Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

MIGUEL VACA,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a state court of last resort effectively create a new category of per se prejudice for ineffective assistance of counsel by ordering a new penalty phase trial due to counsel's failure to consider presenting mental health evidence that the court admitted was as likely to have harmed the defendant as to have helped him?

2. Can a state court of last resort disregard the admonition of *Strickland v. Washington,* 466 U.S. 668 (1984), that the idiosyncrasies of the particular decisionmaker are not to be considered in the prejudice inquiry of an ineffective assistance of counsel claim, and find that the omission of mental health evidence before the particular jury that sat in the defendant's sentencing hearing undermined confidence in the outcome of that sentencing hearing?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the respondent below; respondent, Miguel Vaca, was the appellant.

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The Missouri Supreme Court's opinion reversing the trial court's judgment, filed June 15, 2010, and reported at 314 S.W.3d 331 (Mo. 2010), is re-printed in the Appendix ("App.") at A1-A14. The dissenting opinion is reprinted in the appendix at A15-A18.

JURISDICTION

The Supreme Court of Missouri entered its judgment on June 15, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Constitution of the United States, Amendment XIV:

> ... No state shall . . . deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Miguel Vaca was convicted of numerous charges arising from a series of crimes in late 2002. Vaca used a handgun to rob two businesses and to abduct a woman from a child's birthday party in his own apartment complex. Vaca fired the gun into the ceiling during one of the robberies and he shot at a bystander during the abduction at his apartment complex. When police arrested Vaca, he told a detective, "I have some psychological problems and sometimes I do things wrong."

Anthony Cardarella represented Vaca at trial. He retained a licensed psychologist, Dr. Bill Geis, to determine whether there were any mental health issues that might assist Cardarella in presenting a defense or in developing alternative defenses. Dr. Geis interviewed Vaca, reviewed varous records, and administered psychological tests.

Dr. Geis's report showed that Vaca had a long history of violent behavior. When Vaca was eight or nine years old, he stabbed a boy in the back with a pencil after the boy pushed him. In 1986, Vaca was arrested for assault after he punched a woman whom he thought had made a derogatory comment about him. Vaca told Dr. Geis that he got into several fights with men during that time. When Vaca was living with his brother in Arizona, he got into a fight with his nephew and spent the night in jail. Vaca told Dr. Geis that he watched too much violence on television and was worried that it had a negative effect on him.

Vaca told Dr. Geis that he thought he was having a mental breakdown when he came to the jail. Vaca reported "seeing things and seeing people burning and trying to pull me into this." He said that he was having flashbacks to incidents from his 20's of being slapped, beaten, and whipped. Vaca said that he was having a lot of nightmares and that he had been hearing voices for many years. Vaca told Dr. Geis that he had been drinking heavily at the time of his arrest and that he did not know what was going on in his mind. Vaca also said that he had stopped taking his psychiatric medication because he was having trouble with his insurance. Dr. Geis concluded that Vaca's impulse control appeared to fluctuate with his psychiatric status.

Dr. Geis diagnosed Vaca with schizophrenia, paranoid type; dysthymia, early onset; post-traumatic stress disorder; and alcohol abuse. The testing showed that Vaca's IQ scores were in the borderline range of intelligence, and were consistent with low-functioning, non-mentally retarded individuals.

Vaca was tried in December 2004 under Missouri's bifurcated trial procedure. Mo. Rev. Stat. § 557.036 (Cum. Supp. 2003). That statute provides that trials will be conducted in two stages, with the jury deciding guilt or innocence in the first stage and, if the first stage results in a guilty verdict, assessing and declaring punishment in the second stage. *Id.* In that second stage, both the state and the defendant can present evidence supporting or mitigating punishment. *Id.* Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family, and others; the nature and circumstances of the offense; and the history and

character of the defendant. *Id.* The court has the final authority to impose sentence, but cannot impose a sentence that exceeds the jury's recommendation. *Id.*

Cardarella did not call Dr. Geis to testify, or attempt to enter his report into evidence, at either the guilt or sentencing phases of trial. Vaca presented testimony from his father at the sentencing phase of the trial. He testified that he and Vaca's mother had only visited Vaca twice in jail.

