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

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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