No. 19-227

In the Supreme Court of the United States

ADNAN SYED,

Petitioner,

v.

THE STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF OF MARTIN TANKLEFF AND THIRTY-EIGHT OTHER WRONGFULLY CONVICTED INDIVIDUALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici include a group of wrongfully convicted individuals who spent years (for most, decades) in prison for crimes they did not commit.[*] They submit this brief in support of Adnan Syed's petition for a writ of *certiorari* out of concern that, left uncorrected, the decision below would undermine one of the Constitution's most critical

[*] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

safeguards against wrongful convictions: the Sixth Amendment right to effective assistance of counsel.

Amici understand all too well the importance of such safeguards. In 1990, *amicus* Martin Tankleff was wrongfully convicted of murder in New York state court. When he was only seventeen years old—just as he was about to begin his senior year of high school—Tankleff was convicted based almost solely on a coerced confession written by a detective after hours of interrogation. He was sentenced to fifty years to life in prison. Tankleff spent nearly two decades behind bars before he was exculpated by newly discovered evidence. By the time he was finally released in 2007, Tankleff had spent nearly half his life in prison. Now a free man, Tankleff has completed the education he managed to begin while incarcerated, including graduating from both college and law school, and today he works as an advocate for criminal justice reform.[1] Tankleff is joined by 38 other wrongfully convicted men and women, a full list of whom is included as an appendix to this brief. Together, they have served nearly 650 years in prison for crimes they did not commit.

Tankleff and his fellow exonerees are also joined by Professor Marc Howard of Georgetown University, Tankleff's childhood friend who was inspired to go to law school to help free Tankleff. Howard is the Founding Director of the Prisons and Justice Initiative ("PJI") at Georgetown, an interdisciplinary and direct-action program that supports those affected by mass incarceration and wrongful convictions. PJI's work has saved the lives of innocent individuals. To take just one example,

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[1] He is currently seeking admission to the New York State Bar.

Georgetown undergraduates in Howard's "Making an Exoneree" class, working with Tankleff as an adjunct professor, helped free *amicus* Valentino Dixon, who was wrongfully convicted of murder and served twenty-seven years in a maximum-security prison before being exonerated in 2018.[2]

The exonerees are also joined by Jennifer Thompson, an advocate for both crime victims and wrongfully convicted individuals. In 1984, Thompson was raped at knifepoint by a man who broke into her apartment while she slept. Thompson later mistakenly identified *amicus* Ronald Cotton as the perpetrator, and Cotton spent eleven years in prison. After Cotton was exonerated and released, he and Thompson became friends and even coauthored a book that is the basis for an upcoming major motion picture.[3] In 2015, Thompson and Cotton received the U.S. Department of Justice's Special Courage Award,

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[2] For more about Georgetown and PJI's efforts, *see Wrongfully Convicted Man Thanks Georgetown Students Who Helped Free Him*, Georgetown University (Nov. 2, 2018), https://www.georgetown.edu/news/georgetown-students-help-free-prisoner-wrongfully-convicted-of-murder. To learn more about Dixon's story and how his passion for golf helped lead to his exoneration, *see* Max Adler, *For Valentino Dixon, a wrong righted*, Golf Digest (Sept. 19, 2018), https://www.golfdigest.com/story/for-valentino-dixon-a-wrong-righted-murder-charge-vacated-by-court-after-serving-27-years-in-prison.

[3] *See* Jennifer Thompson & Ronald Cotton, *et al., Picking Cotton: Our Memoir of Injustice and Redemption* (2019), https://www.pickingcottonbook.com.

in recognition of their advocacy on behalf of all those affected by wrongful convictions.[4] Their commitment to such work stems from their own experiences on both sides of the failed justice process, as they seek to combat and help heal the residual harm to wrongfully convicted individuals as well as crime victims and their families.

Finally, the exonerees are joined by Lonnie Soury, a wrongful-convictions advocate who has organized public campaigns to help free exonerees, including, among others, *amicus* Martin Tankleff. Soury is the founder of FalseConfessions.org, an organization that seeks to bring awareness to false confessions and resulting wrongful convictions, and the co-founder of Families of the Wrongfully Convicted, an organization that supports families of wrongfully convicted individuals.

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[4] *See Justice Department Honors 12 Individuals and Teams for Advancing Rights and Services for Crime Victims*, U.S. Department of Justice (Apr. 21, 2015), https://www.justice.gov/opa/pr/justice-department-honors-12-individuals-and-teams-advancing-rights-and-services-crime. Cotton and Thompson's tribute video from the awards ceremony is available at: *2015 National Crime Victims' Service Awards Tribute Video*, Office for Victims of Crime (Apr. 28, 2015), https://www.youtube.com/watch?v=ubuXSiv0wtw.

