice is far more difficult—if not impossible—to show: If the jury could imagine a way around the weaknesses in the State's case, then defense counsel's failure to expose those weaknesses is not prejudicial. This straightforward division in authority on an important question of federal law warrants the Court's intervention.

1. The Fourth, Sixth, and Ninth Circuits, joined by the high courts of Connecticut, Idaho, and Vermont, have explicitly held that to analyze prejudice under *Strickland*, courts must compare the case that the State actually presented to the jury with the case that would have been presented to the jury had defense counsel been effective.

In *Elmore*, the Fourth Circuit explained that courts must take "the State's evidence of guilt" as the "jury heard" it when evaluating prejudice under *Strickland*. 661 F.3d at 868, 870-871. Courts must then compare the State's case to what the "jury would

have learned" had defense counsel been effective. *Id*. at 870-871. In the murder trial at issue in *Elmore*, the "jury heard" that the victim could have died at any time during a 60-hour window. *Id*. at 870. Had counsel conducted an adequate investigation, however, "the jury would have learned that death on Sunday afternoon, when [the defendant] had a corroborated alibi, was much more probable than death on Saturday night." *Id*. Comparing the State's case as it was presented to the jury—that the murder occurred during a 60-hour window—to the defense's case as it would have been presented—that the murder occurred during a short window when the defendant had an alibi—the Fourth Circuit found *Strickland* prejudice. *See id.* at 871-872.

The Sixth Circuit adopted the same approach in *Stewart*, stating that to evaluate *Strickland* prejudice, the court must analyze "[t]he difference between the case that was and the case that should have been." 468 F.3d at 361. In *Stewart*, a prosecution witness testified that the defendant came to the house he was visiting shortly before the murder and "stated he was going to kill the victim." *Id.* at 344. In "the case that was," the defendant had no credible alibi witnesses. *See id.* at 360 (noting that the defendant's sole alibi witness at trial was impeached). In "the case that should have been," however, the jury would have heard from two credible alibi witnesses who contradicted the State's case. *See id.* at 345 (describing testimony); *id.* at 359 (stating that alibi witnesses would have added "substance and credibility" to the defense (internal quotation marks omitted)). The difference between these two cases led the court to conclude that trial

counsel's deficient performance prejudiced the defendant. *Id*. at 361.

In *Hardy*, the Ninth Circuit applied the same test for *Strickland* prejudice. There, the Ninth Circuit explained that *Strickland* calls for courts to "leave undisturbed the prosecution's case" when "analyzing the evidence that would have been presented had counsel not performed deficiently." 849 F.3d at 823. This analysis, the court cautioned, does not leave courts free "to reimagine the entire trial." *Id*. In particular, it does not permit courts to "presume the State would have altered the entire theory of its case in response" to the new evidence or "invent arguments the prosecution could have made if it had known its theory of the case would be disproved." *Id.* at 823-824. Instead, the court must "only envision what [defense counsel] should have presented in [his client's] defense and determine how that would have altered the trial." *Id*. at 823.

Applying that approach to the facts, the Ninth Circuit found prejudice. At trial, the State alleged that the defendant had participated in a murder-for-hire plot, relying on a witness to corroborate its case. *Id*. at 820. Consistent with its theory of the case, "the State would have called" the witness "to the stand to testify" that the defendant committed the murder. *Id*. at 823. If the defendant's trial counsel had been competent, however, defense counsel "would have cross-examined" the witness and uncovered evidence that the witness "was the actual killer." *Id*. Because this "would have completely undermined the prosecution's theory of the case" as it was presented at trial, the Ninth Circuit found that counsel's deficient performance prejudiced the defendant. *Id*. at 821.

The Connecticut Supreme Court, too, evaluates *Strickland* prejudice by considering "the theory the state advanced at trial." *Skakel*, 188 A.3d at 42. Indeed, the court emphasizes that its obligation is *not* to "consider the evidence in the light most favorable to the state," but instead to conduct "an objective review of the nature and strength of the state's case." *Id*. at 25.