The jury sent four questions to the court during its guilt phase deliberations:

1) Where has [Vaca] been since arrested 11-2-2002(?)
2) Was [he] given psychological testing(?)
3) Had he been compliant with medications before arrest(?)
4) Is he currently on meds(?)

The court did not answer any of the questions.

The jury found Vaca guilty on all counts. The jury recommended sentences of life and thirty years imprisonment respectively on the two counts of robbery in the first degree, fifteen years imprisonment for attempted robbery in the first degree, seven years imprisonment for assault in the first degree, and sentences of ten, ten, and thirty years respectively on each count of armed criminal action.

After the conviction and sentence were affirmed on direct appeal,[1] Vaca filed a motion for postconviction relief under Missouri Supreme Court Rule 29.15. The motion alleged, in pertinent part, that trial counsel Cardarella provided ineffective assistance of counsel by failing to call Dr. Geis to testify at the sentencing phase of the trial. An evidentiary hearing was held on July 12, 2007. Both Cardarella and Dr. Geis testified that they could not specifically recall discussing Dr. Geis's report, but both men were certain they did have such a discussion. Dr. Geis could not specifically recall whether he and Cardarella discussed the possibility of his testifying at the sentencing phase of the trial.

Cardarella said that he did not give any consideration to having Dr. Geis testify in the sentencing phase. Cardarella testified that he could not recall a strategic reason for not calling Dr. Geis at sentencing. Cardarella said that he did call some of Vaca's relatives during the guilt phase in order to elicit testimony about Vaca's mental issues and disability. Cardarella wanted the jury to conclude from that testimony that Vaca could not be responsible for the robberies.

The motion court denied the claim for relief raised in the postconviction motion. The Missouri Court of Appeals, Western District, affirmed the motion court's judgment in a five-to-four *en banc* opinion. *Vaca v. State*, 2009 WL 3254560 (Mo. Ct. App., Oct. 13, 2009). The Missouri Supreme Court granted Vaca's application for transfer, and issued a six-to-one opinion on June 15, 2010, granting Vaca's

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[1] *State v. Vaca*, 204 S.W.3d 754 (Mo. Ct. App. 2006).

claim of ineffective assistance of counsel at sentencing and remanding to the trial court for a new sentencing phase trial. *Vaca v. State*, 314 S.W.3d 331, 337 (Mo. 2010); App. at A13-A14.

The court articulated the two-part test for evaluating a claim of ineffective assistance of counsel that this Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). App. at A8. The court stated that Vaca was first required to demonstrate that his counsel's representation fell below an objective standard of reasonableness, and that Vaca must then show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. App. at A8. The court further quoted *Strickland* in observing that a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. App. at A8. The court found that counsel's failure to consider presenting Dr. Geis's report fell below an objective standard of reasonableness and that, "This omission, in front of *this particular jury*, undermines this Court's confidence in the sentencing phase's outcoome." App. at A12 (emphasis in original). The court then stated:

> While Dr. Geis' testimony and report may have helped Vaca, it may have also embittered the jury. This Court has noted that counsel strategically concluding so has been precisely reasonable in previous sentencing cases. As such, the holding of this case is not that counsel was ineffective for not calling Dr. Geis. Rather, this case rests on the fact that the question of whether to call Dr. Geis was never considered.

App. at A12-A13 (footnotes omitted). In remanding the case for a new sentencing phase trial, the court added the following caveat:

> This Court's holding should not be construed to direct future defense counsel for Vaca to either admit or omit Dr. Geis' testimony during his new sentencing phase. Rather, what is required is that future counsel give due consideration to the question before making a strategic choice.

App. at A13.

Judge Fischer dissented from the majority opinion, stating that it "strays from the well-settled proposition that *Strickland* prejudice cannot be proven by mere speculation." App. at A15 (footnote omitted). The dissent found that the principal opinion's conclusion that Dr. Geis's testimony may have helped Vaca or may have hurt him was admittedly speculative. App. at A15. The dissent stated that prejudice must be definite and identifiable to sustain a claim of ineffective assistance of counsel, and noted that the court had previously rejected claims that counsel was ineffective for failing to put on mental health testimony, because the effect of that testimony on the outcome was speculative. App. at A16 (citing *State v. Kenley*, 952 S.W.2d 250 (Mo. 1997)).