SUMMARY OF ARGUMENT

The Sixth Amendment right to effective assistance of counsel can and should be a critical safeguard against wrongful convictions. The ideal, of course, is that every criminal defendant receives constitutionally effective assistance of counsel—including the development and presentation of exculpatory evidence—in the first instance. But when the system fails at the trial level, a defendant's only lifeline may be the opportunity to show a Sixth Amendment violation. In such cases, a reviewing court's proper application of *Strickland v. Washington*, 466 U.S. 668 (1984), is often the best way to correct a process gone wrong.

The decision below violates *Strickland*'s promise. By reimagining the case heard by the jury, the Maryland Court of Appeals erected a virtually insurmountable barrier for defendants seeking to show they were deprived of their Sixth Amendment right to effective trial counsel. The court's decision requires a defendant to show prejudice based not only on the case the prosecution actually presented, but also on any number of hypothetical cases, none of which has ever been tested by a jury. That ruling conflicts with the decisions of ten other courts, and fundamentally undermines *Strickland*'s ability to protect against and correct wrongful convictions.

REASONS FOR GRANTING THE PETITION

I. WRONGFUL CONVICTIONS HARM DEFENDANTS, VICTIMS, AND OUR CRIMINAL JUSTICE SYSTEM

Wrongful convictions have long plagued the criminal justice system.[5] The National Registry of Exonerations estimates that, in just the past three decades, at least 2,492 men and women have been wrongfully convicted of crimes they did not commit.[6] Since 1989, an average of sixty to seventy wrongful convictions have been revealed (and, thankfully, corrected) each year. Last year alone, 151 wrongful convictions were uncovered.[7]

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[5] Though efforts to track wrongful convictions and exonerations have increased in recent years, this is not a new problem. *See* Jerome Frank & Barbara Frank, *Not Guilty* (1957) (recounting stories of wrongful convictions dating back to 1918). The National Registry of Exonerations recently undertook efforts to identify exonerations prior to 1989, compiling a database of 369 such cases from 1820 through 1988. *See Exonerations in the United States Before 1989*, National Registry of Exonerations (Mar. 14, 2018), https://www.law.umich.edu/special/exoneration/Documents/ExonerationsBefore1989.pdf. Those cases include the famous "Scottsboro Boys," *see Powell v. State of Ala.*, 287 U.S. 45 (1932), as well as Clarence Gideon, of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Exonerations in the United States Before 1989* at 2.

[6] *See Exonerations in the United States Map*, National Registry of Exonerations (last visited Sept. 20, 2019), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

[7] *See Exonerations in 2018* at 3, National Registry of Exonerations (Apr. 9, 2019) https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf.

These statistics are particularly troubling because they disproportionately affect people of color: According to a recent DOJ-funded study, nearly half (forty-nine percent) of wrongfully convicted individuals were African American, forty percent were Caucasian, and five percent were Hispanic.[8]

While justice was eventually done for those who have been exonerated, the process was long and hard-fought. Since 1989, wrongfully convicted men and women have spent over *22,010 years* in prison before being able to establish their innocence.[9] In the large majority of cases (sixty-five percent), more than ten years passed between the original conviction and subsequent exoneration. In twenty percent of cases, it took twenty years.[10]

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[8] *See* Seri Irazola *et al.*, *Study of Victim Experiences of Wrongful Conviction* at 22, National Criminal Justice Reference Service (Sept. 2013), https://www.ncjrs.gov/pdffiles1/nij/grants/244084.pdf [hereinafter *Study of Victim Experiences*].

[9] *See Exonerations in the United States Map*, National Registry of Exonerations (last visited Sept. 20, 2019), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

[10] *Study of Victim Experiences* at ii*; see also*, *e.g.*, Ames Grawert, *Wrongful Convictions: Why they happen, and why they can be so hard to fix*, Brennan Center for Justice (Oct. 5, 2018), https://www.brennancenter.org/blog/wrongful-convictions ("Each case hides a massive human toll: Even when uncovered, wrongful convictions take years or decades to correct.").

Meanwhile, these wrongfully convicted individuals lost years, often decades, of their lives to incarceration.[11] Children, spouses, and families were left behind. Jobs and educational opportunities were sacrificed. Family stability and positive social connections disappeared. And, while exonerees eventually regained their freedom, their efforts to reestablish meaningful and productive lives after many years in prison have often proved challenging.[12]

The experiences of *amici* illustrate these difficulties. *Amicus* Leslie Vass's wrongful conviction remained on his

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[11] The case of Anthony Ray Hinton is illustrative. Hinton was convicted of murder in 1986. He immediately challenged his conviction, but he was not set free until April 3, 2015, after spending almost three decades on Alabama's death row. In 2014, this Court ruled unanimously that Hinton's right to a fair trial had been violated, noting that as early as 2002, at a postconviction hearing, Hinton presented testimony that discredited the state's theory of guilt. *Hinton v. Alabama*, 571 U.S. 263, 270 (2014) ("All three experts examined the physical evidence and testified [at the 2002 hearing] that they could not conclude that any of the six bullets had been fired from the Hinton revolver. The State did not submit rebuttal evidence during the postconviction hearing."). Yet it still took another *thirteen years* before he was freed.