In *Skakel*, the State claimed that the defendant had murdered the victim within a short period of time. *Id*. at 13. At trial, family members of the defendant provided an alibi for a significant portion of that period. *Id*. at 12. The State claimed that these witnesses were not credible because they were related to the defendant. *Id.* at 12-13, 38. Competent counsel, however, would have uncovered an alibi witness who was *not* related to the defendant, enabling the defendant "to refute this central thesis of the state's case against him." *Id*. at 38-39. Because a prospective alibi witness directly contradicted the State's case, the Connecticut Supreme Court held that failure to present this witness's testimony prejudiced the defendant. *See id.* at 33.

In stressing the importance of alibi testimony to a jury, the Connecticut Supreme Court cited as authority the Court of Special Appeals decision *in this very case*—the decision that was reversed by the Maryland Court of Appeals below. *See id.* at 43. The Connecticut Supreme Court also cited the decisions of numerous other courts that had reached similar conclusions. *See id.* at 42-44 (collecting cases). The *Skakel* court concluded that where there is "no unassailable evidence establishing the petitioner's guilt," the defendant is "inherently or necessarily"

prejudiced where his attorney fails to investigate "independent alibi testimony." *Id.* at 44.

The Idaho Supreme Court employed the same *Strickland* analysis in *Adams*. There, the court explained that "to determine whether counsel's errors prejudiced the trial's outcome, it is essential to compare the evidence *actually presented* to the jury with the evidence *that may have been presented* had counsel acted differently." 348 P.3d at 152 (emphases added). *Adams* concerned a vehicular manslaughter trial where the State presented evidence that the defendant was driving at breakneck speed and crashed in a distinctive manner. *Id*. at 149-150. Had defense counsel been competent, she would have introduced an expert witness who would have testified that the defendant was not driving as fast as the State claimed. *See id*. at 155. The defendant's expert admitted, however, that the defendant *could* have been driving nearly as fast as the State claimed, and the expert did not contradict that the defendant had been driving fast enough to crash in the distinctive manner alleged by the State. *See id*. at 155-156. Because the State's theory of the case remained unaffected by the omitted evidence, the Idaho Supreme Court concluded that the defendant was not prejudiced by his counsel's poor performance. *Id*. at 156-157.

In *Sharrow*, the Vermont Supreme Court adopted an identical test, stating that analyzing *Strickland* prejudice requires examining "the trial as it actually unfolded." 175 A.3d at 1241 (internal quotation marks omitted). *Sharrow* was an attempted-murder case where defense counsel had failed "to object to jury instructions that did not require that the State

prove the absence of passion or provocation * * * and did not include attempted voluntary manslaughter as a lesser offense." *Id*. at 1237. But "record evidence" from the trial as it actually unfolded suggested that the defendant *had* been provoked. *Id*. at 1242. Because this record evidence could support a different outcome, the court found prejudice under *Strickland*. *See id*. at 1242-43.

2. The Second, Third, Seventh, and Tenth Circuits apply—but do not explicitly voice—the majority approach.

In *Henry*, the Second Circuit pegged its prejudice analysis to the case that the State "presented to the jury." 409 F.3d at 66-67. The defense counsel in that case had elicited an alibi for the wrong date. *Id*. at 64. The court analyzed the prejudicial effect of this mistake by first isolating the "evidence presented to the jury" that "connect[ed]" the defendant to the crime. *Id*. at 66. The court then assessed how the State capitalized on the false alibi: The State used it to "argue[ ] to the jury that the entire attempt at an alibi defense" was a sham. *Id*. at 67. But had counsel been effective, the State would have been unable to "bolster[ ]" its case by challenging the defendant's credibility in presenting an alibi for the wrong day. *Id*. at 66. The Second Circuit concluded that the defendant's "Sixth Amendment right to the effective assistance of counsel at trial was violated." *Id*. at 67.

The Third Circuit followed a similar path in *Grant*. 709 F.3d at 236. In that case, defense counsel failed to discover that the prosecution's key witness was in violation of his parole at the time of the crime—a fact suggesting that he may have been "treated favorably

by[ ] the Commonwealth in exchange for his cooperation." *Id*. at 234-236. To determine whether this omission affected the trial, the Third Circuit examined the case that the prosecution had presented to the jury: The prosecution's witness "was the *only* witness to identify [the defendant] as the shooter" and, in fact, the prosecution rested its case "squarely on the jury's assessment of" the witness's "credibility and absence of bias." *Id*. at 236. Had defense counsel uncovered the witness's potential bias, the witness's "credibility would have been significantly impugned." *Id*. at 237. The court thus concluded that "[g]iven the omission of that crucial evidence of a possible bias, the confidence in the verdict is greatly undermined." *Id*. at 238.

