

CAPITAL CASE

No. 17-6938

In the Supreme Court of the United States

MICHAEL TISIUS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF MISSOURI**

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE - QUESTIONS PRESENTED

The Missouri Supreme Court purported to apply *Strickland v. Washington*, 466 U.S. 668 (1984). However, the Missouri Supreme Court applied a performance prong imposing an intolerable burden – “unqualified support.” Given the factual intensity of a proper performance prong inquiry, no type of evidence satisfies such an impossibly high burden that amounts to an irrebuttable presumption. Additionally, the Missouri Supreme Court applied a modified prejudice prong analysis involving the use of an outcome determinative prejudice standard that this Court rejected in *Williams v. Taylor*, 529 U.S. 362 (2000). The erroneous application of *Strickland* and its progeny leads to the following questions:

1. Whether the Missouri Supreme Court’s creation of an irrebuttable presumption of effectiveness complies with the Sixth Amendment and *Strickland*?
2. Whether the Missouri Supreme Court’s application of an outcome determinative test complies with the Sixth Amendment, *Strickland* and *Williams*?

REPLY IN SUPPORT

Petitioner does not contest that the Missouri Supreme Court at one point provided an appropriate citation to this Court's authority of *Strickland v. Washington*, 466 U. S. 668 (1984). However, the Missouri Supreme Court departed from this Court's precedent and policies in its application of the *Strickland* standard. As to *Strickland*'s performance prong, the Missouri Supreme Court erroneously imposed an "irrebuttable presumption" standard. As to *Strickland*'s prejudice prong, the court erroneously imposed an improper outcome-determinative test in conjunction with a heightened standard of proof requiring Petitioner to satisfy the preponderance-of-the-evidence standard (as opposed to the reasonable-probability standard) and prove that the omitted evidence would have swayed the entire jury be swayed (as opposed to just one juror).

Very little of the Missouri Supreme Court's *Strickland* assessment complies with this Court's directives. Accordingly, as this Court did in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court should grant certiorari and reaffirm that state courts cannot contravene this Court's authority and employ a modified, more-stringent *Strickland* test. In the alternative, this Court should grant, vacate, and remand this case to the Missouri Supreme Court to ensure that court assesses Petitioner's *Strickland* claims under the correct constitutional standard.

I. The Missouri Supreme Court improperly applied *Strickland*'s performance prong.

Respondent agrees that the language of the Missouri Supreme Court's opinion addressing whether counsel's failure to present available mitigating evidence was constitutionally deficient required Petitioner to prove that the omitted evidence would have "*unqualifiedly supported the theory put forward by the defense during the penalty phase retrial . . .*" (BIO at 3 (citing *Tisius v. State*, 519 S.W.3d 413, 420 (2017) (emphasis provided by Respondent)); BIO at 4 (citing

Tisius, 519 S.W.3d at 420 (concluding that the omitted evidence did not “wholly support the defense’s theory at trial.”).) Respondent contends that this language means that “counsel [cannot be] constitutionally deficient for choosing to present evidence that is contrary to, inconsistent with, or potentially harmful to the defense’s trial strategy and case.” (BIO at 8-9.)

In several ways, Respondent’s argument actually supports Petitioner’s position. First, Respondent’s restatement of the *Tisius*’s court’s rule includes the irrebuttable presumption Petitioner asserts is erroneous. If counsel cannot be ineffective for omitting evidence that is potentially harmful to the defense’s trial strategy and case, counsel could never be effective, because nearly all evidence in a contested trial at least has the potential to be harmful in some way.

Second, the cases that Respondent cites for the proposition that Missouri’s rule for assessing deficient performance also contain this same irrebuttable presumption. For example, Respondent quotes the following language from *Rousan v. State*, 48 S.W.3d 756, 587 (Mo. 2001): “When defense counsel believes a witness’ testimony ‘would not *unqualifiedly support his client’s position*, it is a matter of trial strategy not to call him to the stand, and the failure to call such witness does not constitute ineffectiveness of counsel.” (BIO 9 (emphasis in original)). “Unqualified” means “not modified, limited, or restricted in any way; without reservations[; or] absolute.” *Unqualified*, Dictionary.com, <http://www.dictionary.com/browse/unqualifiedly?s=ts> (last visited 2/13/2018). Thus, under the natural meaning of “unqualifiedly,” the court’s language imposes an absolute standard—for counsel’s performance potentially to be considered deficient, the omitted evidence must have supported the defense case absolutely without potential blemish. Again, virtually no evidence absolutely supports a defendant’s position without potential blemish. Under the rule of *Rousan*, so long as defense counsel believes omitted evidence would

