No. 19-227

In The
Supreme Court of the United States

ADNAN SYED,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Maryland Court of Appeals correctly apply the prejudice prong of *Strickland v. Washington*, 466 U.S. 678 (1984), and consider the totality of the evidence presented to the jury when holding that Asia McClain's partial alibi testimony did not create a substantial or significant possibility of a different result at Syed's trial?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Rules

INTRODUCTION

The State's case detailed a roughly five-hour period during which Adnan Syed murdered and buried Hae Min Lee. Asia McClain's testimony would have accounted for only ten to twenty minutes of Syed's time during that period. To evaluate whether Syed was prejudiced by the omission of this testimony, the Maryland Court of Appeals followed the mandate of *Strickland v. Washington*, 466 U.S. 678 (1984), to consider the omitted testimony within the context of the totality of the evidence before the jury. After doing so, the court correctly concluded that there was no prejudice because the State's case did not hinge on the time of the victim's death, and the partial alibi testimony did not rebut any of the circumstantial evidence of Syed's motive and opportunity to kill Lee.

Syed's petition rests on a supposed ten-to-one split of authority in how courts assess prejudice under *Strickland*. Ten state and federal courts, according to Syed, "analyze *Strickland* prejudice by leaving 'undisturbed the prosecution's case' and 'analyzing the evidence that would have been presented had counsel not performed deficiently.'" Pet. 13 (quoting *Hardy v. Chappell*, 849 F.3d 803, 823 (9th Cir. 2016), *as amended* (Jan. 27, 2017)). Standing alone on the other side of this purported split is the Maryland Court of Appeals, which, as Syed tells it, "holds that a court is not required to 'leave undisturbed the prosecution's case,' but may instead assume when assessing *Strickland* prejudice that the jury disbelieved the State's case." Pet. 14 (citation and emphasis omitted) (quoting *Hardy*, 849 F.3d at 823).

The "split" envisioned by Syed is illusory. The Maryland Court of Appeals assessed prejudice by looking at "the totality of the evidence before the jury," Pet. App. 36a, just as the courts did in the ten other cases cited by Syed, and just as *Strickland* commands. *See Strickland*, 466 U.S. at 695 (explaining that an assessment of prejudice "must consider the totality of the evidence before the judge or jury"). What Syed identifies as a one-of-a-kind approach to assessing prejudice is really no more than a fact-bound holding that McClain's partial alibi testimony was unlikely to have changed the outcome because the State's case did not hinge on its theorized time of death. Indeed, not only did McClain's proposed testimony fail to rebut "some of the more crucial evidence the State relied on to prove its case," it also would have "contradicted the defendant's own statements, which were themselves already internally inconsistent." Pet. App. 36a-37a. Thus, although the Maryland Court of Appeals did not reach Syed's desired outcome, its legal analysis did what Syed says it should have done, which is to look at "the totality of the evidence the jury heard." Pet. App. 37a.

It is hardly surprising that Syed has found cases that have reached a different conclusion on whether, in a given set of circumstances, the failure to present alibi testimony resulted in prejudice under *Strickland*. Under a totality-of-the-circumstances test, different facts will produce different results. This unremarkable truism—not the application of different legal tests—fully accounts for the split hypothesized by Syed.

This Court "generally den[ies] certiorari on factbound questions that do not implicate any disputed legal issue," *Wearry v. Cain*, 136 S. Ct. 1002, 1011 (2016) (per curiam) (Alito, J., dissenting). And it has "previously told litigants that petitions like the one here, challenging a state court's denial of postconviction relief, are particularly unlikely to be granted . . . 'even when a petition raises arguably meritorious federal constitutional claims.'" *Id.* (quoting *Lawrence v. Florida*, 549 U.S. 327, 335 (2007) (some internal quotation marks omitted)). Syed's petition presents an entirely "factbound question[]," and it does not raise even "an arguably meritorious" Sixth Amendment claim because there was neither prejudice (as a majority of the Maryland Court of Appeals concluded), nor deficient performance (as the concurring opinion outlined). The petition should therefore be denied.

STATEMENT

A. The murder of Hae Min Lee

On January 13, 1999, Syed murdered his ex-girlfriend and Woodlawn High School classmate, Hae Min Lee.

Syed's motive for killing Lee was manifest. Two months before the murder, Lee broke up with Syed. Pet. App. 112a. Two weeks before the murder, Lee started dating someone else, an older co-worker named Donald Clinedinst. Pet. App. 112a. News of her new romantic interest spread throughout the school, becoming "common knowledge among

students and teachers[.]" Pet. App. 112a. Syed harbored animosity toward Lee for ending the relationship, as documented in Lee's November 1998 letter to Syed, which was found in Syed's home. Pet. App. 220a. The letter read, in part: "You'll move on and I'll move on. But, apparently you don't respect me enough to accept my decision . . . I NEVER wanted to end like this, so hostile + cold. Hate me if you will." State's Ex. 38; T. 1/28 242-44, 246-47. Written on the back were the words: "I'm going to kill." Pet. App. 220a.