In *Stitts*, the Seventh Circuit also evaluated prejudice by analyzing "the prosecution's case" as it was presented to the jury. 713 F.3d at 894. There, "the prosecution's case rested entirely on the testimony of two somewhat unreliable witnesses." *Id*. The State argued at closing that "no witness had contradicted" this testimony. *Id*. (internal quotation marks omitted). Defense counsel, however, had unreasonably failed to investigate an alibi defense. *Id*. at 892-894. Had defense counsel been competent, the court explained, "the trial would have been transformed from a one-sided presentation of the prosecution's case into a battle between competing eyewitness testimony." *Id*. at 894. In light of the difference between those two cases—the one that the State presented and the one that the defense should have presented—the court concluded that defense counsel's deficient performance had prejudiced his client. *Id*. at 895.

The Tenth Circuit has adopted the same approach. In *Fisher*, the Tenth Circuit evaluated *Strickland* prejudice in a capital case where defense counsel had failed to conduct an adequate investigation. 282 F.3d at 1293-1298. The court found that the State "fail[ed] to present evidence" against the defendant on several aspects of the case, while defense counsel "could have, but did not, present available evidence or arguments in his client's favor." *Id*. at 1309 (emphasis omitted). In short, the Tenth Circuit compared the State's case as it was presented to the jury against the case that the defendant would have presented, had his counsel been effective. The court found prejudice and granted a new trial. *Id*. at 1311.

3. In the decision below, the Maryland Court of Appeals rejected the majority approach of ten state and federal courts. It did not take "the State's evidence of guilt" as the "jury heard" it, *Elmore*, 661 F.3d at 870-871, or base its analysis on "the theory the state advanced at trial," *Skakel*, 188 A.3d at 42. Nor did it consider "[t]he difference between the case that was and the case that should have been." *Stewart*, 468 F.3d at 361. And it plainly did not "leave undisturbed the prosecution's case" and then "analyz[e] the evidence that would have been presented had counsel not performed deficiently." *Hardy*, 849 F.3d at 823.

The court instead performed a completely different analysis: It assumed that the "jury could have *disbelieved* that Mr. Syed killed Ms. Lee by 2:36 p.m., as the State's timeline suggested." Pet. App. 34a (emphasis added). In other words, the Maryland Court of Appeals *rejected* the theory of the case presented by the State, and the evidence that the

State introduced to support its theory, in favor of a hypothetical case in which Syed killed Lee at a different time of day (and possibly in a different place). The Maryland Court of Appeals did not cite any record evidence to support its hypothetical case; the time of death was undisputed by both the State and Syed at trial. *See id.* at 97a (Hotten, J.) (noting that Syed did not dispute the State's timeline at trial).

The difference between the majority rule and the approach adopted by the Maryland Court of Appeals is outcome-determinative in this case: If the Maryland Court of Appeals had compared the case that the State actually presented to the jury (which pinned the time of death to a 20-minute window) with the case that Syed would have presented to the jury (which placed him elsewhere during that time), the Maryland Court of Appeals would have found prejudice. Instead, the court compared a case that the State did *not* present (where the murder was committed at a different time) with the case that Syed should have presented to the jury (which addressed his whereabouts at a time when, in this hypothetical case, the murder was not committed).

It is no wonder, then, that the Maryland Court of Appeals found no prejudice. *See Hardy*, 849 F.3d at 823 (the court is not free to "reimagine" the trial or "invent arguments the prosecution could have made"). If a court evaluating prejudice is permitted to hypothesize theories never presented to the jury in response to the defendant's "case that should have been," *Stewart*, 468 F.3d at 361, counsel's incompetence could in *all* of the above cases have been found to be non-prejudicial. The court in *Elmore*, for ex-

ample, could have surmised that the murder occurred outside even the 60-hour window. The court in *Stewart* could have conjectured that the jury would not find credible the new alibi witnesses. The court in *Hardy* could have theorized that there would have been rebuttal evidence to resurrect the credibility of the State's key witness. The court in *Skakel* could have shifted the time of the murder to a time when there were no alibi witnesses. And so on, for each and every case.