REASONS FOR GRANTING THE PETITION

1. The Missouri Supreme Court's opinion continues a recent trend of effectively expanding the scope of the per se prejudice rule established in *United States v. Cronic* by granting relief on a claim of ineffective assistance of counsel for failure to present evidence without requiring a showing of a reasonable probability of a different result had the evidence been presented.

While the Missouri Supreme Court cited *Strickland v. Washington's* performance and prejudice test to resolve Vaca's claim of ineffective assistance of counsel, the court did not actually apply it. Instead, it opened the door to an expansion of the limited rule of per se prejudice announced in *United States v. Cronic*. The *Vaca* decision is just the latest example of the Missouri Supreme Court's willingness to excuse defendants from actually demonstrating prejudice when counsel has failed to elicit expert testimony about that defendant's mental health issues. The Missouri Supreme Court's approach is an unwarranted expansion of *Cronic's* limited categories of exceptions to *Strickland's* prejudice requirement and is contrary to the narrow application of *Cronic* by this Court, the United States courts of appeals, and other state courts of last resort. If the Missouri Supreme Court is allowed to take this approach to mental health evidence, there will be no discernable end to the types of ineffective assistance claims that might also be deemed worthy of a presumption of prejudice in the future. The boundaries of the per se prejudice rule will be defined solely by the state

court's sensitivities and perceptions about the importance of certain types of evidence.

The Missouri Supreme Court's approach also presents practical problems. By not requiring proof that counsel's failure to present mental health evidence created a reasonable likelihood of a different result, and by not requiring counsel to present mental health evidence on remand, the Missouri Supreme Court is permitting new trials to be conducted on the same evidence and theories that were presented in the original trial. Scarce and valuable judicial resources will thus be wasted on unnecessary retrials. This has already happened in one case. It very well may happen in *Vaca's* case and could continue to happen in future cases – all in the name of federal constitutional rights.

a. Strickland and Cronic standards.

Strickland set forth a two-part test for determining whether a conviction should be reversed because the defendant received ineffective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The reasonable probability standard requires more than showing that an error had some conceivable effect on the outcome of a case, but does not require a defendant to show that counsel's

deficient performance more likely than not altered the outcome. *Id.* at 693. Unless a defendant shows both deficient performance and prejudice, it cannot be said that the conviction or sentence resulted from a breakdown in the adversary process that rendered the result unreliable. *Id.* at 687.

On the same day that *Strickland* was decided, this Court also handed down its opinion in *United States v. Cronic*, 466 U.S. 648 (1984). In that case, the Court identified three situations involving the right to counsel where prejudice would be presumed, relieving the defendant of the burden of showing a reasonable probability of a different outcome. *Id.* at 658-59. The first situation is where there is a complete denial of counsel at a critical stage in the proceeding. *Id.* at 659, 662. The second situation is where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. And the third situation is when counsel is called upon to render assistance under circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60.

Since *Cronic* was issued, the Court has taken care to limit its scope. In *Mickens v. Taylor*, the Court clarified that *Cronic* is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable. *Mickens v. Taylor*, 535 U.S. 162, 166 (2001).

In *Bell v. Cone*, this Court could have enlarged one of the *Cronic* exceptions to cover claims similar to those raised by Vaca – that counsel was ineffective

at the sentencing phase of trial by failing to adduce mitigating evidence at sentencing and by waiving closing argument. *Bell v. Cone*, 535 U.S. 685, 692 (2002). The defendant there argued that his claim fell within the second *Cronic* exception – that his attorney failed to subject the prosecutor's case to meaningful adversarial testing. *Id.* at 696. The Court clarified that for that second exception to apply, the attorney's failure to test the prosecutor's case "must be complete." *Id.* at 697. The Court went on to state that counsel's mere failure to contest the prosecution at specific points in the proceeding is a difference "not of degree but of kind," for purposes of distinguishing the rule of *Strickland* from the rule of *Cronic*. *Id.* The Court concluded that counsel's alleged errors of failing to offer mitigating evidence and waiving closing argument "are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components." *Id.* at 697-98.