[12] *See, e.g.*, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* at 3, The Innocence Project (Dec. 2, 2009), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (citing research showing that many wrongfully convicted individuals "suffer from post-traumatic stress disorder, institutionalization and depression," experience significant health problems, and have difficulties securing employment and reintegrating to society).

record for twelve years following his exoneration and release, making it difficult for him to find a job. Absent employment, he lacked health insurance to pay for the therapy he desperately needed to treat depression and post-traumatic stress disorder stemming from his conviction and incarceration. *Amicus* Shabaka Shakur lost something he can never get back—a chance to say goodbye to his mother, who passed away while he was still incarcerated and never got to see her son clear his name. By the time Shakur returned home, his father was suffering from dementia and could not even recognize him. *Amicus* Christopher Tapp never had the chance to say goodbye to his father, who passed away while he was incarcerated. To pay for Tapp's legal defense, his mother was forced to remortgage his childhood home.

Defendants are not the only ones harmed by wrongful convictions. Crime victims and their families experience tremendous pain, fear, and confusion when this wrong is revealed and they learn the true perpetrator remains at large. Gone is the peace and finality that a proper conviction may provide.[13] Renewed legal proceedings may lead

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[13] *See Study of Victim Experiences* at 43; *see also Resources for Crime Victims and Families*, Healing Justice Project (2019), https://healingjusticeproject.org/crime-victims-and-families ("Post-conviction exonerations cause immense pain and confusion to the victims and survivors of the original crime and to their families. The legal proceedings in these cases reopen deep wounds and can lead to re-victimization and re-traumatization.").

to re-victimization and re-traumatization.[14] In a recent study, "more than half of [victims] described the impact of the wrongful conviction as being comparable to—or worse than—that of their original victimization."[15] With wrongful convictions, "a victim's sense of safety and closure disappears . . . as they realize that the real perpetrator may still be free."[16]

At a systemic level, wrongful convictions erode society's trust in the criminal justice system to bring fair and final resolution in criminal matters. In addition to the obvious dissolution of trust on the part of wrongfully convicted individuals, a study found that "[v]ictims may direct their anger and outrage towards the criminal justice system as they lose their preconceived notions of truth and justice,"[17] which in turn sows distrust of the courts and the criminal process.

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[14] *See, e.g.*, *Exonerees and Original Victims of Wrongful Conviction: Listening Session to Inform Programs and Research* at 20, National Institute of Justice (Feb. 22–24, 2016), https://www.ncjrs.gov/pdffiles1/nij/249931.pdf.

[15] Seri Irazola *et al.*, *Addressing the Impact of Wrongful Convictions on Crime Victims*, National Institute of Justice (Oct. 1, 2014), https://nij.ojp.gov/topics/articles/addressing-impact-wrongful-convictions-crime-victims.

[16] *See Study of Victim Experiences* at 12.

[17] *Id.*

II. EFFECTIVE ASSISTANCE OF COUNSEL IS A CRITICAL SAFEGUARD AGAINST WRONGFUL CONVICTIONS

Recent studies reveal that one-quarter of wrongful convictions stem, at least in part, from the ineffective assistance of the exoneree's trial counsel.[18] That is no great surprise. An individual charged with a crime will struggle (to put it mildly) to develop and present an adequate defense against the state's criminal prosecution without the aid of an effective attorney.[19] An ineffective defense drastically increases the risk that the criminal process will produce a wrong and unjust result. *See infra*, section IV. And, where that occurs, both the defendant and the integ-

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[18] *See* National Registry of Exonerations (last visited Sept. 20, 2019), http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (table of exonerees identified by, *inter alia*, factors contributing to their wrongful convictions).

[19] The difference between having an effective attorney and being left to develop a case on one's own is clear from the caution courts employ in allowing defendants to represent themselves. Federal judges, for example, are specifically instructed to engage in a dialogue with defendants who may wish to proceed without a lawyer, to warn them of the "disadvantages [they] will likely suffer." *United States v. Mesquiti*, 854 F.3d 267, 274 n.2 (5th Cir. 2017) (internal quotation marks omitted); *see also, e.g.*, *Roberson v. United States*, No. 13-cv-346, 2014 WL 7149744, at *2 n.3 (S.D. Miss. Dec. 15, 2014) ("There are pitfalls in litigation and these hazards can be difficult for *pro se* litigants to navigate."); Federal Judicial Center, *Benchbook for U.S. District Court Judges* § 1.02 (6th ed. 2013), https://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf. (outlining fifteen questions to ask defendants who request to proceed *pro se* and recommending appointment of standby counsel for any defendant who chooses to do so).

rity of the criminal process are harmed. For these reasons, the Court has long recognized that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system" and a "foundation for our adversary system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012); *see also, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (the right to counsel is "necessary to insure fundamental human rights of life and liberty").

