STATE OF MARYLAND,	*	IN THE
Petitioner,	*	COURT OF APPEALS
v.	*	OF MARYLAND
ADNAN SYED,	*	September Term, 2018
Respondent.	*	No. 24

* * * * * * * * * * * * *

MOTION FOR RECONSIDERATION

Respondent Adnan Syed, through counsel, hereby moves this Court, pursuant to Md. Cts. & Jud. Proc. § 6-408 and Md. Rule 8-605, to reconsider its Opinion and permit the parties to further brief and argue the central point at issue: whether Syed suffered prejudice from the failure of trial counsel to contact a credible, non-cumulative and independent alibi witness who swore she was with Syed at the time of the murder.

Not only is this Court's ruling on this issue at odds with every other jurisdiction in the country, but it materially conflicts with this Court's precedent in *In re Parris W.*, 363 Md. 717 (2001), a case the majority did not address in its prejudice analysis, and with the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), the foundational case setting forth the standard for ineffective assistance of counsel. The Court's mistakes were made by (1) applying an incorrect, heightened prejudice standard; (2) improperly departing from the facts presented at trial; and (3) violating this Court's own core principles by overriding the Circuit Court's factual conclusions without finding them to be clearly erroneous.

As Respondent's amici highlight, the majority's decision carries profound implications for future litigants challenging wrongful convictions and prosecutorial misconduct – at a time when, locally and nationally, our criminal justice system is under great scrutiny. Maryland post-conviction courts will now have near *carte blanche* authority to sweep aside even the most compelling cases of ineffective assistance of counsel on amorphous prejudice grounds. The already near-impossible odds of wrongly convicted inmates gaining relief will grow even longer, amplifying the risk that the innocent will remain behind bars. Because the same prejudice standard applies to *Brady* claims, this ruling will also weaken systemic checks on prosecutorial and police misconduct. These claims too can be more easily swept aside under this Court's new, heightened prejudice standard. Compounding everything, this Court is unlikely to have the opportunity to reexamine this question in future cases; the application-for-leave-to-appeal process makes it nearly impossible for this Court to review a finding of no prejudice. The resulting Opinion sets a demonstrably erroneous decision in concrete, practically impervious to further review. Surely this is not what this Court intended.

ARGUMENT

I. THIS RULING CUTS AGAINST A NATIONWIDE CONSENSUS.

This Court now stands alone. As far as undersigned counsel are aware, every other court in the country to have considered the impact of trial counsel's failure to contact this type of alibi witness has concluded that it was prejudicial. The Connecticut Supreme Court recently noted that "[the court's] research has not revealed 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 Correction*, 188 A.3d 1, 70 (Conn. 2018), *cert denied*, 139 S. Ct. 788 (2019).

This consensus reflects the unique power of third-party alibi testimony – testimony that the defendant could not have committed the crime as alleged because the defendant was somewhere else. As the Sixth Circuit has recognized, "when trial counsel fails to present an alibi witness, the difference between the case that was and the case that should have been is undeniable." *Caldwell v. Lewis*, 414 Fed. App'x 809, 818 (6th Cir. 2011) (internal quotation marks and citation omitted). Hence, even when the missing alibi testimony is cumulative or lacks credibility – neither of which is the case here – courts have found prejudice to the defendant and granted a new trial. *Skakel*, 188 A.3d at 70-72 (collecting cases).

Among the many decisions finding that the absence of an alibi witness undermines confidence in the outcome of trial was this Court's decision in *Parris W.*, 363 Md. at 729-30. Although trial counsel in *Parris W.* did call one alibi witness – the defendant's father, who testified he was with the defendant throughout the day the assault occurred – this Court found that counsel's failure to subpoena five additional corroborating witnesses was enough to undermine confidence in the outcome of the trial. *Id.* at 720-22, 729-30. As this Court explained, prejudice attached because the additional witnesses could have bolstered the father's testimony and probably covered the time of the crime (which was of some dispute). *Id.* at 730. Thus, this Court concluded that a new trial was warranted, drawing support from similar conclusions in courts across the country. *Id.* at 730-36

(citing, among others, *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355 (4th Cir. 1992) and *Montgomery v. Peterson*, 846 F.2d 407 (7th Cir. 1988)).