4. The Court should grant certiorari and resolve this clear split, which affects 11 state and federal courts. Numerous state and federal courts have explicitly adopted a legal standard for *Strickland* prejudice that directly conflicts with the position espoused by the court below. The split, moreover, extends to the Connecticut Supreme Court, which relied on the Maryland Court of Special Appeals decision in this case—the very decision reversed by the Maryland Court of Appeals below—to find *Strickland* prejudice under markedly similar facts. *Skakel*, 188 A.3d at 43. This Court's intervention is warranted.

II. THE DECISION BELOW IS WRONG.

Ten state and federal courts determine *Strickland* prejudice by comparing the case that the State presented to the jury against the case that would have been presented to the jury had defense counsel been effective. Only the Maryland Court of Appeals holds that a court may *ignore* the State's actual case in favor of a hypothetical case that (according to the court) the jury instead may have believed. And the Maryland Court of Appeals placed itself not just

opposite ten of its brethren, but opposite this Court, in so holding.

The Court of Appeals further compounded this error by focusing on the State's case *after* the murder occurred, rather than on the State's case with respect to the murder itself, when assessing *Strickland* prejudice—in direct conflict with this Court's decision in *Wearry*.

1. A defendant suffers prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To determine whether this standard has been met, a court "must consider the totality of the evidence *before the judge or jury*." *Id.* at 695 (emphasis added). That includes examining the "factual findings," the "inferences to be drawn from the evidence," and the "entire evidentiary picture" in light of counsel's errors. *Id.* at 695-696. The court must also examine the extent to which "the record" supports the verdict. *Id.* at 696. In other words, the court must analyze the evidence and arguments *actually presented by the parties* to the jury—and compare it with the evidence that would have been presented if counsel had been effective—to determine whether the defendant suffered prejudice.

This Court has reiterated that standard in subsequent cases. In *Porter* v. *McCollum*, 558 U.S. 30 (2009) (per curiam), for example, the Court determined prejudice by comparing the evidence "adduced at trial"—meaning what the "[t]he judge and jury * * * heard" and "learned"—with the evidence

competent counsel would have presented, meaning what "the judge and jury *would have* learned." *Id.* at 41 (emphasis added and internal quotation marks omitted). In *Bobby* v. *Van Hook*, 558 U.S. 4 (2009) (per curiam), the Court compared "the evidence of the aggravating circumstance the trial court found" with the evidence that a competent counsel would have presented. *Id.* at 12-13. And in *Rompilla* v. *Beard*, 545 U.S. 374 (2005), the Court compared the mitigating circumstances "actually put before the jury" with the mitigation case that should have been presented. *Id*. at 393. In *none* of those cases did the Court suggest that it was permissible to analyze *Strickland* prejudice by assuming that the jury may have *rejected* the State's case in favor of a theory that neither party presented.

Under the standard announced in *Strickland*, and followed in subsequent cases, the Maryland Court of Appeals was required to begin its prejudice inquiry by assessing "the theory the state advanced at trial." *Skakel*, 188 A.3d at 42. As the Circuit Court held below, the State presented evidence and repeatedly argued that Syed killed Lee shortly after school let out at 2:15 p.m. *See supra* pp. 7-8, 10-11; *see also* Pet. App. 113a ("Central to the State's theory was that Syed murdered [Lee] between 2:15 p.m. and 2:35 p.m. * * * ."). This is the "evidentiary picture" against which *Strickland* prejudice must be assessed, and the Maryland Court of Appeals was required to "leave undisturbed the prosecution's case" when conducting this analysis. *Hardy*, 849 F.3d at 823-824.

The Maryland Court of Appeals failed to do so. It did not take the State's evidence of guilt as the "jury

heard" it. *Elmore*, 661 F.3d at 870-871. It instead sketched an entirely different evidentiary picture where the jury rejected the State's case in favor of an alternate time of death. But that is not the case that the State presented, and it is not the case that Syed's counsel was tasked with rebutting. *See Penson* v. *Ohio*, 488 U.S. 75, 84 (1988) (emphasizing that the role of defense counsel is "to test the government's case"). By ignoring the case actually presented by the State in favor of a hypothetical case that neatly sidestepped Syed's alibi, the Maryland Court of Appeals erred.