Effective assistance is not only important once trial is underway. As the Court recognized in *Strickland* itself, the aid of counsel is particularly important before trial, in identifying, investigating, and developing potentially exculpatory evidence. 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). As one court has observed, "[a]dequate preparation for trial often may be a more important element in the effective assistance of counsel . . . than the forensic skill exhibited in the courtroom." *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970). "The careful investigation of a case and the thoughtful analysis of the information [that investigation] yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge." *Id.*

The "careful investigation of a case" certainly includes developing potential alibi witness testimony. A defendant's ability to place him- or herself at a location other than the scene of the crime can be powerful evidence to rebut the prosecution's case. *See, e.g.*, *Montgomery v. Petersen*, 846 F.2d 407, 415 n.6 (7th Cir. 1988) ("[Alibi testimony], if believed, rendered it impossible for the peti-

tioner to be the guilty party under the prosecution's theory of the case.").[20] In some cases, it may be the *only* effective defense against the state's evidence. *See, e.g.*, *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1359 (4th Cir. 1992) (emphasizing the power of alibi evidence in refuting, for example, eyewitness identification evidence). Yet, a defendant's ability to develop alibi evidence without the effective assistance of counsel may be particularly hampered. After all, if a person is truly innocent, that means he or she "did nothing improper on that day [of the crime] and would have no special reason to recall it." Brandon L. Garrett, *Convicting the Innocent* 156 (2011).

For these reasons, courts applying *Strickland* have repeatedly found defense counsel's performance deficient for failure to develop potential alibi testimony for trial. *See, e.g.*, *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) ("Once a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense."); *Montgomery*, 846 F.2d at 415 (finding counsel's performance deficient where counsel failed to investigate an "[alibi] witness whose missing testimony would have been exculpatory"). And those courts have readily

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[20] As scholars have pointed out, "[a] jury's confidence in [the prosecution's] account of guilt may be heightened where the defense fails to or is unable to offer a credible competing story about innocence." Brandon L. Garrett, *Convicting the Innocent* 154 (2011); *see also id.* at 153–58 & n.20 (discussing the importance of alibi evidence in combatting wrongful convictions).

deemed that deficiency sufficiently prejudicial to warrant relief under *Strickland*. *See* Pet. for Cert. at 26–27.[21]

Why are these results so uniform? Because, as one court explained, "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 Fed. App'x 809, 818 (6th Cir. 2011) (internal quotation marks omitted); *see also, e.g.*, *In re Parris W.*, 770 A.2d 202, 209 (Md. 2001) (finding trial counsel's failure to present disinterested alibi testimony prejudicial, as it "may have been enough to create reasonable doubt"). Underscoring that undeniable prejudice is the fact that *amici*, like the Connecticut Supreme Court, were 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 Corr.*, 188 A.3d 1, 42 (Conn. 2018) (emphasis added).

That is, until now.

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[21] *See also, e.g.*, *Blackmon v. Williams*, 823 F.3d 1088, 1107 (7th Cir. 2016); *Bigelow v. Haviland*, 576 F.3d 284, 291–92 (6th Cir. 2009); *Harrison v. Quarterman*, 496 F.3d 419, 429–30 (5th Cir. 2007); *Ramonez v. Berghuis*, 490 F.3d 482, 491 (6th Cir. 2007); *Brown v. Myers*, 137 F.3d 1154, 1158 (9th Cir. 1998); *Tosh v. Lockhart*, 879 F.2d 412, 414–15 (8th Cir. 1989); *Nealy v. Cabana*, 764 F.2d 1173, 1180 (5th Cir. 1985); *In re Parris W.*, 770 A.2d 202, 213 (Md. 2001).

III. THE MARYLAND COURT'S IMPROPER APPLICATION OF *STRICKLAND* ERODES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In a remarkable departure from courts' consistent application of *Strickland*, the Maryland Court of Appeals concluded that the failure of Syed's trial counsel to pursue a lead regarding an alibi witness caused him no prejudice and warranted no relief. That decision reversed the conclusion of the appellate panel below, which unanimously found a "reasonable probability" that "but for counsel's unprofessional errors, the result of [Syed's] proceeding would have been different." *Syed v. State*, 181 A.3d 860, 913 (Md. Ct. Spec. App. 2018) (citing *Strickland*, 466 U.S. at 694). In refusing to grant relief, the Maryland Court of Appeals applied an unprecedented, and improper, interpretation of *Strickland*'s prejudice prong.

The Maryland Court of Appeals did not dispute that Syed's trial counsel was deficient in failing to develop and present exculpatory alibi evidence at trial. *See State v. Syed*, 204 A.3d 139, 153 (Md. Ct. App. 2019) (citing *Strickland*, 466 U.S. at 691). Nor did it question that Syed's alibi witness would have contradicted the case that the prosecution presented at trial, which began and ended with the emphatic assertion that Syed committed the murder between 2:15 and 2:35 p.m. *See* Pet. for Cert. at 2. Syed's alibi witness, if called to testify, would have sworn to the jury that she was with Syed, several miles from the alleged crime scene, during the exact twenty minutes in which the prosecution claimed the murder took place.

