No. 13-963

IN THE
Supreme Court of the United States

MISSOURI,
Petitioner,

v.

DAVID MCNEAL,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY

I. By refusing to adhere to *Strickland*, and by effectively altering the test for determining *Strickland* prejudice, the Missouri Supreme Court decided a federal question.

Respondent argues that the Missouri Supreme Court's decision "was based on state law" and that "[n]o court has yet addressed the question whether respondent received ineffective assistance of counsel" Resp.Br. 6. Respondent asserts that, because the Missouri court ordered an evidentiary hearing to resolve his claim of ineffective assistance of counsel, "[t]he only thing that has been decided in this case is whether respondent is entitled to a hearing under state law" Resp.Br. 6.

But respondent is incorrect. Under Missouri law, an evidentiary hearing is required in any case where the movant has, *inter alia*, alleged facts showing prejudice. App. A4 (citing *Webb v. State*, 334 S.W.3d 126, 128 (Mo. 2011)). Thus, here, by concluding that respondent alleged facts warranting an evidentiary hearing, the Missouri court necessarily concluded that respondent alleged facts showing *Strickland* prejudice. And because the Missouri court refused to adhere to *Strickland* and effectively altered the test for evaluating prejudice, the Missouri court decided "the federal question of *Strickland* prejudice." *See Missouri v. Frye*, 132 S.Ct. 1399, 1411 (2012)

It is plain from the Missouri court's opinion that the remand for a hearing on *Strickland*'s prejudice prong was merely incidental to the remand for a hearing on *Strickland*'s performance prong. As to performance, the Missouri court concluded that counsel's strategic reasoning (if any) was not clear from the record. App. A8. But as to prejudice, the

Missouri court did not identify any additional factual controversies that needed to be resolved at a hearing. To the contrary, the Missouri court made plain that the trial court would have been obligated to submit the lesser-offense instruction to the jury (if it had been requested by counsel) and that the absence of the lesser-offense instruction was prejudicial. App. A7-A10. The Missouri court concluded that "the failure to provide the jury with the option of a lesser-included offense deprives the defendant of a fair trial, even if the jury ultimately convicts the defendant of the greater offense." App. A7-A10.

Moreover, in analyzing prejudice, the Missouri court did not adhere to *Strickland*, and it refused to presume that the jury conscientiously followed the law in rendering its verdict. The Missouri court stated, "Even though juries are obligated 'as a theoretical matter' to acquit a defendant if they do not find every element of the offense beyond a reasonable doubt, there is a 'substantial risk that the jury's practice will diverge from theory' when it is not presented with the option of convicting of a lesser offense instead of acquittal." App. A11 (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

The Missouri court's refusing to adhere to the test set forth in *Strickland* was not an application of state law. If the Missouri court had not rejected *Strickland*'s express admonition that "a court should presume . . . that the judge or jury acted according to law," 466 U.S. at 694-95, and if the court had merely remanded the case for a hearing to resolve factual issues within the framework constructed by the Court in *Strickland*, then it could be reasonably argued that the Missouri court did not decide any federal question. But by rejecting a fundamental part of *Strickland*'s analysis, the Missouri Supreme Court

has significantly altered the test applicable to claims of ineffective assistance of counsel. And because all Missouri courts will be obligated to resolve future Sixth Amendment claims of ineffective assistance of counsel within that altered framework, the Missouri Supreme Court plainly decided "the federal question of *Strickland* prejudice." *See Frye*, 132 S.Ct. at 1411.

The question of how prejudice is evaluated under *Strickland*, or what constitutes *Strickland* prejudice, is an important question. As the Court observed in *Strickland*, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. To that end, the Court also observed that the question of whether a defendant was prejudiced is often more important than whether counsel's performance was consistent with professional standards. "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* Accordingly, the question of what constitutes *Strickland* prejudice is of paramount importance in resolving Sixth Amendment claims of ineffective assistance of counsel.

II. The jury's ability to consider lesser offenses under Missouri's instructional scheme does not alter the analysis, and there is a conflict among the lower courts.

In the petition, petitioner pointed out that juries are normally presumed to follow the law, and that respondent's jury, in finding respondent guilty of burglary, was directed to find him guilty only if it was convinced of certain facts beyond a reasonable doubt. Pet. 9-11. Accordingly, because failing to

submit a lesser-offense instruction would not have changed the evidentiary picture presented to the jury, petitioner argued that "absent the possibility of nullification, whimsy, caprice, or compromise on the part of the jury, there is no reasonable probability that the jury would have made different factual findings and rendered a different verdict." Pet. 11.

Respondent asserts that this argument "rests on the premise that the jury must acquit the defendant of the greater offense before it considers the lesser." Resp.Br. 7. He then points out that, under Missouri's instructional scheme, the jury need not first acquit the defendant of the greater offense before the jury can consider lesser offenses. Resp.Br. 7. He argues that, "for this reason, the fact that a defendant was convicted of the greater offense does not imply that the jury would not have convicted him of a lesser included offense instead, if the jury had been given the opportunity to do so." Resp.Br. 8.

But respondent apparently misunderstands the petitioner's argument. Petitioner has never argued that the jury could not (or even that it would not) have considered a lesser-included offense due to any purported requirement that it must first acquit the defendant of the charged offense. Rather, petitioner's argument rests on the indisputable fact that the jury found beyond a reasonable doubt that respondent was guilty of burglary. Thus, the question—in light of the jury's actual verdict in this case—is whether there is a reasonable probability that the submission of a lesser-included offense instruction for trespass would have caused the jury to make different factual findings. However, where counsel's alleged error has no effect on the evidentiary picture presented to the jury, it is only by resorting to speculation and lawlessness in the verdict that respondent can

suggest that the jury would have made different factual findings.