not unqualifiedly support the defense, “the failure to call such witness does not constitute ineffectiveness of counsel.” 48 S.W.3d at 587. In other words, under *Rousan*, whether the evidence actually could have supported the defense or the case is irrelevant. If counsel believes, it did not wholly support the defense, regardless of how helpful the evidence could have been, counsel’s failure to present the evidence cannot have been ineffective.

Third, although Respondent appears to recognize that *Strickland* requires an inquiry into the reasonableness of a defense counsel’s decision to omit available evidence, Respondent’s analysis of the court’s decision establishes that Missouri Supreme Court in fact eschewed this component of *Strickland*. Instead, the Missouri Supreme Court applied the erroneous irrebutable presumption: because the evidence in question potentially could have harmed the case in some way, counsel could not have been ineffective. For example, Respondent posits that because the omitted mitigation evidence portrayed Petitioner’s father in a positive light, it was inconsistent with counsel’s defense asserting that Petitioner’s father’s abandonment made Petitioner susceptible to his accomplice’s influence as a substitute father figure. Because it was inconsistent, counsel could not have been ineffective for failing to present it. Similarly, because the omitted evidence potentially portrayed Petitioner himself in a negative light, the failure to present it could not constitute ineffective assistance of counsel.

As Respondent explains, because the omitted evidence potentially was harmful, the Court therefore dismissed any notion of deficient performance. But this analysis does not consider—as *Strickland* requires—whether counsel’s decision to not present the evidence was informed and reasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (explaining that the proper focus of the *Strickland* inquiry in failure-to-present-mitigating evidence-cases is “whether the investigation

supporting counsel’s decision not to introduce mitigating evidence of [the defendant’s] background was itself reasonable.”)

This Court repeatedly has held that the failure to present potentially harmful evidence can indeed constitute deficient performance. *See Williams*, 529 U.S. at 398 (“While [evidence of remorse], coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams’ childhood, filled with abuse and privation, or the reality that he was “borderline mentally retarded,” might well have influenced the jury’s appraisal of his moral culpability.”); *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (concluding that the state supreme court unreasonably discounted as unhelpful omitted evidence establishing that the defendant had gone AWOL because that evidence actually was consistent with the theory of mitigation). Accordingly, it is inappropriate to discount evidence as irrelevant or inconsequential just because it does not unqualifiedly support the defendant. *See Williams*, 529 U.S. at 398; *Porter*, 558 U.S. 30 at 44; *see also Porter*, 558 U.S. at 43 (concluding that it was “unreasonable to discount to irrelevance the evidence of [the defendant’s] abusive childhood, especially when that kind of history may have particular salience for a jury evaluating [the defendant’s] behavior in his relationship with [the victim].”).

In this case, even if evidence portraying Petitioner’s father in a positive light potentially was harmful to the case, it also was helpful to the case. Because the omitted evidence also showed how bad Petitioner’s home life was—as evidenced by the physical beatings he endured, his ragged clothing, the stench of urine accompanying him, his pervasive destitution—it underscored how important a father figure was to Petitioner. Moreover, although some of the omitted evidence potentially portrayed Petitioner in a bad light, it also supported the notion that

Petitioner's medical diseases were the root causes of his negative behavior, which again was consistent with the defense case.

As is clear from Respondent's brief, the Missouri Supreme Court did not undertake any analysis of whether the omitted evidence potentially could have supported Petitioner's defense. Instead, the Court determined that because the evidence potentially was harmful, counsel's failure to present it could not have been deficient. This analysis contravenes the rule of *Strickland* and its progeny. Moreover, as Respondent has shown, this error recurs with regularity in Missouri. (BIO at 9 (citing *Davis v. State*, 486 S.W.3d 898 (Mo. 2016); *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. 2002); *Rousan*, 48 S.W. 3d at 587; and *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. 1995)); see also *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005) ("If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance."); *Leisure v. State*, 828 S.W.2d 872, 875 (Mo. 1992) ("If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance of counsel.")).