The morning of Lee's murder, Syed confided in his friend, Jay Wilds, that Lee had "made him mad" and that he was "going to kill that bitch." Pet. App. 113a-114a. In the afternoon, after school let out, Syed executed his plan, strangling Lee in her car and hiding her body in the trunk. Pet. App. 30a-31a. Later that night, Syed drove to nearby Leakin Park, where, with the assistance of Wilds, he buried Lee in a shallow grave. Pet. App. 29a-30a, 120a-121a.

Lee was missing for three weeks before her body was discovered. Investigating detectives obtained Syed's cell phone records and used them to identify potential witnesses, including Jennifer Pusateri and Wilds. T. 2/17 154-58. Wilds led the police to Lee's abandoned vehicle, which police had been searching for since Lee's disappearance but had been unable to find. Pet. App. 36a, 118a n.11. Inside, they discovered a map book with Syed's palm print on the back cover. Pet. App. 36a, 123a-124a. The book had a page ripped from it—the page that mapped Leakin Park and the surrounding area. Pet. App. 36a, 123a-124a. They also found that the wiper control lever inside Lee's car

was broken, corroborating Wilds's account that Syed told him Lee "kicked off" one of the controls as he strangled her in the front seat of her car. Pet. App. 118a n.11.

Syed told police shifting and inconsistent stories about what happened the day Lee was killed. When he was interviewed on the day of the murder, Syed told Officer Scott Adcock that Lee was supposed to give him a ride, but he "got detained," and he believed that Lee "got tired of waiting and left." Pet. App. 32a. Nearly two weeks later, Syed told Detective Joshua O'Shea that he "did not see [Lee] after school because he had gone to track practice." Pet. App. 32a-33a, 74a, 246a. A few days after that, Syed denied ever saying that Lee was supposed to give him a ride, and he instead told officers that "he drives his own car to school so he wouldn't have needed a ride from her." Pet. App. 33a. Finally, about a month and a half after the murder, Syed told the police that he could not remember what he did on the day that Lee was killed. Pet. App. 33a.

B. Syed's Trial and Direct Appeal

On April 13, 1999, a grand jury indicted Syed on charges of murder, kidnapping, robbery, and false imprisonment. Pet. App. 261a. Syed's first trial ended in a mistrial when the jury overheard a conversation between the court and defense counsel. Pet. App. 112a n.5, 344a-345a. Syed's second trial began on January 21, 2000 and lasted 22 days, with the State calling 27 witnesses and Syed calling 11.

1. *The State's evidence at Syed's second trial*

Jay Wilds was the State's main eyewitness. Wilds testified that on the morning of the murder, after going shopping, Syed let Wilds borrow his car and cell phone while Syed was at school; he told Wilds that he would call when he wanted to be picked up. Pet. App. 113a-114a. Later that afternoon, Syed called Wilds to say that he was not ready yet, but would need Wilds "to come get [him] at like 3:45 or something like that[.]" Pet. App. 114a; T. 2/4 130.

Sometime later, Syed called Wilds from a payphone in the parking lot of a nearby Best Buy store to request a ride. Pet. App. 115a, 223a, 262a, 271a n.9. When Wilds met Syed in the parking lot, Syed asked if he was "ready for this." Pet. App. 116a. Syed then opened the trunk of Lee's car, revealing Lee's dead body. Pet. App. 115a-116a. Syed closed the trunk and drove with Wilds to a Park and Ride off Interstate 70 where they abandoned Lee's car. Pet. App. 116a.

The pair then drove around trying to find someone with marijuana for sale. Pet. App. 116a. Eventually, Syed decided that he should be dropped off at track practice at the high school because "he needed to be seen." Pet. App. 117a.

During the trip to the high school, Syed bragged about "kill[ing] somebody with [his] bare hands." Pet. App. 117a-118a. He told Wilds that killing Lee "kind of hurt him but not really" because, when "someone treats him like that, they deserve to die." Pet. App. 117a. Syed also shared details of the murder, telling

Wilds that Lee "was trying to say something to him like apologize[,]" and that during the struggle, she had kicked the turn signal off of her car. Pet. App. 117a.

Wilds left Syed at the school for approximately half an hour before returning to pick him up and drive him to Kristi Vinson's apartment, where they arrived around 6:00 p.m. Pet. App. 118a. While at Vinson's apartment, Syed received three phone calls—two from Lee's family and the third from the police—asking if Syed knew Lee's whereabouts. Pet. App. 118a-119a. After speaking to the police, Syed said, "they're going to come talk to me," and abruptly left Vinson's apartment. Pet. App. 119a. Wilds "jumped up and ran out of the apartment" after him. Pet. App. 119a.

The pair drove to Wilds's house where Syed put two shovels in the back seat of his car. Pet. App. 119a-120a. They then drove to the Interstate 70 Park and Ride and retrieved Lee's car with her body in the trunk. Pet. App. 120a. After driving around for some time, at about 7:00 p.m., Syed and Wilds ended up in Leakin Park, where they buried Lee's body in a shallow grave. Pet. 120a-121a.

After Syed and Wilds finished burying Lee, they left the park. Pet. App. 121a-122a. They stopped to abandon Lee's car behind some apartments and then drove in Syed's car to Westview Mall where they discarded their shovels and some of Lee's personal effects in dumpsters. Pet. App. 122a. Wilds paged Pusateri and she picked him up a short time later. Pet. App. 122a.