The Court also declined to expand the scope of the second *Cronic* exception in *Florida v. Nixon*, 543 U.S. 175 (2004). There, the Court found that a presumption of prejudice should not have been applied based solely on the defendant's failure to provide express consent to trial counsel's strategic decision to concede guilt and concentrate on sparing the defendant from the death sentence. *Id.* at 178-79, 190.

b. The per se prejudice rule has been narrowly construed by lower courts.

Consistent with *Bell v. Cone* and *Florida v. Nixon*, the United States courts of appeals and state courts of last resort have been careful to limit the

application of the per se prejudice rule to the categories identified by this Court. In particular, several circuits have drawn the distinction between *Cronic's* per se rule and *Strickland's* prejudice requirement in terms of whether counsel provided no defense at all, versus bad, even deplorable, assistance.

One of those courts is the Fourth Circuit, which warned against extending the per se prejudice rule to the point that it swallows *Strickland's* actual prejudice rule:

> If we were to broaden the per-se prejudice exception to *Strickland*, we would only add an extra layer of litigiousness to ineffective assistance law. To designate certain categories of cases as *Cronic* "constructive denial" cases and others as *Strickland* "deficient performance" cases would promote a new threshold area of debate and complicate the handling of this most common area of contention on collateral review.

Glover v. Miro, 262 F.3d 268, 277 (4th Cir. 2001). The court found that a per se prejudice rule did not apply to a claim that counsel had limited time to prepare the defense case and interview alibi witnesses. *Id.* at 278.

The Fifth Circuit has described *Cronic's* per se prejudice rule as applying to "only a very narrow spectrum of cases" where counsel's ineffectiveness was so egregious that the defendant was effectively denied any meaningful assistance at all. *Johnson v. Cockrell*, 301 F.3d 234, 238 (5th Cir. 2002). The court found that while counsel's trial strategy may have

been mistaken, such a "strategic blunder" or "bad lawyering" was insufficient to support a *Cronic* claim of per se prejudice. *Id. See also Gochicoa v. Johnson*, 238 F.3d 278, 285 (5th Cir. 2000) (stating that the critical distinction between *Strickland* and *Cronic* is whether the defendant asserts that he received incompetent counsel or none at all).

The First Circuit has also noted the narrow scope of the per se prejudice rule, stating that even egregious attorney error is subject to *Strickland's* prejudice standard. *United States v. Theodore*, 468 F.3d 52, 56 (1st Cir. 2006). The court found that counsel's efforts on the defendant's behalf during the sentencing phase of trial were "meager," but that a per se presumption of prejudice was not appropriate because counsel had not failed *entirely* to oppose the prosecution. *Id.* at 57.

The Sixth Circuit concluded that the *Strickland* prejudice standard, rather than the *Cronic* presumption of prejudice, applied to a claim that counsel was ineffective for failing to cross-examine key government eyewitnesses. *Moss v. Hofbauer*, 286 F.3d 851, 861 (6th Cir. 2001). The court found that counsel's performance, whether good or bad, was not the equivalent of being physically or mentally absent from trial. *Id.* at 862.

The Seventh Circuit has also rejected attempts to extend *Cronic's* per se prejudice rule to claims involving substandard performance by counsel. *Davis v. Vannata*, 438 F.3d 707, 711-12 (7th Cir. 2006); *Patrasso v. Nelson*, 121 F.3d 297, 302 (7th Cir. 1997).

State courts of last resort have also declined to apply *Cronic's* per se prejudice rule to ordinary claims of deficient performance by counsel.

The Mississippi Supreme Court has found that a per se prejudice rule "is reserved only for those extreme cases in which counsel fails to present any defense." *Branch v. State*, 882 So. 2d 36, 65-66 (Miss. 2004). That court thus found that a defendant was not relieved of his burden of proving prejudice when he alleged various errors by counsel, including a failure to present mitigating evidence at sentencing. *Brawner v. State*, 947 So. 2d 254, 261, 263 (Miss. 2006).