Instead, the court below rejected Syed's *Strickland* claim on a novel ground—one that was not even presented

in the State's brief. The court speculated that, if presented with the alibi witness's testimony, the jury might have concluded that the murder occurred outside the narrow timeframe the prosecution repeatedly emphasized at trial. *Syed*, 204 A.3d at 157. And if the jury on its own were to reach that hypothetical conclusion—one the prosecution itself never argued—the alibi testimony would not have stood in the way of Syed's conviction. *Id.* In other words, rather than assess whether Syed was prejudiced in the context of the case the prosecution *actually* tried to the jury, the Court of Appeals conjured an alternate case, and decided that in *that* case, Syed would not have been prejudiced. That approach cannot be squared with *Strickland*'s command that a reviewing court "consider the totality of the evidence *before the jury*" in assessing prejudice. 466 U.S. at 695 (emphasis added). And it departs from the decisions of numerous state and federal courts, which make clear that the "prosecution's case" should be left "undisturbed" when applying *Strickland*'s second prong. *Hardy v. Chappell*, 849 F.3d 803, 823 (9th Cir. 2016), *as amended* (Jan. 27, 2017); *see also* Pet. for Cert. at 13–14.

That "do not disturb" rule makes good sense. If reviewing courts could invent a new, hypothetical theory of prosecution each time they were confronted with defense counsel's failure to develop and present exculpatory evidence, it would be impossible to establish prejudice in virtually all cases. Alibi evidence is a perfect case in point. The exculpatory power of alibi evidence depends on the timeline of events the prosecution presented to the jury. If that timeline could be shifted earlier or later after the fact, without any jury testing, reviewing courts would almost *never* find prejudice from a failure to call an alibi witness to testify.

In all cases, the ability to respond to a *Strickland* challenge by inventing a new prosecution theory would substantially increase the burden on defendants: Rather than simply showing "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 defendant would be required to anticipate every potential iteration of his or her case that a reviewing court might dream up, and prove prejudice under those additional and untested theories of prosecution too. Meanwhile, numerous instances of defense counsel error—including undisputed failures to develop and present exculpatory evidence that did in fact prejudice the defendant—would go unremedied.

IV. ABSENT A PROPER APPLICATION OF *STRICKLAND*, WRONGFULLY CONVICTED INDIVIDUALS MIGHT STILL BE LANGUISHING IN PRISON

The men and women who have signed onto this brief do so because they know that the protections of the Sixth Amendment, and the requirements of *Strickland* which enforce those protections, can be nothing short of life-altering. For many of them, *Strickland* is what set them free, and restored not only their lives, but some faith in our justice system.

What follows are stories of how *Strickland* changed the course of four wrongful convictions.

A. Lee Antione Day[22]

On September 1, 1990, *amicus* Antione Day spent the evening at his home in Chicago. Across town, two men were shot—one killed, the other wounded—in what police said was a botched attempt to rob a dice game outside a liquor store. Day was charged with murder and attempted murder, and stood trial alongside a co-defendant he had never met. He gave his trial attorney lists of witnesses, both alibi witnesses and eyewitnesses who would testify he was not at the scene when the crime occurred. His attorney did nothing, and Day was convicted and sentenced to sixty years in prison.

One afternoon a few years into his sentence, Day was told he had a visitor, a lawyer. Day was confused—he was not represented by counsel at the time and was not expecting any visitors. The lawyer was Howard Joseph, a semi-retired attorney who had heard about Day's case through Day's sister. In October 2001, thanks to Joseph's tireless work on his behalf, a state appellate court found

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[22] Facts regarding Day and his case are drawn in part from: Antione Day & Jamie Freveletti, *The Last Bad Morning*, *in* Anatomy of Innocence 197–206 (Laura Caldwell & Leslie S. Klinger, eds., 2017), *Lee Antione Day*, The National Registry of Exonerations (Dec. 18, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3162; and *Wrongful Conviction with Jason Flom: Antione Day: A Musician Framed For Murder*, Art19 (June 19, 2017), https://art19.com/shows/wrongful-conviction-with-jason-flom/episodes/fc9675bd-2717-4434-a425-43e8d0ccf0d8.

that Day's trial attorney had been constitutionally ineffective in failing to investigate or call Day's alibi witnesses.[23] On May 8, 2002, the state dismissed the charges against Day, and he was released after eleven years of incarceration.