Wilds's testimony was corroborated by documentary and testimonial evidence. Syed's cell phone records documented incoming and outgoing calls that coincided with Wilds's testimony about calls being made and received on Syed's cell phone, and showed the phone pinging towers in areas where Wilds said the pair were during the time of the calls. Pet. App. 264a-266a. The records showed, for example, that Syed received three calls at 6:07, 6:09, and 6:24 p.m. that pinged off cell towers near Vinson's apartment. Pet. App. 265a. And two calls at 7:09 and 7:16 p.m.—the time that Wilds said he and Syed were in Leakin Park burying Lee's body—connected to the "strongest cell site for the location of [Lee's] body in Leakin Park."[1] Pet. App. 36a, 121a, 266a.

Pusateri, Vinson, and other witnesses also corroborated Wilds's testimony. Vinson testified that Wilds and Syed came to her apartment around 6:00 the night of the murder and were behaving strangely. Pet. App. 118a. Pusateri testified that Wilds played video games at her house from early afternoon until he left around 3:30 or 3:45 p.m. T. 2/15 185-87. She heard from Wilds again at around 7:00 that night when she received a page from him. Pet. App. 120a-121a. When Pusateri returned the call, someone else answered the phone and said that Wilds was busy. Pet. App. 121a. Wilds paged her again around 8:00 p.m. and asked her to pick him up from Westview Mall. Pet. App. 30a, 122a.

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[1] The phone records also corroborated, among other things, Wilds's testimony about calls made earlier in the day and his testimony that he paged Pusateri at 7:00 p.m. Pet. App. 114a, 120a.

When Pusateri arrived at Westview Mall around 8:15 p.m., she saw Wilds in a car with Syed. Pet. App. 30a, 122a. She said that when Wilds got in her car he told her that Syed strangled Lee in the parking lot of the Best Buy, that he saw Lee's body in the trunk of her car, and that they used Wilds's shovels to bury Lee. Pet. App. 122a; T. 2/15 195-96.

Detective Gregory MacGillivary interviewed Pusateri a few weeks after Lee's body was found. T. 2/17 310. She told him that, the day after Lee went missing, she heard that Lee had been strangled to death. T. 2/17 314-15. Detective MacGillivary considered this information "very important" because the manner of Lee's death had not been released to the public. T. 2/17 315.

2. *The State's theory about Lee's precise time of death.*

Because there were no eyewitnesses to the crime or other similar dispositive evidence establishing precisely when the murder took place, Pet. App. 227a-228a, the State relied upon circumstantial evidence to establish a timeline of the crime. Multiple witnesses saw Lee alive at 2:15 p.m. when school was dismissed for the day, but something was amiss by 3:00 p.m. when she failed to pick up her cousin from elementary school. Pet. App. 115a.

Call records from Syed's cell phone, which Wilds had while Syed was at school, document several "incoming" calls during the afternoon of Lee's

disappearance.[2] The prosecution reviewed the call records from Syed's phone and argued that Syed's call from the Best Buy was made at 2:36 p.m. Pet. App. 221a-222a, 248a, 271a n.9, 288a. Wilds, however, testified that he thought Syed made the Best Buy call around 3:45 p.m., and Pusateri testified that Wilds was at her house until around 3:30 or 3:45 p.m. T. 2/15 185-87; Pet. App. 227a n.43, 248a, 262a, 288a-289a.

The State argued its theory to the jury in closing argument, telling the jury that Lee was dead twenty minutes after school let out and that Syed called Wilds at 2:36 p.m. from the Best Buy. T. 2/25 66. But the precise time of Syed's call to Wilds from the Best Buy was a small part of the State's case; the prosecution mentioned the 2:36 call only once during closing arguments.

Far more important to the State's case was Jay Wilds—the prosecutor told the jury that the case "hinge[d] on his testimony." T. 2/25 57. The 2:36 call was not even the most important corroborating cell phone call, according to the prosecutor. T. 2/25 70. That distinction went to the 7:00 p.m. incoming calls that pinged the cell site covering Lee's burial site in Leakin Park. T. 2/25 70-71. Those calls, the prosecutor said, were "crucial" in corroborating Wilds's testimony. T. 2/25 70.

After deliberating for less than three hours, the jury convicted Syed of first-degree murder,

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[2] The records from Syed's cell phone indicated the phone numbers of only outgoing phone calls; all incoming calls to Syed's phone were simply labeled "incoming call" and, therefore, the records alone could not establish who made the incoming calls or where the call originated. Pet. App. 115a.

kidnapping, and robbery. Pet. App. 3a. Syed was sentenced to life plus 30 years in prison. Pet. App. 108a, 267a. His convictions were affirmed on direct appeal. Pet. App. 3a.

C. Syed's Postconviction Proceedings

Syed waited more than a decade after his conviction to file for postconviction relief under Maryland's Uniform Postconviction Procedure Act ("UPPA"). Pet. App. 109a.[3] Syed claimed, among other things, that his trial counsel, Christina Gutierrez, provided ineffective assistance of counsel because she failed to properly investigate a potential alibi witness named Asia McClain. Pet. App. 3a-4a, 125a.