The Texas Court of Criminal Appeals declined to apply *Cronic*'s presumption of prejudice where counsel provided active and zealous advocacy, even though the defendant claimed counsel's advocacy was insufficient. *Ex parte McFarland*, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005).

The Michigan Supreme Court found that *Strickland's* prejudice requirement, rather than *Cronic's* presumption of prejudice, applied to a claim that counsel erred in advising the defendant that he could waive his right to counsel at a police interrogation. *People v. Frazier*, 733 N.W.2d 713, 721 (Mich. 2007).

The Oregon Supreme Court found that a claim of numerous errors by trial counsel did not meet the standard for a presumption of prejudice, even though counsel did make some mistakes in his representtation. *Ryan v. Palmateer*, 108 P.3d 1127, 1133, 1139 (Or. 2005).

The Iowa Supreme Court emphasized the narrow scope of per se ineffectiveness of counsel in finding that such a per se rule did not apply to counsel's failure to insist on a full open court colloquoy in a guilty plea proceeding. *State v. Moore*, 638 N.W.2d 735, 739 (Iowa 2002).

And several courts have held that the per se prejudice rule does not apply to complaints about counsel's strategic and tactical choices. *See, e.g., Chavez v. State*, 12 So. 2d 199, 210-12 (Fla. 2009); *Walker v. State*, 892 A.2d 547, 562-63 (Md. 2006); *Commonwealth v. Cousin*, 888 A.2d 710, 715, 723 (Pa. 2005).

c. *Missouri Supreme Court's approach is contrary to the narrow scope of the per se prejudice rule.*

While this Court and the courts listed above have been careful to narrowly limit application of the per se prejudice rule, the Missouri Supreme Court has shown a willingness to effectively create a new category of per se prejudice. That new category involves cases where there is some indication that the defendant may have mental health issues, but counsel does not present expert mental health evidence at trial. *Vaca* is only the latest example of the Missouri Supreme Court's openness to mandating new trials in those types of cases on federal constitutional grounds while relieving the defendant of any burden of demonstrating prejudice. That approach implicates the Fourth Circuit's concern (*see* p.12, *supra*) by threatening to expand the per se prejudice rule to the point that it swallows *Strickland's* actual prejudice rule. *Glover*, 262 F.3d at 277. It also ignores the standard adopted and

applied by many courts that limits per se prejudice to a complete failure of advocacy rather than discrete errors in portions of the representation – a standard derived from this Court's statements in *Cronic* and *Mickens*.

The Missouri Supreme Court's approach is also problematic because it has already created practical problems. In a separate case, the court, by denying transfer, let stand an opinion by the Missouri Court of Appeals, Western District, that remanded for a new trial because counsel's failure to prove the defendant's indigence prevented the defendant from obtaining funds to retain an expert to evaluate the defendant's mental state at the time of the offense and his competency to proceed. *Williams v. State*, 254 S.W.3d 70, 83 (Mo. Ct. App. 2008). The Court of Appeals found that the defendant was prejudiced even though he produced no evidence as to what an expert would have found had one been retained or how the expert's assistance would have changed the outcome of the trial. *Id.* at 82-83. In remanding for a new trial, the Court of Appeals did not enter any orders requiring that an expert be retained for that second trial. *Id.* at 83.

And when the case was returned to the trial court on remand, defense counsel informed the court that he had decided not to present any expert testimony on the defendant's mental state after determining that such testimony would not be helpful. The defendant was thus getting a second trial that would consist of the same evidence presented at the first trial. That prompted the State to file a motion to recall the mandate with the Missouri Supreme Court, seeking to have the original conviction reinstated. The court denied that motion.

As a result, the state is being forced to prosecute Williams a second time even though there was no error in the first trial and the second trial will be duplicative of the first. That is at odds with this Court's interest in defining the scope of collateral review in a way that seeks to reasonably conserve scarce judicial resources. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Here, in remanding Vaca's case for a new sentencing hearing, the Missouri Supreme Court explicitly stated that counsel would not be required to present Dr. Geis's testimony, or any other mental health evidence. App. at A13. Instead, counsel need only *consider* whether to present it. App. at A13. Should counsel, after due consideration, decide that the mental health evidence was more likely to be harmful than helpful, the end result would be like that in *Williams*, with the trial court empaneling a new jury to hold a second sentencing hearing that would be nearly identical to the first in terms of the evidence presented. That would be a misuse of judicial resources that are better applied to other cases.