Numerous courts have concluded "that when trial counsel fails to present an alibi witness, the difference between the case that was and the case that should have been is undeniable." *Caldwell* v. *Lewis*, 414 F. App'x 809, 818 (6th Cir. 2011) (internal quotation marks, brackets, and citation omitted). *See, e.g.*, *Griffin* v. *Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1359 (4th Cir. 1992) (reversing state court finding of no prejudice where counsel failed to investigate alibi); *Grooms* v. *Solem*, 923 F.2d 88, 90-91 (8th Cir. 1991) (finding prejudice where counsel failed to call disinterested alibi witness); *Montgomery* v. *Petersen*, 846 F.2d 407, 414-415 (7th Cir. 1988) (finding prejudice for failure to call alibi witness because "if believed by the jury, it would have directly exonerated [the defendant] of the crime"); *Raygoza* v. *Hulick*, 474 F.3d 958, 965 (7th Cir. 2007) ("Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never

had the chance to do so. This undermines our confidence in the outcome of the proceedings * * * .").[5]

Here, McClain's testimony directly refuted the State's case with respect to when Syed allegedly killed Lee. As the dissent stated below, "[n]ot only does Ms. McClain's alibi address the most integral period of time in the case, it presents direct, not merely circumstantial, evidence of Mr. Syed's whereabouts during that time." Pet. App. 98a (Hotten, J.). No "other evidence was offered by the State that would have refuted Ms. McClain's testimony and affidavits." *Id.* The "State offered no eyewitness testimony, or any other evidence for that matter, putting Mr. Syed with Ms. Lee during the time of her death, much less any direct evidence that Mr. Syed caused the death of Ms. Lee." *Id.* "Ms. McClain's alibi was direct, uncontroverted evidence that Mr. Syed was elsewhere at the time of Ms. Lee's death." *Id.* By failing to present McClain's testimony to the jury, Syed's counsel prejudiced his defense. Syed is entitled to a new trial.

2. When evaluating *Strickland* prejudice, moreover, the Maryland Court of Appeals was required to examine the State's case *with respect to the murder itself*—not events occurring after the murder. This

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[5] *See also Avery* v. *Prelesnik*, 548 F.3d 434, 437-439 (6th Cir. 2008) (finding prejudice where "the jury was deprived of the right to hear [alibi] testimony that could have supplied" reasonable doubt); *Alcala* v. *Woodford*, 334 F.3d 862, 872 (9th Cir. 2003) (concluding that if trial counsel had presented alibi evidence, there is a reasonable likelihood that the jury would have discounted eyewitness testimony and found that the defendant could not have committed the crime).

Court made clear in *Wearry* that evidence a defendant "may have been involved in events related to the murder *after* it occurred" may support a charge of accessory after the fact—but it is not sufficient to conclude that the defendant committed the murder itself. 136 S. Ct. at 1006; *see also Browning* v. *Baker*, 875 F.3d 444, 469 (9th Cir. 2017) (citing *Wearry* for the proposition that evidence suggesting that the defendant may have been involved in a robbery where a murder occurred is insufficient to show that he—rather than someone else—"committed the murder"). When evaluating the evidentiary picture with respect to Syed's murder charge, the Maryland Court of Appeals was required to focus on the "evidence directly tying [the defendant] to that crime"—not events that occurred later. *Wearry*, 136 S. Ct. at 1006.

In the decision below, however, the court did exactly what *Wearry* cautioned courts not to do: It emphasized events *after* the murder occurred, even while minimizing the evidence with respect to the murder itself. *See* Pet. App. 36a-41a. The Maryland Court of Appeals posited that the "crux" of the State's murder case was Syed's alleged participation in burying Lee's body, and held that in light of this evidence, testimony with respect to Syed's whereabouts during the murder would not change the evidentiary picture. *Id.* at 37a-38a (internal quotation marks omitted). As this Court observed in *Wearry*, however, the crux of a murder case is the murder. *See* 136 S. Ct. at 1006. The failure of the Maryland Court of Appeals to focus its prejudice analysis on the State's case *with respect to Lee's murder* is yet another reason to reverse.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is important for at least three reasons.

First, the standard for *Strickland* prejudice should be uniform among the state and federal courts. Whether defense counsel's ineffective performance prejudiced the defendant—requiring a new trial—should not depend on the jurisdiction in which the defendant is prosecuted. Ten state and federal courts have adopted a consistent approach; the Maryland Court of Appeals departed from that approach. This Court's intervention is warranted to resolve the split.