In support of his petition, Syed testified that, shortly after his arrest, McClain sent him two letters. Pet. App. 179a. The first letter stated that she would "try [her] best to help [Syed] account for some of [his] unwitnessed, unaccountable lost time." Pet. App. 184a-185a. Toward that end, McClain claimed that she "remembered chatting with" Syed in the Woodlawn Public Library on the day of Lee's murder. Pet. App. 184a-185a. The second letter, written the day after the first, similarly suggested that McClain saw Syed in the library on the day of the murder, which she believed might be helpful to his case. Pet. App. 186a-187a.

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[3] *See generally* Md. Code Ann., Crim. Proc. § 7-101 through § 7-301 (LexisNexis 2018 Repl. Vol.), *implemented by* Maryland Rules 4-401 through 4-408 (LexisNexis 2019).

Syed testified that he asked Gutierrez to contact McClain and obtain any security footage from the library. Pet. App. 179a. He claimed that Gutierrez later told him that she "looked into it and nothing came of it[,]" but shortly after he was convicted, he discovered that Gutierrez had never contacted McClain. Pet. App. 180a-181a.

The postconviction court denied Syed's petition, finding that Gutierrez's performance was not deficient because her decision not to contact McClain was a reasonable trial strategy. Pet. App. 4a, 182a. Syed sought leave to appeal the decision in the Maryland Court of Special Appeals. Pet. App. 4a.

While Syed's application was pending, McClain executed an affidavit stating, in pertinent part, that she was in the Woodlawn Public Library on January 13, 1999, she had a conversation with Syed at approximately 2:30 p.m., and Syed was still in the library when she left at 2:40 p.m. Pet. App. 126a, 191a-192a. Syed requested that the Court of Special Appeals remand the case back to the postconviction court for further factual findings in light of this new evidence. Pet. App. 126a. The court granted Syed's application for leave to appeal, stayed the appeal, and remanded for further proceedings. Pet. App. 126a-127a.

At the hearing on remand, McClain testified that, on January 13, 1999, at approximately 2:15 p.m., she had a fifteen- to twenty-minute conversation with Syed in the Woodlawn Public Library. Pet. App. 183a. She further testified that she was never contacted by Syed's trial defense team. Pet. App. 189a.

The State noted in response (among other things) that McClain's testimony was inconsistent with Syed's statements to the police. Pet. App. 283a. Additionally, counsel had reason to suspect that McClain, in her letters to Syed, was offering to fabricate an alibi. Pet. App. 280a-281a.

In a second memorandum opinion, the postconviction court again rejected Syed's claim that Gutierrez was ineffective because she failed to investigate McClain as an alibi witness. This time, it found that trial counsel was deficient for failing to investigate McClain, but that this failure did not prejudice Syed. Pet. App. 5a-6a. The court reasoned that "the crux of the State's case . . . did not rest on the time of the murder" and "McClain's testimony would not have been able to sever th[e] crucial link between Mr. Syed burying Ms. Lee's body and the State's evidence supporting that allegation." Pet. App. 37a (internal quotation marks omitted). The court, however, found that trial counsel was ineffective on other grounds.[4] Pet. App. 6a. Accordingly, it granted Syed a new trial.

The Maryland Court of Special Appeals, in a 2-1 decision, affirmed the postconviction court's decision, but on different grounds. The court held that Syed had waived the claim granted by the postconviction court, but went on to hold that counsel was ineffective for failing to contact McClain. Pet. App. 170a. The dissenting judge argued that Syed had failed to show

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[4] Syed argued that Gutierrez was ineffective for failing to cross-examine the State's cell phone expert about a "disclaimer" concerning the reliability of location information that appeared on a fax cover sheet. Pet. App. 144a.

that his counsel was deficient in choosing not to pursue McClain as a witness.

The Maryland Court of Appeals reversed. Six of the seven judges agreed with the lower courts that Syed's trial counsel was ineffective for failing to investigate McClain. Pet. App. 26a-27a. The court explained that, "[a]t a minimum, due diligence obligated Mr. Syed's trial counsel to contact Ms. McClain in an effort to explore her potential as an alibi witness." Pet. App. 23a.

Four judges concluded, however, that counsel's deficient performance did not create a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Pet. App. 27a, 41a (quoting *Strickland*, 466 U.S. at 694). The majority cited *Strickland*'s admonition that a reviewing court "must consider the totality of the evidence before the judge or jury" when evaluating prejudice, and held that, in this case, the totality of the evidence established that the "State's case against [Syed] could not have been substantially undermined merely by the alibi testimony of Ms. McClain." Pet. App. 27a, 35a, 41a.

The court identified two main reasons why McClain's partial alibi testimony was insufficient to discount the "substantial direct and circumstantial evidence pointing at Mr. Syed's guilt." Pet. App. 41a. First, McClain's testimony covered a very narrow window of time—she could account for only ten to twenty minutes between 2:20 or 2:30 and 2:40 p.m.—"whereas the State's case covered a much more extended period of time" on the day in question. Pet. App. 33a n.15, 41a. Second, "the State presented a

relatively weak theory as to the time of [Lee's] murder." Pet. App. 40a. To prove Syed's guilt, the State did not rely on proof of the precise time of Lee's death "as much as it relied on the substantial circumstantial evidence that pointed to Mr. Syed's motive and his transportation and burial of [Lee's] body." Pet. App. 40a. In other words, "the crux of the State's case did not rest on the time of the murder." Pet. App. 40a.