2. The Missouri Supreme Court's opinion conflicts with decisions from other courts that have considered the prejudicial effect of not presenting "double-edged" mental health evidence.

If the Missouri Supreme Court's decision is viewed as actually applying *Strickland's* prejudice prong – i.e., if the opinion is read as holding that there is a reasonable probability that Dr. Geis's testimony would have favorably affected the outcome

of the trial – that holding conflicts with how this Court and other courts have handled claims of failure to present evidence that has the potential to damage the defense case. While most courts have found no prejudice from the failure to present such "double-edged" evidence, the Missouri Supreme Court found prejudice despite an express acknowledgement of the potentially harmful nature of the unpresented mental health evidence.

This Court has addressed how the *Strickland* standard is to be applied to claims that counsel was ineffective for failing to present mitigating evidence at sentencing. *Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009). The Court stated that the defendant had to show a reasonable probability that a competent attorney who was aware of the available mitigating evidence would have introduced it at sentencing, and that had the jury been confronted with the mitigating evidence, there was a reasonable probability that it would have returned with a different sentence. *Id.* *Wong* reversed a decision by the United States Court of Appeals for the Ninth Circuit that vacated the defendant's sentence on habeas review, after finding that the Court of Appeals failed to apply the *Strickland* prejudice standard. *Id.* at 390-91. And in finding that the defendant was not prejudiced by the failure to present additional mitigating evidence, including mental health evidence, the Court noted that some of the unpresented evidence could have opened the door to allow the state to present evidence that would have been damaging to the defendant's case. *Id.* at 388-89.

The approach taken by the Missouri Supreme Court in *Vaca* (and by sanctioning the state court of

appeals decision in *Williams*) not only conflicts with *Wong*, it represents a retreat from the approach the court has taken in past cases. In *State v. Link*, the court considered a claim that counsel was ineffective for failing to present any psychological experts in the penalty phase of a capital trial. *State v. Link*, 25 S.W.3d 136, 149 (Mo. 2000). The court found that the defendant did not establish prejudice, in part because the psychologist's report contained information that would have verified other expert opinions that the defendant was anti-social, aggressive, and a serial rapist. *Id.* The dissent in *Vaca* noted another prior Missouri Supreme Court opinion that conflicts with *Vaca*. App. at A16. In *State v. Kenley*, the court found no prejudice from defense counsel's failure to obtain additional psychiatric evaluations of a capital defendant because those evaluations could have opened the door to potentially damaging evidence. *State v. Kenley*, 952 S.W.2d 250, 268 (Mo. 1997).

The United States Court of Appeals for the Fourth Circuit reached a similar conclusion in finding that a capital defendant was not prejudiced by counsel's failure to present mitigating evidence at sentencing about his mental impairment and his upbringing in a dysfunctional and abusive home. *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir. 1995). The court concluded that the defendant could not satisfy *Strickland*'s "reasonable probability of a different outcome" standard because the mitigating evidence of mental illness or a history of abuse could have also contained sufficient evidence to support a finding of future dangerousness. *Id.*

Other courts have given similar treatment to claims of failure to present evidence with the potential to be both mitigating and aggravating. The

Fifth Circuit found that a defendant was not prejudiced by counsel's failure to discover evidence of mental illness because "the evidence was doubled-edged in nature." *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000). Accordingly, trial counsel's failure to discover the evidence did not create a probability of a different outcome that was sufficient to undermine confidence in the outcome. *Id.* The Fifth Circuit made a similar finding in rejecting a claim that counsel was ineffective for failing to discover and present penalty phase evidence of the defendant's abusive upbringing as detailed in his welfare file. *Ransom v. Johnson*, 126 F.3d 716, 721-22 (5th Cir. 1997). The court ruled that the defendant did not meet his burden of establishing prejudice because the welfare file also contained evidence that would have been detrimental to his case. *Id.* at 724.

