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 Maryland Court of Appeals

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

At issue in this case is a straightforward question of law: whether a court evaluating *Strickland* prejudice must take the State's case as it was presented to the jury, or may instead hypothesize that the jury disbelieved the State's case. Ten state and federal courts adopt the first approach, concluding that courts "must leave undisturbed the prosecution's case" when evaluating prejudice. *Hardy* v. *Chappell*, 849 F.3d 803, 823 (9th Cir. 2016), *as amended* (Jan. 27, 2017); *see* Pet. 13-21. In the decision below, the Maryland Court of Appeals adopted the second approach, holding that the court may hypothesize that the jury *disbelieved* the State's case. *See* Pet.

App. 33a-34a. This Court's attention is warranted to resolve this clear division on an important question of federal law.

The brief in opposition employs two tactics in its bid to defeat certiorari. First, the State rewrites the question presented: Instead of addressing whether courts must take the State's case as it was presented to the jury, the State addresses whether courts must "consider the totality of the evidence" when evaluating prejudice. Opp. i; *see id.* at 19. The question in this case, however, is not whether courts should evaluate the totality of the evidence; it is instead *how* a court evaluating that evidence determines prejudice. By sidestepping the question presented, the State ignores the clear division between the state and federal courts.

Second, the State repeatedly focuses on the facts rather than the law, reciting those facts in the light most favorable to the prosecution and ignoring evidence undercutting the State's case. The State's recitation of the facts, however, is largely irrelevant to the question presented. And in any event, *Strickland* requires an objective analysis of the facts—which the State manifestly fails to conduct. The State's related contention that the petition is "fact-bound" is belied both by the legal analysis of the court below and by the contributions of multiple national amici, all of whom have urged this Court to grant review. The sharp dissonance between the majority rule and the decision below, as amici have explained, has important implications well beyond this case, including for habeas petitioners and defendants seeking relief on *Brady* claims.

Every state and federal court to address the question presented, with the exception of the court below, has uniformly held that a defendant suffers prejudice when defense counsel fails to investigate evidence that would have rebutted the case *actually presented* by the State at trial. The Court should grant certiorari and reverse.

I. THE STATE MISSTATES THE QUESTION PRESENTED, IGNORING A CLEAR SPLIT AMONG ELEVEN STATE AND FEDERAL COURTS.

The petition describes a clear split among eleven state and federal courts. *See* Pet. 13-23. Under the majority rule, courts evaluate *Strickland* prejudice by comparing the case that an effective defense counsel would have presented with the case the State presented to the jury. *See Henry* v. *Poole*, 409 F.3d 48, 65-66 (2nd Cir. 2005); *Grant* v. *Lockett*, 709 F.3d 224, 236-238 (3rd Cir. 2013); *Elmore* v. *Ozmint*, 661 F.3d 783, 868-871 (4th Cir. 2011); *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006); *Stitts* v. *Wilson*, 713 F.3d 887, 888, 894-895 (7th Cir. 2013); *Hardy*, 849 F.3d at 823 (9th Cir.); *Fisher* v. *Gibson*, 282 F.3d 1283, 1309-10 (10th Cir. 2002); *Skakel* v. *Comm'r of Corr.*, 188 A.3d 1, 70 (Conn. 2018); *Adams* v. *State*, 348 P.3d 145, 152 (Idaho 2015); *In re Sharrow*, 175 A.3d 1236, 1241 (Vt. 2017). The Maryland Court of Appeals evaluates prejudice by comparing the case that an effective defense counsel would have presented with *any* case that the jury may have hypothesized. *See* Pet. App. 33a-34a. The Court should grant certiorari to resolve this stark division on an important question of federal law.