The Maryland Court of Appeals recounted the compelling evidence of Syed's guilt that was unrelated to the timeline and McClain's partial alibi testimony. Pet. App. 36a. It pointed to Wilds's testimony that Syed showed him Lee's body; Pusateri's corroborating testimony and her knowledge that Lee had been strangled before that information had been made public; Syed's cell phone records placing him in Leakin Park at the time Wilds said the two were burying Lee; Wilds's ability to locate Lee's abandoned car; Syed's palm print on the map book found in Lee's car with the torn out map page; and various witnesses who testified that they saw Syed with Wilds that day. Pet. App. 36a.

The court explained that given the relative weakness of the State's theory about exactly when Syed killed Lee and the "substantial circumstantial evidence" of Syed's guilt, McClain's "alibi does little more than to call into question the time that the State claimed Ms. Lee was killed and does nothing to rebut the evidence establishing Mr. Syed's motive and opportunity to kill Ms. Lee." Pet. App. 33a-34a. Given the specific facts of this case, "the jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m.,

as the State's timeline suggested, yet still believed that Mr. Syed had the opportunity to kill Ms. Lee after 2:40 p.m." Pet. App. 34a.

The court also noted some of the problems that McClain's testimony would have created for Syed's defense. For example, she "offered various times when she observed Mr. Syed at the Woodlawn Public Library." Pet. App. 33a n.15. And her testimony would have been inconsistent with Syed's statements that he needed a ride after school on the day of Lee's murder.[5] Pet. App. 33a n.15. McClain "would have been an alibi witness who contradicted the defendant's own statements," and could have further undermined Syed's credibility. Pet. App. 37a.

Three judges dissented from the majority's prejudice analysis. The dissent conceded that circumstantial evidence against Syed was "extensive," and included "a significant amount of evidence regarding Mr. Syed's involvement in Ms. Lee's burial." Pet. App. 97a, 100a (quotation omitted). In their view, however, even though the evidence "create[d] an inference that [Syed] committed [Lee's] murder," because "the State posited that Ms. Lee was killed between 2:15PM and 2:35PM," and McClain's testimony would have covered that time frame, the *Strickland* prejudice standard was met. Pet. App. 97a, 101a-102a.

One judge filed a concurring opinion agreeing with the majority's prejudice analysis, but departing from the majority's conclusion that trial counsel was

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[5] The Woodlawn Public Library is located within walking distance of Woodlawn High School. Pet. App. 59a n.2.

deficient. Pet. App. 55a. Adopting a position similar to the dissent in the intermediate appellate court, Judge Watts concluded that Syed "failed to rebut the presumption that it was reasonable for his trial counsel to refrain from contacting McClain, as Syed's trial counsel already knew McClain's version of events" and where "her testimony could prejudice the defendant." Pet. App. 59a, 65a, 92a. Given the potential harm of McClain's testimony, it was reasonable for Syed's counsel to forego investigating McClain and instead choose to focus on Syed's statements and "an alibi that was based on his daily routine." Pet. App. 73a-80a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT OF AUTHORITY BECAUSE THE MARYLAND COURT OF APPEALS' PREJUDICE ANALYSIS FOLLOWED *STRICKLAND* AND THE "MAJORITY APPROACH" URGED BY SYED.

Under the "majority approach" touted by Syed, a court's prejudice inquiry should "take the State's evidence of guilt as the jury heard it," examine "the theory the State advanced at trial," and "consider the difference between the case that was and the case that should have been." Pet. at 21 (alteration, citations, and internal quotation marks omitted). This is precisely what the Maryland Court of Appeals did here.

The court began its prejudice analysis by assessing "the State's theory of Mr. Syed's involvement in the murder of Ms. Lee," Pet. App. 29a, which is just what

Syed says is "required" by *Strickland*. Pet. at 25. The court then considered "all of the evidence before the jury," as it repeatedly noted throughout the opinion. Pet. App. 35a; *see also* Pet. App. 37a ("Given the totality of the evidence the jury heard, we conclude that there is not a significant or substantial possibility that the verdict would have been different . . . ."); *id.* ("Trial counsel's deficient performance . . . could not have prejudiced Mr. Syed in light of the totality of the evidence presented to the jury."); Pet. App. 41a ("[W]e consider the totality of the evidence.")). And finally, the court considered how the outcome might have changed "if the alibi testimony had been admitted into evidence." Pet. App. at 35a. In other words, it considered "the difference between the case that was and the case that should have been." Pet. 21 (alteration, citation, and internal quotation marks omitted).

At no point did the Maryland Court of Appeals "reject[] the majority approach" to analyzing prejudice, as Syed contends. Pet. 21. The "split" identified by Syed is instead implied from a single sentence in the opinion, which states that "the jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m., as the State's timeline suggested, yet still believed that Mr. Syed had the opportunity to kill Ms. Lee after 2:40 p.m." Pet. App. 34a; *see* Pet. 21. Syed reads far too much into this single sentence, which represents neither a departure from *Strickland* nor the "majority approach" identified by Syed.