Here, the prejudice to Syed is even greater than that found in *Parris W.* because McClain's alibi testimony was not cumulative, and it directly overlapped with the State's time of the murder. "[T]his Court does not overrule its own precedent in the absence of blatant error, grave injustice or 'significant changes in the law or facts.'" *Gore Enter. Holdings, Inc. v. Comptroller*, 437 Md. 492, 510 n.8 (2014) (internal citation omitted). No such findings were made here. Indeed, the majority did not even mention *Parris W.* in its prejudice analysis.

Nor did the majority discuss the prejudice analysis of any other alibi case. Instead, the Court exclusively relied on several findings of "deficiency-but-no-prejudice" in cases not involving alibi testimony. *See State v. Syed*, No. 24, slip op. at 24 (Md. Ct. App. Mar. 8, 2019) (hereinafter "Op.") (citing *St. Cloud v. Leapley*, 521 N.W.2d 118, 128 (S.D. 1994) (failure to investigate defendant's tribal court file); *Brewer v. Hall*, 603 S.E.2d 244, 247 (Ga. 2004) (failure to object to police testimony regarding defendant's silence); *Moreland v. Robinson*, 813 F.3d 315, 329 (6th Cir. 2016) (failure to use police reports regarding alternative suspect)).

Given the stark divide between the majority's Opinion and the clear consensus among other courts – including this Court in *Parris W.* – the Court should order additional briefing and argument on prejudice and reconsider its decision denying Syed a new trial.

II. THE COURT'S DECISION CONFLICTS WITH MARYLAND AND SUPREME COURT PRECEDENTS.

The Court's departure from the nationwide consensus is attributable in part to the majority's application of an overly burdensome prejudice standard that cannot be squared with its own or Supreme Court precedent.

The Court identified the correct prejudice standard early in its analysis. Op. 23. But the standard it went on to apply more closely resembled the preponderance standard the Supreme Court rejected in *Strickland*. For example, the Court required Syed to prove a "substantial probability that the jury would have discounted Mr. Wilds's testimony in favor of Ms. McClain's testimony." Op. 29 n.15. But this is not the burden Syed bears. Under *Strickland*, Syed merely has to show a "reasonable probability" that the alibi testimony could have raised doubt in the mind of at least one juror. 466 U.S. at 695. He need not affirmatively convince anyone – much less the entire jury – of the falsehood of Wilds's testimony.

This reasonable-probability standard is "diametrically different" from a more-probable-than-not standard. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). In fact, *Strickland* expressly rejected a standard requiring a defendant to show "that counsel's deficient conduct more likely than not altered the outcome in the case." *See* 466 U.S. at 693-94. As the Supreme Court subsequently explained in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), "[a] defendant need not demonstrate that . . . there would not have been enough left to convict;" rather, he need only show that "the favorable evidence could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 434-35.

This was the standard the Court of Special Appeals properly applied when it concluded that Syed suffered prejudice. *See Syed v. State*, 236 Md. App. 183, 276 (2018) (petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," meaning "a probability sufficient to undermine confidence in the outcome.") (internal quotation marks and citation omitted). This is also the standard consistently applied in scores of other cases finding that the failure to present alibi testimony prejudiced the defendant. *See, e.g.*, *Griffin*, 970 F.2d at 1357, 1359 (reversing state court finding of no prejudice where counsel failed to investigate alibi, noting that state court applied an overly demanding prejudice standard); *Grooms v. Solem*, 923 F.2d 88, 90-91 (8th Cir. 1991) (finding prejudice where counsel failed to call disinterested alibi witness); *Montgomery*, 846 F.2d at 414-15 (finding prejudice for failure to call alibi witness because "if believed by the jury, it would have directly exonerated [defendant] of the crime"); *Raygoza v. Hulick*, 474 F.3d 958, 965 (7th Cir. 2007) ("Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so. This undermines our confidence in the outcome of the proceedings").[1]