1. The State claims that there is no split because the state and federal courts, including the Maryland Court of Appeals, evaluate prejudice "by considering the totality of the evidence before the judge or jury." Opp. 19 (internal quotation marks omitted). That misses the point. The question in this case is not whether courts must "consider the totality of the evidence." *Id.* at i. The question is *how* a court evaluating that evidence determines prejudice. Is a defendant prejudiced, as ten courts have held, if an effective counsel would have investigated evidence that directly rebutted the State's case? Or does the defendant suffer no prejudice, as the Maryland Court of Appeals held below, if a court can hypothesize that the jury may have disbelieved the State's case in favor of a different case that the prosecution did not present? The State does not confront that question.

Nor does the State confront the many statements by state and federal courts that explicitly depart from the decision below. In the Fourth Circuit, for example, in which Maryland sits, federal courts must take "the State's evidence of guilt" as the jury heard it when evaluating prejudice. *Elmore*, 661 F.3d at 868, 870-871. In the Ninth Circuit, courts must evaluate whether an effective defense counsel would have presented evidence that would have "undermined the prosecution's theory of the case." *Hardy*, 849 F.3d at 821. And in Connecticut, courts must evaluate prejudice by considering "the theory the state advanced at trial." *Skakel*, 188 A.3d at 42. In all of those decisions, the court evaluated *Strickland* prejudice in light of the case that the State actually presented—not some hypothetical unpresented case that the jury may have come up with.

The State attempts to explain away these cases as resting on different facts. *See* Opp. 20-21. Yet it ignores how each case would have come out differently under the decision below. In *Elmore*, the Fourth Circuit found prejudice where an effective counsel would have narrowed the State's timeline for the murder to a period in which the defendant had an alibi. *See* 661 F.3d at 870-872. Under the Maryland Court of Appeals' approach, the Fourth Circuit would have been free to conclude that there was no prejudice because the jury could have disbelieved the State's timeline. In *Stewart*, the Sixth Circuit found prejudice where an effective counsel would have presented testimony from a witness who contradicted the State's claim that the defendant said he was going to kill the victim. *See* 468 F.3d at 356-361. Under the Maryland Court of Appeals' approach, the Sixth Circuit would have been free to conclude that there was no prejudice because the jury could have disbelieved the State's claim that the defendant said he was going to kill the victim.[1] In *Skakel*, the Connecticut Supreme Court found prejudice where an effective counsel would have presented testimony from an alibi witness who placed the defendant elsewhere during the time that the State claimed the murder occurred. *See* 188 A.3d at 37-38, 42. Under the Maryland Court of Appeals' approach, the Connecticut Supreme Court would have been free to conclude that there was no prejudice because the jury could have disbelieved the State's timeline.

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[1] In *Stewart*, the court also found prejudice where defense counsel failed to investigate two alibi witnesses who contradicted the State's case. *See id.* at 357-360.

Skakel, moreover, is directly on point: There, forensic evidence suggested that the victim could have been killed any time before 5:30 a.m. *See id.* at 42. At trial, however, the State alleged that the victim died between 9:30 and 10 p.m. the previous evening. *See id.* The court found prejudice where counsel failed to investigate an alibi witness *for that period*—despite the forensic evidence already admitted at trial that would have allowed the jury to hypothesize a later time of death. *See id.* The Connecticut Supreme Court thus took as a given the State's case with respect to the time of death, and ordered a new trial so that the jury could reevaluate that issue in light of the defendant's alibi witness. The Maryland Court of Appeals embraced the opposite assumption, hypothesizing that the jury may have *disbelieved* the State's timeline in favor of a new and unpresented timeline, and refusing on that basis to remand for a new trial.

2. The State also asserts that there is no split because the Maryland Court of Appeals in fact followed the majority approach. *See* Opp. 17-18. But the court below plainly did not evaluate *Strickand* prejudice in light of "the theory the state advanced at trial." *Skakel*, 188 A.3d at 42. The State does not dispute that it repeatedly alleged at trial that Lee was killed between 2:15 and 2:35 p.m. *See* Pet. 7. Nor does the State dispute that McClain's testimony would have directly rebutted the State's opening statement that Lee was killed around "2:35, 2:36" p.m., and the State's closing statement that Lee "was dead 20 to 25 minutes from when she left school." Pet. App. 221a, 272a n.9. And the State does not dispute that the court below evaluated *Strickland* prejudice by hypothesizing that the jury *disbelieved*

the State's case. *See* Pet. App. 33a-34a. The State does not cite any other state or federal court that has rejected the State's theory of the case when evaluating *Strickland* prejudice.