When the Maryland Court of Appeals said that the jury could have rejected the State's theory about precisely when Syed killed Lee, but still concluded

that Syed did, in fact, kill Lee, the court's point was that McClain's testimony would not, in *Strickland*'s words, "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96. Instead, for at least two reasons outlined by the court, its effect would have been "isolated" and "trivial." *Id.*

First, "McClain's account was cabined to a narrow window of time in the afternoon" on the day of Lee's murder, and so "would not have served to rebut the evidence" about Syed's whereabouts and activities at any time other than the ten to twenty minutes covered by her testimony. Pet. App. 29a, 37a. Second, the State's case did not rest on its theory about the time of Lee's murder. Pet. App. 40a. The crux of the State's case was "the substantial circumstantial evidence that pointed to Mr. Syed's motive and his transportation and burial of [Lee's] body[.]" Pet. App. 40a. Because the court assessed—and ultimately discounted—the significance of McClain's testimony by considering the "totality of the evidence the jury heard," its analysis was true to *Strickland*.

The court's analysis was also consistent with the cases Syed cites as representing the "majority" (and correct) approach. In each of those cases, as in this one, the courts evaluated prejudice by considering "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695; *see Hardy*, 849 F.3d at 823; *Grant v. Lockett*, 709 F.3d 224, 235 (3d Cir. 2013); *Stitts v. Wilson*, 713 F.3d 887, 894-95 (7th Cir. 2013), *cert. denied*, 571 U.S. 1197 (2014); *Elmore v. Ozmint*, 661 F.3d 783, 869-70 (4th Cir. 2011), *as amended* (Dec. 12, 2012); *Stewart v. Wolfenbarger*, 468 F.3d

338, 361 (6th Cir. 2006), *as amended on denial of reh'g and reh'g en banc* (Feb. 15, 2007); *Henry v. Poole*, 409 F.3d 48, 64 (2d Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002); *Skakel v. Comm'r of Correction*, 188 A.3d 1, 25 (Conn. 2018), *cert. denied*, 139 S. Ct. 788 (2019); *In re Sharrow*, 175 A.3d 1236, 1241 (Vt. 2017); *Adams v. State*, 348 P.3d 145, 152 (Idaho 2015).

To be sure, in some of the "majority approach" cases cited by Syed, courts found prejudice based on the failure to present alibi testimony. But this difference in *outcomes* is hardly surprising—and indeed should be expected—given the fact-specific nature of the analysis. Different facts, not a different method of legal analysis, fully explain why prejudice was found in those cases but not this one.

In *Elmore*, for example, one of defense counsel's deficiencies was the failure to conduct an independent analysis of the medical examiner's 60-hour window for the victim's time of death. 661 F.3d at 853-55. An independent expert would have testified that it was "much more probable" that the victim was killed on Sunday afternoon—when Elmore had a corroborated alibi—than on Saturday night. *Id.* at 870. Elmore's counsel's failure to take steps that could have narrowed the prosecution's two-and-a-half day range down to a single afternoon was far more prejudicial than the decision of counsel here not to contact McClain, who could have, at most, shaved a mere ten to twenty minutes from the hours during which Syed had the opportunity to kill Lee. When combined with the prejudice caused by Elmore's defense counsel's failure to investigate any of the other pieces of

forensic evidence, the totality of the evidence led the Fourth Circuit to conclude that competent counsel would have exposed "gross violations of standard procedures for the handling of forensic evidence," and shown that the investigative team "was at least mistake-prone," if not "outright dishonest." *Id*. McClain's testimony would have done nothing of the sort.

Likewise, McClain's testimony would not have placed Syed in another State at the time of the murder, or corroborated the testimony of another alibi witness, as the two excluded alibi witnesses would have done for the defendant in *Stewart*, 468 F.3d at 360. Rather, McClain's testimony would have put Syed in a place where he himself had *never* claimed to be at the time, and where his typical afternoon routine did not take him.

McClain's omitted alibi testimony also would not have "eviscerated" the State's theory that the defendant "was the actual killer," as the omitted cross-examination would have done in *Hardy*, 849 F.3d at 826. McClain's testimony, at best, would have "call[ed] into question the time that the State claimed Ms. Lee was killed," Pet. App. 34a, without undermining any of the evidence supporting the State's theory that Syed was the killer.

Nor was this a case like *Skakel*, in which there was "no forensic evidence or eyewitness testimony linking the petitioner to the crime," and in which the omitted alibi testimony "left the door wide open for the state to argue that the alibi was predicated solely on the testimony of close family members, all of whom were lying to protect the petitioner." 188 A.3d at 39. The

State's case here, by contrast, "included a combination of witness testimony, cell phone technology evidence, and some forensic evidence," Pet. App. 35a, and the omitted alibi testimony could have increased, rather than diminished, the likelihood that jurors would suspect fabrication. Pet. App. 33a-34a n.15.

And this case was not *Stitts*, where trial counsel's failure to investigate multiple additional alibi witnesses permitted a conviction based "entirely on the testimony of two somewhat unreliable witnesses." 713 F.3d at 894. McClain is the only partial alibi witness at issue here, and her testimony placing Syed in the Woodlawn Public Library at the alleged time of the murder would have highlighted Syed's own "failure to account precisely for his whereabouts after school," while also doing nothing to rebut the corroborated eyewitness account of Syed's actions after the murder, which was the focus of the State's case. Pet. App. 29a, 37a.