The divergence in authority, moreover, is particularly acute in this case, where state and federal courts in the same jurisdiction now apply different legal standards. In the Fourth Circuit, which encompasses Maryland, courts must take the government's evidence of guilt as the jury heard it when evaluating *Strickland* prejudice. *See Elmore*, 661 F.3d at 868, 870-871. The Maryland Court of Appeals, in contrast, holds that a court may evaluate whether "the jury could have disbelieved" the State's case when assessing prejudice to the defendant. *See* Pet. App. 34a. This straightforward conflict between courts within the same jurisdiction is plainly worthy of the Court's attention.

Second, "this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. The decision below undermines that right to counsel, so much so that it hardly leaves a remaining right at all: It holds that

as long as a jury could hypothesize a way around a flaw in the prosecution's case, there is no prejudice where an incompetent counsel failed to highlight that flaw. If that were correct, however, only a defendant with an airtight case would suffer prejudice from incompetent counsel. But it is precisely the defendants whose chance of success is uncertain who benefit most from competent representation. As *Strickland* itself recognized, the question is not whether the defendant would have been acquitted outright absent counsel's errors, but instead "whether there is a reasonable probability" that "the factfinder would have had a reasonable doubt." *Id.* at 695.

The purpose of our system of litigation is to search for truth through an adversarial presentation of the evidence. This "system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981). A fair trial is thus "one in which evidence subject to adversarial testing is presented to an impartial tribunal." *Strickland*, 466 U.S. at 685. Where the evidence is conflicting—and the truth is clouded—the adversarial process is crucial to reaching a just result. *Cf. United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive."). As this Court has emphasized, "truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson*, 488 U.S. at 84 (internal quotation marks omitted). Indeed, "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Nixon*, 418 U.S. at 709.

In the decision below, the Maryland Court of Appeals ignored the role of adversarial testing in ensuring a fair trial. It sidestepped the case actually presented to the jury, and instead asked whether the jury may have believed a "speculative" theory of Lee's death that neither party alleged. In doing so, it created a standard for prejudice that is virtually impossible to meet: In a world where the jury may simply ignore the weaknesses in the State's case, no defendant suffers prejudice when his counsel fails to attack those weaknesses through an adversarial presentation of evidence.

The Court should grant certiorari to affirm that the right to counsel, enshrined in the Sixth Amendment, relies on an adversarial presentation of the evidence to a jury—not on a reviewing court's analysis of a hypothetical case devised years after the defendant's trial.

Third, the decision below significantly discounts the importance of alibi witnesses, in clear conflict with numerous state and federal courts. As the Connecticut Supreme Court emphasized in *Skakel*, it could not 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*. 188 A.3d at 42. "There are many cases, however, in which counsel's failure to present the testimony of even a questionable or cumulative alibi witness was deemed prejudicial in view of the critical importance of an alibi defense." *Id.*

This consensus reflects the unique power of alibi testimony. A live witness telling the jury that the defendant could not have committed the crime

because the witness *saw him somewhere else* is potent evidence. As the Sixth Circuit has recognized, "when trial counsel fails to present an alibi witness, the difference between the case that was and the case that should have been is undeniable." *Caldwell*, 414 F. App'x at 818 (internal quotation marks, brackets, and citation omitted). By permitting post-conviction courts to circumvent alibi evidence, the decision below substantially undercuts the broad agreement among state and federal courts that alibi evidence plays a crucial role in the courtroom. For this reason, too, the Court should grant certiorari.

IV. THIS CASE IS A CLEAN VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This case presents a clean vehicle to address the question presented. Both the Maryland Court of Special Appeals, and the dissent below, followed the majority approach to hold that Syed is entitled to a new trial. Numerous state and federal court decisions, including in markedly similar cases, support that conclusion. *See, e.g.*, *Skakel*, 188 A.3d at 38-42 (collecting cases). The Maryland Court of Appeals departed from the majority approach and found no prejudice despite the failure of Syed's counsel to present an alibi witness for the exact time that the State says he committed murder. There are no vehicle problems to reaching the question at issue, which has been briefed and argued throughout three state courts. Syed should have the opportunity to present his alibi to a jury, and the jury—not the Maryland Court of Appeals—should decide its worth.

The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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