The Tenth Circuit has likewise found no prejudice from the failure to present evidence that would have been at least as damaging to the defendant as it would have been helpful. *Davis v. Executive Dir. Dept. of Corr.*, 100 F.3d 750, 760-61 (10th Cir. 1996). The damaging evidence that would have been revealed to the jury included the defendant's history of violence and his abusive behavior that was fueled by alcohol. *Id.* at 761.

The Eighth Circuit has rejected a claim that counsel was ineffective for failing to present expert testimony at a non-capital sentencing about the defendant's diminished mental capacity. *King v. Kemna*, 266 F.3d 816, 825 (8th Cir. 2001). The court characterized as "rank speculation" the defendant's argument that the evidence might have persuaded the trial court to impose a more lenient sentence. *Id.*

It concluded that the defendant had thus failed to establish *Strickland* prejudice. *Id.*

The Florida Supreme Court has applied the "double-edged sword" standard to reject claims that defense counsel was ineffective for failing to present mitigating evidence of the defendant's mental health background. *See, e.g., Willacy v. State*, 967 So. 2d 131, 144 (Fla. 2007). The court found that prejudice is not established where the evidence not presented "'would likely have been more harmful than helpful.'" *Id.* (quoting *Evans v. State*, 946 So. 2d 1, 13 (Fla. 2006)).

Other state courts of last resort, while not applying the "double-edged sword" standard, have nonetheless rejected claims of ineffectiveness for failure to present potential mitigation evidence where the defendant failed to establish a reasonable probability that the unpresented evidence would have changed the outcome of the sentencing proceeding. *See, e.g., In re Washington*, 838 A.2d 87, 90-91 (Vt. 2003); *Roitaille v. State*, 971 So. 2d 43, 71 (Ala. Crim. App. 2005); *People v. Gacy*, 530 N.E.2d 1340, 1345 (Ill. 1988). In *Gacy*, the Illinois Supreme Court rejected an argument that a defendant was prejudiced because counsel failed to present mitigating evidence that might have convinced the jury to impose a life sentence rather than death. *Id.* The court noted that the defendant's argument was incompatible with the *Strickland* standard of a reasonable probability of a different outcome. *Id.*

3. The Missouri Supreme Court's opinion conflicts with the Court's opinion in *Strickland v. Washington* by considering the particular idiosyncrasies of the jury in evaluating prejudice from counsel's performance.

The Court declared in *Strickland* that the assessment of prejudice in a claim of ineffective assistance of counsel "should not depend on the idiosyncracies of the particular decisionmaker," and that those particular idiosyncrasies "are irrelevant to the prejudice inquiry." *Strickland*, 466 U.S. at 695. The Missouri Supreme Court disregarded those admonitions. It noted that the jury sent four questions to the trial court during its guilt phase deliberations, three of which were related to Vaca's mental condition. App. at A5, A11. After finding that counsel was unreasonable for failing to consider using Dr. Geis's report in the sentencing phase of the trial, the Missouri Supreme Court concluded, "This omission, in front of *this particular jury*, undermines this Court's confidence in the sentencing phase's outcome."[2] App. at A12 (emphasis in original). But the Missouri Supreme Court's conclusion conflates the standard for determining the reasonableness of counsel's performance with the standard for measuring prejudice.

The jury questions submitted during guilt phase deliberations could properly be considered in assessing the reasonableness of counsel's failure to consider presenting Dr. Geis's report during the sentencing phase. *See Strickland*, 466 U.S. at 695

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[2] The court then noted in the very next sentence the double-edged nature of Dr. Geis's report and testimony. App. at A12.

(stating that idiosyncrasies of the particular decisionmaker may, to a limited extent, affect the performance inquiry). But the phrase "undermine[s] confidence in the outcome" is part of the definition of prejudice. *See id.* at 694 ("A reasonable probability [that the result of the proceeding would have been different] is a probability sufficient to undermine confidence in the outcome."). The Missouri Supreme Court thus made a finding of prejudice based on the particular idiosyncrasies of the jury that heard Vaca's case. That directly contradicts the *Strickland* standard. In fact, *Strickland* stated that evidence of the actual decision making process, if not part of the record, should not be considered in the prejudice determination. *Id.* at 695. The record in this case contained no evidence of the jury's decision making process in the sentencing phase of the trial. What the Missouri Supreme Court did was take the little evidence that did exist as to the decision making process in the guilt phase and use it to determine prejudice in the sentencing phase.