[1] *See also Avery v. Prelesnik*, 548 F.3d 434, 437-39 (6th Cir. 2008); *Harrison v. Quarterman*, 496 F.3d 419, 427 (5th Cir. 2007); *Alcala v. Woodford*, 334 F.3d 862, 872 (9th Cir. 2003); *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001).

The majority invoked *Harrington v. Richter*, a case decided under the more exacting standard of the Antiterrorism and Effective Death Penalty Act, as support for its statement that the likelihood of a different result must be "substantial, not just conceivable." 562 U.S. 86, 112 (2011); Op. 24. But this "substantial likelihood" formulation does not require proof that a different outcome was more likely than not. Indeed, many courts applying *Harrington's* "substantial likelihood" standard have found prejudice in circumstances precisely like these. *See, e.g.*, *Skakel*, 188 A.3d at 26 (applying *Harrington*'s "substantial likelihood" standard and finding that failure to investigate alibi witness prejudiced defendant).

Had the Court applied the correct prejudice standard, it could not have reached the conclusion it did. When a disinterested, non-cumulative alibi witness would have testified to the defendant's whereabouts at the exact time of the crime – and when that testimony may be corroborated by other witnesses and a surveillance camera – the likelihood of a different outcome is sufficiently substantial. *See Skakel*, 188 A.3d at 25-26, 61-62; *In re Parris W.*, 363 Md. at 727-28. The McClain alibi may have been "one piece of evidence," as the majority described it. Op. 33. But it is difficult to imagine a piece of evidence more impactful to the outcome of the case than the testimony of a disinterested alibi witness who would have stated that she was with Syed at the time of the murder. *See In re Parris W.*, 363 Md. at 730 (one witness's alibi testimony "alone may have been enough to create reasonable doubt in the mind of the hearing judge had she been able to testify"); *Caldwell*, 414 Fed. App'x at 818 ("[W]hen trial counsel fails to present an alibi witness, the difference between the case that was and the case that should have been is undeniable.")

(internal quotation marks and citation omitted). This is why courts across the country are unanimous in finding that the failure to present such an alibi witness is prejudicial.

III. THE COURT'S FACTFINDING WAS IMPROPER.

This Court's method of determining the facts in this case is also in material conflict with the standards established by *Strickland* and Maryland law. The majority's finding of no prejudice necessarily rested on two improper factual findings: that the murder could have occurred at a different time, and that McClain would not have been a credible witness. But making such findings was not the Court's job, and those are not the facts.

A *Strickland* prejudice inquiry is backwards looking. It requires "compar[ing] the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately." *Thomas v. Chappell*, 678 F.3d 1086, 1102 (9th Cir. 2012) (internal quotation marks and citation omitted). In other words, courts must take "the unaffected findings as a given, and tak[e] due account of the effect of [trial counsel's] errors on the remaining findings." *Strickland*, 466 U.S. at 696. This Court has explained that the unaffected findings relevant to the prejudice analysis are those that were part of "'the prosecution's theory of the case, as presented'" at trial. *In re Parris W.*, 363 Md. at 733 (quoting *Montgomery*, 846 F.2d at 415 n.6).

The majority initially nodded to the principle of sticking to the trial facts: it recited that the prejudice inquiry requires considering the deficient performance "in light of all

the evidence before the jury."[2] Op. 29. But then it veered off course when it reasoned that the jury could have believed the victim was killed some time after 2:40 p.m. *Id.*

This was legal error. The jury never heard any such theory. The State at trial repeatedly argued that Syed committed the crime by 2:36 p.m. Cir. Ct. Op. 24. When the State later offered, on collateral review, a new theory that "would have allowed [Syed] to commit the murder after 2:45 p.m.," the Circuit Court rejected this, explaining that any other timeline would have been virtually impossible. *Id.* 11 n.9. The Court of Special Appeals affirmed on this point. *Syed,* 236 Md. App. at 280-81.