After his release, Day first worked in construction, then took a job as Outreach Coordinator of Prison Reentry at the Howard Area Employment Resource Center in Chicago. Along with a fellow exoneree, he founded the non-profit Life After Justice, which provides reentry resources to exonerees after their release from prison.[24]

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[23] Day was granted a certificate of innocence by the Illinois courts in 2010. *See Lee Antione Day*, The National Registry of Exonerations (Dec. 18, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3162. Accordingly, by operation of Illinois law, the details of his case, including prior court decisions, have been sealed and are unavailable. *See* 735 Ill. Comp. Stat. Ann. 5/2-702; *Coleman v. City of Peoria, Ill.*, 925 F.3d 336, 344 (7th Cir. 2019) ("If an Illinois conviction is reversed or vacated, the previously convicted individual may petition for a 'certificate of innocence.' If granted, such a certificate constitutes a judicial 'finding that the petitioner was innocent of all offenses for which he or she was incarcerated' and sets in motion a process to expunge the matter from the petitioner's record.") (citing 735 Ill. Comp. Stat. Ann. 5/2-702).

[24] Life After Justice: Providing a path for exonerees and parolees to successfully re-enter society, http://lifeafterjustice.org/.

In 2013, Day donated a kidney to his mother, who had severe kidney disease and needed a transplant to survive.[25] And he has had a successful music career, most recently with The Exoneree Band, the members of which have served a combined eighty-five years in prison for crimes they did not commit.[26]

B. Luis Rojas[27]

In the early morning hours of November 18, 1990, Luis Rojas was in Manhattan, waiting for a train back to his home in Weehawken, New Jersey. He was an eighteen-year-old high school senior with no prior criminal record and dreams of becoming an engineer. Meanwhile, a few streets away, a man pulled out a gun and shot the side of a building, then handed the gun to his friend, who shot into a crowd, killing one man and wounding another. Eyewitnesses incorrectly identified Rojas as one of the shooters, after which he was arrested and stood trial for murder. His community was shocked. 150 of his classmates wrote

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[25]Alison Flowers, *Exoneree Diaries: Antione Day saves his mother's life*, WBEZ Chicago (Dec. 26, 2013), https://www.wbez.org/shows/wbez-blogs/exoneree-diaries-antione-day-saves-his-mothers-life/3e82a677-0408-44d9-a1a4-a8bcb91b4425.

[26]Alan Feuer, *The Exoneree Band Is Free to Rock, and Rightly So*, The N.Y. Times (Sept. 27, 2016), https://www.nytimes.com/2016/09/28/arts/music/exoneree-band-wrongfully-convicted.html.

[27] Facts regarding Rojas and his case are drawn in part from: *Luis Kevin Rojas*, The National Registry of Exonerations (Dec. 12, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3595; and Kevin Flynn, *Persevering Woman Helps Free Stranger in '90 Murder Case*, The N.Y. Times (Oct. 23, 1998), https://www.nytimes.com/1998/10/23/nyregion/persevering-woman-helps-free-stranger-in-90-murder-case.html.

letters to the trial judge on his behalf. Despite telling his lawyer he was waiting for a train in a busy station at the time of the shooting, the lawyer never investigated or called a single alibi witness. Rojas was convicted of second-degree murder and related offenses and sentenced to fifteen years to life in prison.

By chance, Priscilla Read Chenoweth, a retired lawyer, took an interest in his case. Ms. Chenoweth hired three retired New York City police officers to investigate the crime. They found, among other exculpatory evidence, an alibi witness: a police officer who remembered seeing Rojas at the train station on the night in question. Applying *Strickland*, an appellate court found Rojas's trial counsel had rendered ineffective assistance and ordered a new trial. *People v. Rojas*, 213 A.D.2d 56, 67, 71 (N.Y. App. Div. 1995). Rojas was acquitted at a retrial and ultimately released from prison after serving six years for a crime he did not commit.

After his release, Rojas settled a civil claim against the state and used part of the proceeds to repay Ms. Chenoweth for her efforts.

C. Eric Blackmon[28]

Eric Blackmon was busy co-hosting a Fourth of July barbecue in Chicago in the summer of 2002—he manned the grill, played cards, and socialized with his guests. Around 4:30 p.m., while the party was in full swing, a man was shot and killed outside a restaurant about a mile away. A few months later, Blackmon was arrested and charged with the murder. While awaiting trial, he gave his lawyer a list of party guests who could serve as alibi witnesses. The lawyer ignored Blackmon's list, and Blackmon was convicted and sentenced to sixty years in prison.

Blackmon challenged his conviction. When his *pro se* habeas petition was dismissed by the district court, Blackmon persuaded the Seventh Circuit to hear his case and appoint *pro bono* counsel. In 2016, the Seventh Circuit held that his trial attorney's failure to investigate and call alibi witnesses constituted ineffective assistance in violation of *Strickland*. *Blackmon v. Williams*, 823 F.3d 1088, 1104–07 (7th Cir. 2016). On remand, following an evidentiary hearing, the district court granted Blackmon's petition for a writ of habeas corpus, finding that his trial lawyer's failure to investigate and call alibi witnesses was

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[28] Facts regarding Blackmon and his case are drawn in part from: *Eric Blackmon*, The National Registry of Exonerations (May 25, 2019), http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=5480; and Megan Crepeau, *Eric Blackmon became a paralegal in prison to prove his innocence. Prosecutors dropped murder charges Wednesday*, The Chicago Tribune (Jan. 16, 2019), https://www.chicagotribune.com/news/breaking/ct-met-murder-charges-dropped-20190116-story.html.

prejudicial under *Strickland*'s second prong. *Blackmon v. Pfister*, No. 11-cv-2358, 2018 WL 741390, at *9–10 (N.D. Ill. Feb. 7, 2018). Blackmon was released pending a retrial, but the State of Illinois announced earlier this year it was dropping the charges against him. He is now a free man after having served almost sixteen years in prison.