The State attempts to minimize the ruling below, claiming that "Syed reads far too much into [a] single sentence" in the opinion. Opp. 18. But the only way for the Maryland Court of Appeals to find no prejudice where Syed's counsel failed to investigate an alibi witness for the *exact time when the State alleged that the murder occurred* was to conclude that the jury could have disbelieved the State's timeline. *See* Pet. App. 34a. That is the sentence that matters. And that is precisely the approach that has been rejected by numerous state and federal courts. As the Ninth Circuit explained, courts are not free to "reimagine" the trial or "invent arguments the prosecution could have made" when evaluating *Strickland* prejudice. *Hardy*, 849 F.3d at 823.

In a final effort to avoid certiorari, the State contends that McClain's alibi does not matter because the State's case rested primarily on circumstantial evidence that Syed buried Lee's body. *See* Opp. 19.[2] Evidence that a defendant "may have been involved in events related to the murder *after* it occurred" may support a charge of accessory after the fact, but it is not sufficient to conclude that the defendant

[2] This evidence includes testimony from a witness who admits to lying to police, Pet. App. 340a-343a, and a cell phone expert who has since recanted. *See id.* at 328a n.24. The State also emphasizes that Syed's hand print was found on a map book in Lee's car, *see* Opp. 25, while neglecting to mention that Syed had been in Lee's car many times prior to the murder.

committed murder. *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam). The State was instead required to put forth an affirmative case for where—and when—Syed killed Lee. McClain's testimony directly rebuts that case. And even if circumstantial evidence related to Lee's burial is relevant to the murder charge, it is at best weak evidence that Syed committed murder. As this Court held in *Strickland*, a "conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984). Because the State's evidence tying Syed to the murder was weak, the failure to investigate McClain's testimony was *more* prejudicial, not less so.

This case presents a clear split among eleven state and federal courts, and it departs from the Court's decision in *Wearry*. The Court should grant certiorari and reverse.

II. THE STATE'S RECITATION OF THE FACTS IS IRRELEVANT AND IMPROPER.

Instead of focusing on the legal question presented, the State spends the majority of its brief on a recitation of the facts, in an apparent attempt to convince this Court of Syed's guilt. *See* Opp. 3-17, 24-26. But just as the Maryland Court of Appeals should not have taken it upon itself to evaluate Syed's guilt or innocence, neither is this Court tasked with that duty. Syed is entitled to a new trial before a jury. *See* Pet. 27.

And in any event, the State improperly describes the facts in the light most favorable to the prosecution, without discussing the numerous inconsistencies in Wilds' testimony or the many problems with

the State's (new) timeline for the murder. It argues that Syed could have committed murder during a several-hour window, and that McClain's testimony thus provides only a "partial alibi." Opp. 19-22.[3] The State made the same argument, for the first time, at Syed's 2016 post-conviction hearing, suggesting "a new timeline that would have allowed [Syed] to commit the murder after 2:45 p.m. and then call Wilds at 3:15 p.m." Pet. App. 271a n.9. The post-conviction court *rejected* that argument as inconsistent with the evidence. *Id.* at 271-272 & n.9 (explaining that the State's new timeline was incompatible with Wilds' testimony of his activities following the murder and Syed's phone records).