Despite this, the majority incorrectly reasoned that the jury could have believed instead that the victim was killed some time after 2:40 p.m. Op. 29. But the theory that the victim was killed between 2:15 p.m. and 2:35 p.m. was the timeline against which the Court should have measured prejudice. The majority's resurrection of a twice-rejected timeline never presented to the jury is in conflict with *Strickland.*

The majority also usurped the function of the factfinder when it hypothesized that McClain would not have been a credible witness. *See Harris v. State*, 303 Md. 685, 698 (1985) (this Court "do[es] not judge the credibility of the witnesses").

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[2] The facts in a prejudice analysis are to be construed evenhandedly, not in the light most favorable to the State. *Tice v. Johnson*, 647 F.3d 87, 110 (4th Cir. 2011). When this Court recited the facts, however, it did not consider Syed's counterarguments, including, among others, the glaring inconsistencies in Jay Wilds's testimony, the insignificance of Syed's palm print on a map in Hae Min Lee's car when the two had been a couple and remained friends, and contextual explanations for Syed's comments to police. That was error. *See Elmore v. Ozmint*, 661 F.3d 787, 868 (4th Cir. 2011) (reversing state postconviction court that "unreasonably discounted evidence favorable to [the petitioner] by unduly minimizing its import and evaluating it piecemeal").

No jury has considered McClain's credibility. Even the postconviction court, which had an opportunity to do so, refrained. Cir. Ct. Op. 24-26; *compare* E1203 (expert on criminal defense practice, David Irwin, testifying that McLain was a "fabulous" and "credible" witness). This Court, however, hypothesized that a single sentence in McClain's letter "could have" undermined her "credibility as a disinterested witness" in the eyes of the jury. Op. 28-29 n.15.

This error was compounded by the majority's failure to consider the corroborating evidence that would have been available had trial counsel investigated McClain: two other witnesses and the library's surveillance video. *Syed*, 236 Md. App. at 274.

Instead, the Court minimized McClain's potential impact by shifting the focus of the State's case from the murder to the burial – a shift that was necessary because, according to the majority, the State's theory as to the time of the murder was not the "crux" of its case.[3] Op. 32.

But the crux of a murder case is the murder. And Syed was not charged solely as an accessory after the fact. Even accepting that the burial was somehow the "crux" of the State's murder case, that evidence "suggests, at most" that Syed "may have been involved in events related to the murder *after* it occurred." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (emphasis in original).

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[3] The majority gives weight to two incoming calls purportedly putting Syed's phone near Leakin Park – despite the fact that the State's cell phone expert essentially recanted at the postconviction hearing, swearing that, had he seen the AT&T instruction sheet disavowing the accuracy of the phone records, he would not have used incoming calls for location. Cir. Ct. Op. 40, 56, n.11.

The majority's assertion that McClain's "alibi does little more than to call into question the time that the State claimed Ms. Lee was killed," Op. 29, undervalues the ripple effect such testimony, if believed, would have had on the remainder of the State's case.

IV. THE COURT UNJUSTIFIABLY OVERRULED THE TRIAL COURT'S FINDING OF FACT.

The majority decision comes squarely into conflict with some of the most basic tenets of Maryland law when it overrules a critical factual finding by the postconviction court without any consideration of whether the finding was clearly erroneous.

It is fundamental that this Court "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348 (2001).[4] Yet that is precisely what the majority did when it hypothesized that the jury could have adopted an alternative timeline of when the murder occurred. Op. 29 ("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.").