But those guilt phase questions do not provide any insight into the jury's sentencing decision. There may be cases where statements by the sentencing judge clearly indicate that an error by counsel in either the sentencing or guilt phases of a trial influenced the length of the sentence. *See* Note, *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims*, 119 Harv. L. Rev. 2143, 2151, 2162 n.89 (2006). But no such certainty attaches to the jury questions at issue here. There is no way to know what concerns prompted the questions, how many of the jurors held those concerns, or what the effect on the jury would have been, during sentencing deliberations, had the questions been answered.

The Missouri Supreme Court's reliance on those questions is another example of how it found prejudice based on speculation. This Court should grant certiorari to ensure that reviewing courts consider only proper matters in evaluating prejudice from counsel's performance at sentencing proceedings.

4. The Missouri Supreme Court has set a lower bar for vacating non-capital sentences than exists for vacating capital sentences and could create precedent in an undeveloped area of law.

Of the cases cited in section 2, *supra*, all but *King v. Kemna* and *In re Washington* were capital cases. The Missouri Supreme Court thus vacated a non-capital sentence on grounds that it and other courts, including this Court, have found insufficient to vacate a capital sentence. Besides the conflict with *Strickland* noted above, the Missouri court's opinion is also at odds with this Court's recognition that "death is different," that has led to stringent guidelines for capital sentencing and heightened judicial scrutiny of capital cases in both the state and federal courts. *See Gregg v. Georgia*, 428 U.S. 153 (1976); Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. Rev.1069, 1071 (2009). The *Vaca* opinion thus anomalously sets a lower bar for vacating non-capital sentences than this Court has set for vacating capital sentences.

And if the Missouri Supreme Court's opinion stands, it will create precedent in an undeveloped area of law. *Strickland* and *Wong* were decided in the context of a claim that counsel provided ineffective

assistance of counsel at the sentencing phase of a capital case. *Strickland*, 466 U.S. at 675, 683; *Wong*, 130 S. Ct. at 384. In *Strickland*, the Court expressly declined to consider the role of counsel in non-capital sentencing. *Strickland*, 466 U.S. at 686. The Court has subsequently extended the two-prong *Strickland* test to a non-capital case that involved the erroneous application of the then-mandatory Federal Sentencing Guidelines. *Glover v. United States*, 531 U.S. 198, 199-200 (2000). But the Court has not yet addressed the standard to be applied to ineffective assistance claims in a discretionary non-capital sentencing system,[3] and the substantive law of non-capital sentencing remains largely undeveloped. Hessick, *supra*, at 1071.

Because of the undeveloped nature of non-capital sentencing law, the Missouri Supreme Court's opinion in *Vaca* could become a precedent that other courts follow in evaluating claims of ineffective assistance of counsel in non-capital sentencing proceedings. That precedent, if allowed to stand, would eviscerate the prejudice requirement for those claims and would permit sentences to be set aside on little more than speculation. This Court surely did

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[3] The sentencing scheme under which Vaca was sentenced permits the jury to select any sentence within the range of punishment set by statute, and the jury's discretion is not limited by statute or regulation. Mo. Rev. Stat. § 557.036.3 (Cum. Supp. 2003), *see*, Hessick, *supra*, at 1071-72 (defining indeterminate and discretionary sentencing systems). Sentencing guidelines are available to the court when it imposes sentence, but the court retains the discretion to impose a sentence that is either lower or greater than the sentence recommended by the guidelines. Mo. Rev. Stat. § 558.019.7 (Cum. Supp. 2003). The only limit on the court's discretion is that it cannot exceed the sentence declared by the jury. Mo. Rev. Stat. § 557.036.5 (Cum. Supp. 2003).

not intend that non-capital sentences could be so easily vacated when it set a higher bar in *Strickland* for vacating capital sentences.

In addition to the reasons cited above, this Court should grant certiorari to ensure that prejudice in non-capital sentencing proceedings is treated consistently with the principles set out in *Strickland* and its progeny.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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