Blackmon became a paralegal during his incarceration and plans to enroll in law school.

D. Brian Ferguson[29]

In 2002, *amicus* Brian Ferguson was a sophomore at West Virginia University. He played soccer, had a 4.0 grade point average, and planned to go to law school. On February 2, around 7:00 p.m., Ferguson's classmate Jerry Wilkins was shot and killed outside Wilkins's apartment near campus. Ferguson was among those questioned by police, but he was told he was not a suspect. Months later, while Ferguson was working as a summer intern at the law firm Arnold & Porter, in Washington, D.C., he received a phone call: He had been indicted for Wilkins's murder. Ferguson drove to West Virginia to turn himself in, and, in what can only be described as a fateful decision, hired a local lawyer to represent him at trial. That lawyer

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[29]Facts regarding Ferguson and his case were drawn in part from: Justin Wm. Moyer, *How a murder convict facing a life sentence became a D.C. mayoral appointee*, The Wash. Post (Dec. 12, 2016), https://www.washingtonpost.com/local/how-a-murder-convict-facing-a-life-sentence-became-a-dc-mayoral-appointee/2016/12/11/a8c9d726-a1fb-11e6-a44d-cc2898cfab06_story.html; and *Wrongful Conviction with Jason Flom: Unusually Cruel: The Wrongful Conviction Of Brian Ferguson And His Fight To Make A Difference*, Art19 (Aug. 7, 2017), https://art19.com/shows/wrongful-conviction-with-jason-flom/episodes/d460c64c-e2e6-48e5-be39-b504a1f0e734.

learned that another man had confessed to killing Wilkins, but never followed up on the information or attempted to investigate further. Ferguson was convicted of first-degree murder and sentenced to life without the possibility of parole.

A team from the law firm Covington & Burling, headed by future Attorney General of the United States Eric H. Holder, Jr., took Ferguson's case *pro bono*. After years of litigation, in 2013, the Supreme Court of Appeals of West Virginia upheld a lower court's decision granting Ferguson habeas corpus relief. *Ballard v. Ferguson*, 751 S.E.2d 716, 728 (W.Va. 2013). The court held that Ferguson's trial attorney's failure to investigate amounted to a "constitutionally deficient performance." *Id.* After 11 years behind bars, Ferguson returned home to Washington, D.C.

Today Ferguson serves as the Director of the Washington, D.C. Mayor's Office of Returning Citizen Affairs. He finally had a chance to complete his bachelor's degree, at Georgetown University, in 2018, and was recently awarded a prestigious Marshall Scholarship (one of only 48 in the country) to pursue a master's degree at the University of Oxford.[30] Last spring, he served as the Senior

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[30] *Wrongfully Convicted Alumnus Wins Marshall Scholarship to Study Comparative Social Policy at Oxford*, Georgetown University (Dec. 3, 2018), https://www.georgetown.edu/news/wrongfully-convicted-alumnus-wins-marshall-scholarship-to-study-prison-justice-reform-at-oxford.

Convocation speaker at Georgetown University's graduation ceremonies.[31]

* * *

For Day, Rojas, Blackmon, Ferguson, and so many others, the difference between years (or even a lifetime) in prison and their freedom was effective counsel. Without a proper application of *Strickland*, any one of them might still be incarcerated for crimes he did not commit. The decision below risks eroding or removing entirely that protection against wrongful convictions.

Amici respectfully ask this Court to step in and ensure that courts properly apply *Strickland* and that the Sixth Amendment means what it says: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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[31] *Prison Justice and Reform Advocate, Alumnus Shares His Story With Seniors*, Georgetown University (May 3, 2019), https://www.georgetown.edu/news/prison-justice-advocate-to-speak-for-senior-convocation-2019.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX: LIST OF WRONGFULLY CONVICTED *AMICI CURIAE*

- In 2006, Clemente Aguirre-Jarquin was wrongfully convicted of murder in Florida state court. He spent nearly fifteen years in prison, before being released in 2018.
- In 1995, Obie Anthony was wrongfully convicted of murder in California state court. He spent sixteen years in prison, before being released in 2011.
- In 1992, Fernando Bermudez was wrongfully convicted of murder in New York state court. He spent eighteen years in prison, before being released in 2009.
- In 1996, Kristine Bunch was wrongfully convicted of murder in Indiana state court. She spent more than seventeen years in prison, before being released in 2012.
- In 2002, Natale Cosenza was wrongfully convicted of assault in Massachusetts state court. He spent sixteen years in prison, before being released in 2016.
- In 1985, Ronald Cotton was wrongfully convicted of sexual assault in North Carolina state court. He spent eleven years in prison, before being released in 1995.
- In 1992, Lee Antione Day was wrongfully convicted of murder in Illinois state court. He spent ten years in prison, before being released in 2002.
- In 1989, Mark Denny was wrongfully convicted of sexual assault in New York state court. He spent nearly thirty years in prison, before being released in 2017.