The overruling of this fact was of paramount importance because it represents the only plausible way that the failure to contact the alibi witness could have not prejudiced Syed. If, on the other hand, the State were bound by its trial timeline – in which the

[4] While the postconviction court's factual findings are afforded deference, its legal conclusions, such as the finding of no prejudice, are subject to *de novo* review.

murder occurred just before 2:36 p.m. – the McClain alibi, if believed, would have made it impossible that Syed committed the murder.

The postconviction court firmly rejected the idea of an alternative timeline and stated *as a fact* the following: "[T]he Court finds that the State committed to the 2:36 p.m. timeline and thus the Court will not accept the newly established timeline." Cir. Ct. Op. 11 n.9. The postconviction court explained:

> During opening arguments, for instance, the State asserted that at "[a]bout 2:35, 2:36, Jay Wilds received a call on the cell phone from [Petitioner] saying, 'Hey, come meet me at the Best Buy.'" Trial Tr., at 106, Jan. 27, 2000 . . . .
>
> Wilds [also] testified on direct examination that he called Pusateri at 3:21 p.m. to go buy some marijuana after abandoning the victim's body and her vehicle at the Interstate 70 Park & Ride. Accordingly, the State's new timeline would create a six-minute window between the 3:15 p.m. call from Petitioner and the 3:21 p.m. call to Pusateri. Within this six-minute window, Wilds had to complete a seven-minute drive to the Best Buy on Security Boulevard from Craigmount Street, where he claimed he was located when he received Petitioner's call. Wilds then had to make a stop at the Best Buy parking lot, where Petitioner showed him the body in the victim's vehicle. Then, both parties had to take another seven-minute drive to the Interstate 70 Park & Ride to abandon the victim's body and her vehicle. It would be highly unlikely that Wilds could have completed this sequence of events within a six-minute window under the State's new timeline.
>
> The State contended during closing arguments that "[the victim] was dead 20 to 25 minutes from when she left school" at 2:15 p.m. Trial Tr., at 54, Feb. 25, 2000. The State also urged the jury to consider the 2:36 p.m. incoming call on Petitioner's cell phone records, and asserted once again that "[at 2:36 p.m. [Petitioner] call[ed] Jay Wilds, come get me at Best Buy."

Id.

This fact was enshrined by the Court of Special Appeals, which "agree[d] with the postconviction court's rejection of the State's attempts to alter its timeline of the murder,"

Syed, 236 Md. App. at 281, and the State itself, which abandoned its alternate-timeline argument by the time the case reached this Court.

By adopting the possibility of an alternative timeline, this Court overruled the circuit court's factfinding without acknowledging the extensive evidence supporting it. The Court failed to grasp how rigid and interconnected the State's trial timeline was – and that it could not simply be manipulated to defeat McClain's alibi testimony. A later timeline simply cannot be reconciled with the other facts presented at trial. Based on the postconviction court's factfinding, the majority's alternative timeline theory was an impossibility. Yet this Court adopted it.

Finally, the majority could not have possibly found that the postconviction court's factfinding was clearly erroneous because Judge Welch's factual conclusions were exhaustively supported by the record. *See Schade v. Md. Bd. of Elections*, 401 Md. 1, 33 (2007) ("If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous.").

Absent a finding of clear error, this Court simply was not permitted to rewrite the facts of the case and reach the conclusion that the jury could have disregarded an alibi based on an alternative timeline. Because of the importance of this fact in relation to the prejudice analysis, this Court should reconsider its position and permit the parties additional briefing to address this issue.

CONCLUSION

For the foregoing reasons, this Court should reconsider its decision and either affirm the Court of Special Appeals or order additional briefing and argument on the prejudice issue.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH MARYLAND RULES

Pursuant to Maryland Rule 8-504(a)(9), Respondent states that this brief was prepared in Times New Roman 13-point font. Further, this brief complies with the font, margin, and line spacing requirements of Maryland Rule 8-112; and the Motion for Reconsideration contains 3,703 words.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were delivered by first-class mail, postage prepaid, this 8th day of April, 2019 to:

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