Respondent also fails to recognize what the jury's verdict on the charged offense communicates. Rather than implying anything, the verdict shows that the jury found and concluded beyond a reasonable doubt that respondent was guilty of burglary. In his brief, respondent points out that, under Missouri's method of instructing, "if the jury had found itself divided on the burglary count, the jury could have stopped deliberating on the burglary count and turned to the trespass count." Resp.Br. 8. He then asserts that the jury "could have reached a guilty verdict on the trespass count without ever coming to a final decision on the burglary count." Resp.Br. 8. In other words, respondent asserts that he was prejudiced because his jury was not given the opportunity to follow a similar course and find him guilty of the lesser offense without going through the trouble of determining whether he was guilty of burglary.

But this speculative and hypothetical argument is foreclosed by *Strickland*. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 466 U.S. at 695. Thus, even if it can be speculated that the jury in respondent's case was divided in its deliberations at some point, there is no reason to assume—and no objective, reasonable probability—that the jury would have arbitrarily curtailed its deliberations and delivered a compromise verdict on the lesser offense instead of carrying out its assigned task of determining whether respondent was guilty of the charged offense of burglary. Moreover, in light of the jury's unanimous finding that respondent *was* guilty of burglary, it is extraordinary for respondent

to now suggest—absent any change in the evidence—that the jury would have made some other factual finding (*i.e.*, that he did not have the culpable mental state when he entered the dwelling).

Respondent contrasts Missouri instructions with those of Florida, which "specifically allow[] the jury to consider a lesser-included offense *only* if it decides that the main accusation has not been proved beyond a reasonable doubt[.]' " Resp.Br. 7 (quoting *Sanders v. State*, 946 So.2d 953, 958 (Fla. 2006)). However, while it would be even more extraordinary to find prejudice under Florida's instructional scheme, the difference between the instructional schemes does not permit a Missouri court to ignore *Strickland* and predicate prejudice on the speculative possibility that the jury might not have followed the law in rendering the verdict that it actually rendered.

And yet, that is precisely what the Missouri court did when it relied on *Beck v. Alabama*, 447 U.S. 625 (1980), and *Keeble v. United States*, 412 U.S. 205 (1973). The Missouri court was explicit; it stated: "Even though juries are obligated 'as a theoretical matter' to acquit a defendant if they do not find every element of the offense beyond a reasonable doubt, there is a 'substantial risk that the jury's practice will diverge from theory' when it is not presented with the option of convicting of a lesser offense instead of acquittal." App. A10-A11. It is that "substantial risk" of the jury diverging from the law (and the defendant's alleged loss of a conviction on the lesser-included offense) that the Missouri court identified as giving rise to *Strickland* prejudice in this case.

The conflict between the analyses of the Missouri Supreme Court and the Florida Supreme Court is

stark, and it cannot be dismissed by a reference to different facts or slightly different instructions. The Missouri court has expressly rejected the notion that *Strickland*'s presumption precludes a finding of prejudice, and, instead, the Missouri court has concluded that the "substantial risk" that the jury might not have followed the law is sufficient to show *Strickland* prejudice. The Florida Supreme Court, on the other hand, has flatly rejected the notion that lawlessness of the part of the jury can support a claim of *Strickland* prejudice: "under *Strickland*, a defendant cannot, as a matter of law, demonstrate prejudice by relying on the possibility of a jury pardon, which by definition assumes that the jury would have disregarded the law, the trial court's instructions, and the evidence presented." *Sanders*, 946 So.2d at 956; *see also State v. Grier*, 246 P.3d 1260, 1272 (Wash. 2011) ("In *Strickland*, the Court indicated that, '[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law.' ").

This basic conflict among the lower courts cannot be attributed to, or dismissed by, mere differences in the facts or differences in state law. There are, to be sure, some factual differences among the cases. But that is almost always true. At bottom, there is a fundamental difference of opinion as to whether a jury's actual verdict should be accorded the ordinary presumption of reliability, or whether it should be viewed with skepticism in light of the practical reality that juries do not always follow the law.

The contours of this basic conflict are set out in greater detail in the petition but, in brief, the Missouri court in this case, and the United States Court of Appeals for the Third Circuit in *Breakiron v.*

Horn, 642 F.3d 126, 138-39 (3rd Cir. 2011), have held that the "substantial risk" that the jury will "diverge" from following the law is sufficient to demonstrate *Strickland* prejudice. Conversely, the United States Court of Appeals for the Eleventh Circuit and various state courts of last resort have relied upon, or cited, *Strickland*'s presumption of juror reliability in rejecting such claims. *See Johnson v. Alabama*, 256 F.3d 1156, 1183 (11th Cir 2001); *Fair v. Warden*, 559 A.2d 1094, 1099-1100 (Conn. 1989); *Autrey v. State*, 700 N.E.2d 1140, 1142 (Ind. 1998); *Sanders v. State*, 946 So.2d at 956-60; *State v. Grier*, 246 P.3d 1260, 1268, 1272-73 (Wash. 2011).

This conflict will result in disparate treatment of this sort of Sixth Amendment claim. Thus, "it is important to settle upon a single formulation for this Court and other courts to employ in deciding this kind of federal question." *See Boyde v. California*, 494 U.S. 370, 379 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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