- In 1990, Jeffrey Deskovic was wrongfully convicted of murder in New York state court. He spent sixteen years in prison, before being released in 2006.
- In 1984, Luis Diaz was wrongfully convicted of sexual assault in California state court. He spent nine years in prison, before being released in 1993.
- In 1997, Anthony DiPippo was wrongfully convicted of murder in New York state court. He spent twenty years in prison, before being released in 2016.
- In 1992, Valentino Dixon was wrongfully convicted of murder in New York state court. He spent twenty-seven years in prison, before being released in 2018.
- In 1996, Audrey Edmunds was wrongfully convicted of murder in Wisconsin state court. She spent twelve years in prison, before being released in 2008.
- In 2002, Brian Ferguson was wrongfully convicted of murder in West Virginia state court. He spent eleven years in prison, before being released in 2013.
- In 1991, Dean Gillispie was wrongfully convicted of sexual assault in Ohio state court. He spent twenty years in prison, before being released in 2011.
- In 1980, Kevin Green was wrongfully convicted of murder in California state court. He spent sixteen years in prison, before being released in 1996.
- In 1992, Derrick Hamilton was wrongfully convicted of murder in New York state court. He spent more than twenty years in prison, before being released in 2011.

- In 1979, Keith Harris was wrongfully convicted of attempted murder in Illinois state court. He spent twenty-four years in prison, before being released in 2003.
- In 1991, Johnny Hincapie was wrongfully convicted of murder in New York state court. He spent twenty-four years in prison, before being released in 2015.
- In 2009, Noura Grace Jackson was wrongfully convicted of murder in Tennessee state court. She spent eleven years in prison, before being released in 2016.
- In 1997, Lorenzo Johnson was wrongfully convicted of murder in Pennsylvania state court. He spent twenty-two years in prison, before being released in 2017.
- In 1986, Gloria Killian was wrongfully convicted of murder in California state court. She spent over seventeen years in prison, before being released in 2002.
- In 2009, Amanda Knox was wrongfully convicted of murder in Italy. She spent almost four years in prison, before being released in 2011.
- In 1995, Scott Lewis was wrongfully convicted of murder in Connecticut state court. He spent nearly twenty years in prison, before being released in 2014.
- In 1982, Eddie Lowery was wrongfully convicted of sexual assault in Kansas state court. He spent ten in prison, before being released in 1991.
- In 1998, Susan Mellen was wrongfully convicted of murder in California state court. She spent seventeen years in prison, before being released in 2014.
- In 1982, Jerry Miller was wrongfully convicted of sexual assault in Illinois state court. He spent twenty-five years in prison before being released in 2007.

- In 2000, Randall Mills was wrongfully convicted of sexual assault in Tennessee state court. He spent eleven years in prison, before being released in 2011.
- In 1987, Michael Morton was wrongfully convicted of murder in Texas state court. He spent twenty-four years in prison, before being released in 2011.
- In 1993, Anthony Ortiz was wrongfully convicted of murder in New York state court. He spent seventeen years in prison, before being released in 2010.
- In 1995, Michael L. Piaskowski was wrongfully convicted of murder in Wisconsin state court. He spent nearly six years in prison, before being released in 2001.
- In 1996, Rodney Roberts was wrongfully convicted of kidnapping. He spent eighteen years in prison, before being released in 2014.
- In 1990, Yusef Salaam was wrongfully convicted of sexual assault. He spent almost eight years in prison, before being released in 1997.
- In 1989, Shabaka Shakur, formerly Louis Holmes, was wrongfully convicted of murder in New York state court. He spent nearly twenty-eight years in prison, before being released in 2015.
- In 2000, Jason Strong was wrongfully convicted of murder in Illinois state court. He spent fifteen years in prison, before being released in 2015,
- In 1990, Martin Tankleff was wrongfully convicted of murder in New York state court. He spent seventeen years in prison, before being released in 2007.

- In 1998, Christopher Tapp was wrongfully convicted of murder in Idaho state court. He spent twenty years in prison, before being released in 2017.
- In 1975, Leslie Vass was wrongfully convicted of robbery in Maryland state court. He spent ten years in prison, before being released in 1984.
- In 1982, Michael VonAllmen was wrongfully convicted of sexual assault in Kentucky state court. He spent nearly twelve years in prison, before being released in 1994.