The State also asserts that McClain's testimony, if presented, would have contradicted "Syed's statements that he needed a ride after school on the day of Lee's murder," and thus would have undermined his case. Opp. 16. Yet the State does not mention that the library abuts the high school or McClain's testimony that she was picked up at the library after school. *See* Pet. App. 59a n.2, 337a. The State similarly suggests that McClain may not have been credible. *See* Opp. 26. It neglects to mention that an expert testified at Syed's post-conviction hearing that "McClain's story was powerfully credible," and that McClain was a believable and intelligent witness. Pet. App. 193a (alterations and internal quotation

[3] The court below did not describe McClain as providing a "partial" alibi. The State alleged at trial that Lee died between 2:15 and 2:35 p.m. McClain provides a complete alibi for that period.

marks omitted).[4] And McClain's credibility, in any case, is for a *jury* to decide.

Nor does the State acknowledge the lack of evidence tying Syed to the murder itself. There was "no eyewitness testimony, video surveillance, or confession of the actual murder," and "no forensic evidence linking Syed to the act of strangling" Lee. *Id.* at 227a; *see id.* at 97a-98a (Hotten, J., concurring in part and dissenting in part). As a result, the State was forced to rely at trial primarily on Wilds' testimony, despite the fact that Wilds admitted to *repeatedly lying to police*. *See id.* at 340a-343a (Q. "So, you lied about that too, right?" A. "Yes, ma'am."). The State does not mention that fact, either.

To repeat, the Court need not consider the facts of this case in order to grant certiorari on the legal question presented. And the Court *must* not consider them in the light in which the State has cast them; when analyzing *Strickland* prejudice, courts must conduct "an objective review of the nature and strength of the state's case." *Skakel*, 188 A.3d at 25.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION.

The State identifies no vehicle problems preventing the Court's review. *See* Pet. 32.[5] And the briefs filed

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[4] The State asserts that McClain's testimony would not have contradicted Wilds' account, *see* Opp. 24 n.6, but the opposite is true: Wilds testified that Syed committed murder. McClain would have testified that Syed *could not* have committed murder.

by multiple national amici demonstrate that the petition is not "factbound," as the State asserts, but instead presents a significant question of federal law. Given the "high and nationally-important stakes," the Court should grant certiorari. Amicus Br. of Nat'l Ass'n of Criminal Def. Lawyers (NACDL) 13.

First, as the NACDL points out, the decision below has important ramifications outside the Maryland courts. Prior to the decision below, criminal defendants seeking habeas relief could demonstrate that under clearly established law, counsel's failure to investigate an alibi witness was prejudicial. *See id.* at 12. Today, prosecutors can point to the Maryland Court of Appeals' decision to establish that the courts are *divided* on this issue, frustrating "the ability of courts around the country to remedy trial counsel's prejudicial errors." *Id.* at 13.

Second, as amici the Innocence Network et al. explain, a defendant bringing a *Brady* claim must meet the *Strickland* prejudice standard. *See* Amicus Br. of Innocence Network et al. 12-14. Under the approach adopted below, if the State fails to turn over exculpatory evidence that directly rebuts the State's own case—but the court can hypothesize that the jury may have disbelieved the State's case—then there is no *Brady* violation. Requiring a defendant "to show

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[5] The State asserts that the Court should decline to grant petitions on state post-conviction review, but the Court frequently grants certiorari in this posture. *See, e.g.*, *Wearry*, 136 S. Ct. at 1008. The State also argues that Syed's counsel was not ineffective, *see* Opp. 28-30, but the State did not file a cross-petition on that question and thus forfeited it. *See Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013).

that the suppressed evidence would have likely changed the result at the trial that actually happened as well as at some hypothetical trial with potentially unknown and untested evidence" creates a new, and unwarranted, obstacle to relief for *Brady* claims. *Id.* at 13-14.

Third, as the amicus brief submitted by exonerees explains, ineffective assistance of counsel is a significant contributor to wrongful convictions. *See* Amicus Br. of 39 Wrongfully Convicted Individuals 11. "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." *Id.* at 16.

The Court should grant certiorari to resolve the clear split created by the decision below, which will affect criminal defendants across the country.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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