The remaining five cases cited by Syed are of limited relevance. Four of those cases involve findings of prejudice based on errors not involving the failure to present alibi testimony. Those cases evaluate prejudice in a manner consistent with the decision here (and consistent with *Strickland*), but they are otherwise factually inapposite and offer nothing to suggest error by the Maryland Court of Appeals in this case. Syed's trial counsel did not "undermine the defense" by eliciting "an alibi for the wrong date," *Henry*, 409 F.3d at 64 (internal quotation marks omitted); she did not fail to request a jury instruction on a lesser offense despite evidentiary support for

such an instruction, *In re Sharrow*, 175 A.3d at 1242; she did not fail to impeach a key prosecution witness in a manner that would have "deprived" the prosecution's closing argument "of its force," *Grant*, 709 F.3d at 238; and she did not conduct "an admittedly uninformed and therefore highly reckless 'investigation' during trial," resulting in the elicitation of testimony that was "highly detrimental" to the defense. *Fisher*, 282 F.3d at 1294.

The last case cited by Syed is one in which no prejudice was found. That case is in line with the decision here. The omitted expert in *Adams* would have testified only to the maximum speed that Adams's car was capable of attaining. 348 P.3d at 155. But evidence of Adams's speed was just a "building block in Adams's defense" and was not, in and of itself, "dispositive of whether he drove with gross negligence at the time of the accident." *Id.* Similarly, McClain's testimony, if believed, proved only that Syed did not kill Lee between 2:20 and 2:40 p.m. It did "nothing to rebut the evidence" that Syed killed Lee later in the day and buried her body in Leakin Park.

Syed's real complaint, in the end, is that the Maryland Court of Appeals misapplied a properly stated legal rule governing *Strickland* prejudice. But such claims do not ordinarily justify certiorari review. Sup. Ct. R. 10. And they are all the more "unlikely to be granted" when they arise from a state court's denial of postconviction relief. *Wearry*, 136 S. Ct. at 1011 (Alito, J., dissenting). Because Syed offers no reason why his fact-bound claim of error warrants a departure from the ordinary course, his petition should be denied.

II. THE MARYLAND COURT OF APPEALS CORRECTLY APPLIED THE "MAJORITY APPROACH" TO FIND NO PREJUDICE.

Syed's claim has no merit regardless. Following the "majority approach" outlined by Syed, the Maryland Court of Appeals correctly found no prejudice.

The State's theory of the case "focused primarily on Mr. Syed's actions on the evening of January 13, 1999," because its "strongest evidence . . . related to the period of time Mr. Syed was involved in burying Ms. Lee's body." Pet. 29a. That evidence included Wilds's eyewitness testimony that he saw Lee's body in the trunk of her car, helped Syed bury Lee in Leakin Park, and participated in abandoning her car afterwards.[6] Wilds's testimony was corroborated by cell phone records and Pusateri's testimony about her effort to reach Wilds during the burial, her observation of Wilds with Syed shortly thereafter, and Wilds's confession that Syed strangled Lee and Wilds helped him bury her. Pet. App. at 29a-30a.

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[6] Contrary to Syed's claim that the omission of McClain's testimony deprived the jury of the opportunity "to determine who [was] credible: Wilds or McClain[,]" Pet. 3, McClain's testimony would not have affected Wilds's testimony at all. Wilds did not testify to anything that occurred between 2:15 and 2:40 p.m. In fact, Wilds testified that Syed called him from the Best Buy around 3:45 p.m., not 2:36 p.m. as the State theorized. Pet. App. 227a n.43; T. 2/4 130. The jury could have believed McClain's testimony that Syed was in the library until 2:40 p.m. and also believed Wilds's testimony that Syed strangled and buried Lee.

The State also relied on evidence of premeditation and deliberation, including Syed's statement to Wilds, hours before the murder, that he was "going to kill that bitch." Pet. 30a. Other "crucial evidence the State relied on to prove its case" included Pusateri's knowledge (gleaned from Wilds) that Lee was strangled to death; Wilds's knowledge of the location of Lee's car, which police had been unable to find for weeks; Syed's palm print on a map book in Lee's car, from which the page showing Leakin Park had been removed; and eyewitness testimony placing Syed and Wilds together throughout the afternoon and evening of the murder. Pet. App. 36a.

Because the State's case "focused primarily" on Syed's actions after the murder—a period for which the State had corroborated eyewitness testimony—and because the precise time and location of the murder was not directly established or a "crucial" part of the State's case, there was no significant "difference between the case that was and the case that should have been." Pet. 15. As the Maryland Court of Appeals put it, "the jury could have disbelieved that Mr. Syed killed Ms. Lee by 2:36 p.m., as the State's timeline suggested, yet still believed that Mr. Syed had the opportunity to kill Ms. Lee after 2:40 p.m." Pet. App. 34a.

Whereas McClain's testimony, in the context of all that the jury heard would have done little harm to the State's case, it could have done considerable damage to Syed's defense. Although Syed gave "conflicting statements to law enforcement about needing a ride after school, the conflict in those statements was not inconsistent" with the defense theory that he followed

his routine of attending track practice after school. Pet. App. 33a. McClain's testimony, however, "did not comport with th[is] theory" because Syed's "routine did not involve going to the Woodlawn Public Library," where McClain claimed to have seen him. Pet. App. 33a-34a n.15, 184a-185a. McClain's testimony also "could have been more harmful than helpful" because it was inconsistent with Syed's statements to police about needing a ride after school. Pet. App. 33a-34a n.15, 184a-185a.Worse still, based on McClain's offer to "try [her] best to help [Syed] account for some of [his] unwitnessed, unaccountable lost time" on the day of the murder, the jury "could have concluded that Ms. McClain's statement was an offer to fabricate an alibi for Mr. Syed." Pet. App. 33a-34a n.15, 184a-185a.