Because the Missouri Supreme Court's decision applying a reformulated and impermissibly heightened *Strickland* performance standard conflicts with relevant decisions of this Court, and because this error recurs with regularity in Missouri post-conviction cases, this Court should grant review pursuant to Sup. Ct. R. 10(c). Cf. *Hinton v. Alabama*, 134 S.Ct. 1081 (2017); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam). In the alternative, this Court should grant, vacate, and remand this case to the Missouri Supreme Court to ensure that the court applies the correct *Strickland* standard. At minimum, this Court should hold Petitioner's case until it resolves *Rosales-Mireles v. United States*, Case No. 16-9493, which involves an

analogous misinterpretation of a legal standard. *Rosales-Mireles* is set for argument on February 21, 2018.

II. The Missouri Supreme Court’s prejudice analysis is an outlier and conflicts with the prejudice analysis this Court identified in *Strickland* and has applied since.

A. The Missouri Supreme Court erroneously applied an outcome-determinative test that failed to give adequate consideration to whether the result of the proceeding was fundamentally unfair or unreliable.

Respondent agrees that an outcome-determinative standard would be improper. (BIO 12.)

Respondent further agrees that the ultimate focus of the inquiry must be on the fairness of the proceeding. (BIO 13.)

If the ultimate focus of the inquiry must be on the fairness of the proceeding, then a reviewing court must consider how counsel’s failure to present mitigating evidence affected a defendant’s right to a fair trial. In other words, a reviewing court must assess the reliability of the result of the proceedings given counsel’s failure to use available mitigating evidence to counter the State’s evidence and argument. *See Rompilla v. Beard*, 545 U.S. 374, 386-93 (2005) (assessing prejudice resulting from counsel’s failure to rebut the aggravating evidence).

The Missouri Supreme Court’s analysis does not include such an assessment:

- “[T]here was not a reasonable probability of a different outcome.” *Tisius*, 519 S.W.3d at 427;
- “Mr. Tisius has not established that a reasonable probability exists that the result of the penalty phase would have been any different had the additional portions of Dr. Peterson’s prior testimony been presented to the jury.” *Id.*

Respondent does not point to any evidence suggesting otherwise. (BIO at 5-6, 13-14.) Thus, as in *Williams v. Taylor*, the Missouri Supreme Court committed error.

B. The Missouri Supreme Court erroneously imposed a higher burden of proof than the Constitution and this Court requires.

Respondent concedes that “[t]he Missouri Supreme Court requires post-conviction movants to prove claims raised in post-conviction motions by a preponderance of the evidence.” (BIO 14 (citing Mo. Sup. Ct. R. 29.15(i)).) Respondent further concedes that, accordingly, “the petitioner was required to prove his claim of ineffective assistance of counsel (including the *Strickland* prejudice prong) by a preponderance of the evidence.” *Id.* (citing *Tisius*, 519 S.W.3d at 420). However, Respondent contends that the “preponderance of the evidence” language did not subject Petitioner to a more-likely-than-not standard of proof. (BIO at 14.)

Respondent’s argument is unpersuasive for several reasons. First, Respondent does not offer any reason why this Court should not take the Missouri Supreme Court at its word. Word usage counts, particularly when describing the level of proof required for a legal claim. Similarly, those interpreting words must give them their ordinary and natural meaning. *See ElectriCities of N. Carolina v. F.E.R.C.*, 708 F.2d 783, 787 (D.C. Cir. 1983) (relying on the plain language of a regulatory commission’s order as evidence of the commission’s intent); *Cf Richards v. United States*, 369 U.S. 1, 9 (1962) (plain language of a statute). The Missouri Supreme Court’s language is direct, forthright, and not open to any other interpretation. Thus, this Court must give it its ordinary and natural effect. *See id.*

Second, Respondent does not cite to any cases stating that the preponderance-of-the-evidence standard is equivalent to *Strickland*’s reasonable-probability standard. Thus, Respondent has not offered any authority countering this Court’s specific holdings concluding that the preponderance-of-the-evidence standard is greater than the reasonable-probability standard and that the application of the preponderance-of-the-evidence standard to *Strickland* claims is clearly erroneous.