In sum, "[g]iven the totality of the evidence the jury heard," there was not "a significant or substantial possibility that the verdict would have been different" had McClain testified. Pet. App. 37a. Her testimony was "cabined to a narrow window of time" that was not the "crux" of the State's case, and she would have "further undermined" Syed's credibility by contradicting his own statements, "which were themselves already internally inconsistent." Pet. App. 37a.

Besides following *Strickland*, the Maryland Court of Appeals' legal analysis did not "conflict with this Court's decision in *Wearry*." Pet. 24, 27-28. Syed claims that "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." Pet. at 28

(emphasis in original). Syed reads too much into this Court's discussion of the factual question presented in *Wearry*.

This Court described the State's evidence against Wearry as "a house of cards, built on the jury crediting [the State's key witness's] account rather than Wearry's alibi." *Wearry*, 136 S. Ct. at 1006. Because of the import of that witness's testimony, the State's failure to disclose significant impeachment evidence "suffice[d] to undermine confidence in Wearry's conviction." *Id*. The remainder of the evidence against Wearry was the testimony of three witnesses who saw Wearry after the murder in the victim's car and with the victim's belongings. *Id*. at 1010-11 (Alito, J., dissenting). That evidence, the Court said, suggested only that "Wearry may have been involved in events related to the murder *after* it occurred." *Id*. at 1006 (emphasis in original). That evidence did not tie Wearry to the murder itself, and was not enough to assure the Court that there was no reasonable likelihood that the withheld evidence would have affected the verdict. *Id*.

This Court was not announcing a blanket rule that evidence relating to events that occurred after the murder is off-limits in a prejudice analysis. It was commenting on the specific facts of *Wearry* and explaining why the evidence that was left after the key witness was discredited could not support a murder conviction. Here, evidence of events that occurred after the murder, including Wilds's testimony that Syed showed him Lee's body in the trunk and that the two buried her in Leakin Park, *do* tie Syed to Lee's murder and *are* enough to defeat

Syed's claim that McClain's testimony created a substantial likelihood of a different result at trial.

III. THERE WAS NO DEFICIENT PERFORMANCE TO BEGIN WITH.

Although Syed's petition focuses on prejudice, "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components," the first of which requires proof that counsel's performance was deficient. *See Strickland*, 466 U.S. at 687. Syed's failure to satisfy this first prong of *Strickland*—despite the Maryland Court of Appeals' conclusion to the contrary—is yet another reason to deny relief.

Obtaining relief under *Strickland* requires showing *both* deficient performance and prejudice. *Id*. So if this Court were to grant Syed's petition, it would have to decide the fact-bound question whether Syed's counsel was deficient before it could reverse on Syed's claim of prejudice.[7] Syed, though, cannot prove deficient performance. Because this alternative ground for affirmance is logically antecedent to the prejudice issue, it cannot be avoided if this Court grants review. The need to address not just one, but

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[7] Of course, the reverse is not true. "[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. Indeed, Judge Watts calls the majority's discussion of counsel's performance "dicta" because, given its ruling on the prejudice prong, there was no reason for it to address counsel's alleged deficiency. Pet. App. 55a-57a.

two, fact-bound issues is another reason why the petition should be denied.

Decisions by defense counsel enjoy a presumption of reasonableness; a defendant claiming deficient performance must overcome the strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance[,]" and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 689-90. Only where "counsel's representation fell below an objective standard of reasonableness[]" will counsel's performance be deemed deficient. *Id*. at 688.

As with all deficient performance claims, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. at 691. "There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus making particular investigations unnecessary." *Cullen v. Pinholster*, 563 U.S. 170, 197 (2011).

As Judge Watts explained in her concurring opinion (and Judge Graeff explained in her dissent in the intermediate appellate court), defense counsel's decision not to investigate McClain's partial alibi testimony was reasonable. Pet. App. 65a-92a, 231a-257a. Syed's counsel knew McClain's version of events based on the two letters she sent Syed while he was in jail. Pet. App. 59a. Those letters also contained indications from which a reasonable attorney could conclude that McClain's version of events was fabricated. Pet. App. 33a-34a n.15, 87a-88a. And even if McClain's story were true, it contradicted Syed's

statements to the police, and pursuing that line of defense could potentially undermine Syed's credibility. Given that counsel knew what McClain would say and she could have reasonably been suspicious that McClain was not telling the truth, she could have reasonably decided "that another strategy [was] in order," thus making further investigation into McClain's statements unnecessary. *Cullen*, 563 U.S. at 197.

In holding that Syed's defense counsel was deficient, the majority of the Maryland Court of Appeals failed to afford counsel's strategic decision not to investigate McClain's claims the appropriate deference. If this Court grants Syed's petition for certiorari review, Syed will have to satisfy both prongs of his ineffective assistance of counsel claim before he is entitled to relief. He can satisfy neither. His petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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