Respondent does rely on *Holland v. Jackson*, 542 U.S. 649 (2004), as support for the proposition that the Missouri Supreme Court actually applied the correct *Strickland* standard despite the court's references to the incorrect standard. However, because Petitioner's case distinguishes from *Holland*, Respondent's reliance on *Holland* is misplaced.

In *Holland*, this Court reviewed whether the state court opinion at issue required the petitioner to prove prejudice by a preponderance-of-the-evidence standard as opposed to a reasonable-probability standard. This Court construed the state court opinion via the lens of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 542 U.S. at 652-53. This Court determined that under AEDPA, the state court decision should be given the benefit of the doubt. *Id.* at 655. In *Holland*, the Court noted, the state court's language did not explicitly state that the preponderance-of-the-evidence standard was applicable to the prejudice prong of the *Strickland* analysis. *See id.* at 654-55. Thus, this Court held, even if the court's language suggested that it might not have applied the reasonable-probability standard, AEDPA requirements mandated that this Court resolve any ambiguity in favor of the state court. *Id.* at 655.

However, *Holland* did not disturb the Court's long-standing precedent that the application of a preponderance standard to the prejudice prong of a *Strickland* claim is erroneous. *See* Cert. Pet. at 18-19. Moreover, the constrictions of AEDPA recognized in *Holland* do not apply to this case. Thus, the question here is not whether the Missouri Supreme Court decision could have been correct. Rather, the question is whether it was correct.

Unlike in *Holland*, the state court here explicitly stated that the preponderance-of-the-evidence standard applied to the prejudice prong of the *Strickland* analysis. The plain language of both the Missouri rule and the Missouri Supreme Court interpreting that rule require a preponderance-of-the-evidence standard of proof. This language and the application of it directly

contradict opinions of this Court requiring the application of a lower standard of proof to the prejudice prong of *Strickland* claims.

The Missouri Supreme Court's usage of a preponderance-of-the-evidence standard conflicts with this Court's announced prejudice test defining the requisite standard of proof to the reasonable-probability standard. *Williams*, 529 U.S. at 405-06. Furthermore, because the reasonable-probability standard is a lower standard than the preponderance-of-the-evidence standard, *Strickland*, 466 U.S. at 694, the court's analysis prejudiced Petitioner.

C. The Missouri Supreme Court erroneously required Petitioner to prove that the entire jury—as opposed to just one juror—would have decided against the death penalty.

Respondent agrees that the one-juror standard is the standard applicable to the assessment of *Strickland* prejudice. (BIO at 15.) Respondent also recognizes that the Missouri Supreme Court did not use one-juror language in its opinion. (BIO at 16.) Despite this omission, Respondent contends, the court nonetheless applied the correct standard because under Missouri law, one juror can prevent the imposition of the death penalty. *Id.*

However, the fact that Missouri law permits one juror to prevent a death sentence does not prove that the Missouri Supreme Court applied the appropriate *Strickland* standard to Petitioner's claims, especially given that the court did not make any reference the appropriate one-juror standard. On the contrary, the plain language of the court's opinion suggests otherwise: “Regarding a sentence to death, a defendant must show with reasonable probability that **the jury**, balancing all the circumstances, would not have awarded the death penalty.” *Tisius*, 519 S.W.3d at 420 (quoting *Strong v. State*, 263 S.W.3d 636, 642 (Mo. banc 2008)) (emphasis added).

As Respondent acknowledges, not once did the court refer to the correct one-juror standard. Instead, the court consistently required Petitioner to prove that absent counsel's failures, the entire jury would not have awarded the death penalty. Respondent does not offer any compelling reason to ignore the natural meaning of the Missouri Supreme Court's consistent language.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his petition for writ of certiorari. In the alternative, this Court should grant, vacate, and remand this case to the Missouri Supreme Court to ensure that the court applies the correct *Strickland* standard. At minimum, this Court should hold Petitioner's case until it resolves *Rosales-Mireles v. United States*, Case No. 16-9493, which involves an analogous misinterpretation of a legal standard. *Rosales-Mireles* is set for argument on February 21, 2018.

Respectfully Submitted,

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