No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

YARA CHUM,
Petitioner

v.

PATRICIA ANNE COYNE-FAGUE
Director of the Adult Correctional Institutions,
Respondent

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIRST CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Camille A. McKenna*
Assistant Public Defender
Appellate Division
Rhode Island Public Defender
160 Pine Street
Providence, RI 02903
401-222-1510 (phone)
401-222-5225 (fax)
cmckenna@ripd.org

**Counsel of Record, Member of Supreme Court Bar*
Counsel for Petitioner

QUESTION PRESENTED

Did the Court of Appeals for the First Circuit err in holding that a state court decision was not contrary to federal law when, in deciding a Sixth Amendment ineffective assistance of counsel claim, the state court cited the *Strickland v. Washington* prejudice standard, but applied a different state law standard, failed to link that state law standard with the *Strickland* prejudice standard, and never resolved, as required by *Strickland*, whether there was a reasonable probability that, but for trial counsel's constitutionally deficient representation—as conceded by the state—the outcome of the proceeding would have been different?

PARTIES TO THE PROCEEDINGS BELOW

Yara Chum, petitioner here, was the habeas applicant below.

Patricia Anne Coyne-Fague, Director of the Adult Correctional Institutions, respondent here, was the respondent below.[*]

[*] The respondent in the state court proceedings was the State of Rhode Island, and the respondent in the federal district court proceedings was Ashbel T. Wall, then Director of the Adult Correctional Institutions. Director Wall retired, and Ms. Coyne-Fague was substituted by the Court of Appeals, pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, when she became the Acting Director on January 30, 2018. She then became the Director.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Yara Chum respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit ("COA").

OPINIONS BELOW

The opinion of the COA (Appendix ("App.") A) is published and available at 948 F.3d 438. The relevant district court opinion (App. B) is published and available at 2018 U.S. Dist. LEXIS 169119. The relevant state court opinions (App. C, D, E) are published and available at 160 A.3d 295, 2014 R.I. Super. LEXIS 163, and 54 A.3d 455.

JURISDICTION

The COA issued its opinion on January 27, 2020, and judgment entered on that day. App. 002. On March 19, 2020, due to the COVID-19 pandemic, this Court, in an order, extended the deadline for any petition for a writ of certiorari due on or after the date of the order, to 150 days from the date of the lower court judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment of the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

28 U.S.C. § 2254 – State Custody; Remedies in Federal Courts

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1) (2020).

INTRODUCTION

The prosecutor at Yara Chum's trial told the jury in his opening statement that Mr. Chum confessed. He then detailed the substance of that confession for the men and women who would later convict Mr. Chum. But the prosecutor never introduced that confession into evidence. And Mr. Chum's trial attorney did nothing to mitigate the harm from the jury hearing about a confession: He did not move for a mistrial, he did not ask for a curative instruction, and he did not argue to the jury in closing that the prosecution had failed to follow through on the evidence it promised to present.

The Federal District Judge who heard Mr. Chum's habeas petition found that "[t]here is no doubt" that the failure of Mr. Chum's trial attorney not to challenge in any way the prosecutor's use of a never-introduced confession in his opening statement was constitutionally deficient representation. App. 015. The state also conceded in the COA that Mr. Chum established that his attorney's performance was deficient. App. 007.

With the agreement that Mr. Chum's defense attorney had performed inadequately, the only issue before the COA was the state court's determination of whether Mr. Chum was prejudiced by his attorney's error. *Strickland v. Washington*, 466 U.S. 668 (1984), provides the standard for measuring prejudice: a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Indeed, *Strickland* is its own unique standard that does not incorporate any other test. Yet when analyzing prejudice, the Rhode Island Supreme Court ("RISC" or "state court") did not apply the *Strickland* standard; instead, the court applied the incurable prejudice standard—a state court direct appellate review standard. This was contrary to federal law.

Despite the fact that the RISC applied its own state law prejudice test, the COA determined that the state court correctly applied federal law, simply because it cited *Strickland*

and performed a prejudice analysis. App. 010. But the RISC did not "link" the two standards, as the COA concluded; it replaced *Strickland* with its own test. App. 010. Indeed, although ultimately denying Mr. Chum relief, the COA identified additional errors in the state court's analysis that show that the RISC's prejudice analysis was contrary to federal law. First, the RISC considered facts irrelevant to the *Strickland* prejudice analysis, including the trial judge's post-hoc insistence that he would not have granted a mistrial had the defense attorney requested it. Second, the state court failed to answer the only question before it—whether there was a reasonable probability that, if counsel had moved for a mistrial, the outcome of the proceeding would have been different. App. 10. As the COA noted, it would be improper for the RISC to replace or otherwise equate the incurable prejudice standard with *Strickland* prejudice, yet that is exactly what the RISC did, and it was error for the COA not to recognize this. App. 009.

Moreover, had the state court properly analyzed prejudice under *Strickland*, it would have been clear that if the trial attorney had moved for a mistrial, there is a reasonable probability it would have been granted by the trial judge given the outsized impression the reference to Mr. Chum's unintroduced confession would have made on the jury.

This Court should grant certiorari to address the serious errors that have occurred here and to ensure that, going forward, the state courts in Rhode Island apply the appropriate legal standard when analyzing the often dispositive prejudice prong of *Strickland*.

STATEMENT OF THE CASE

State Court Trial and Direct Appeal

On March 26, 2009, Mr. Chum was charged in Rhode Island state court with two counts of felony assault, along with one count each of conspiracy, carrying a dangerous weapon during the commission of a crime of violence, and using a firearm during the commission of a crime of violence. The charges arose from a single shot that was fired at several people on the porch of 33

Peach Avenue in Providence, Rhode Island, during the early winter evening of March 1, 2009. Tr. I 196-97.[1] No one was hit.

In March 2010, Mr. Chum was tried before a jury in Providence County Superior Court. Tr. I 1.[2] He was represented by attorney Todd Dion; the case was prosecuted by Special Assistant Attorney General James Baum and presided over by Associate Justice Robert D. Krause. Tr. I 1.

The Prosecutor's Opening Statement: A Never Introduced Confession

In his opening statement, the prosecutor promised the jury that the state would prove its case "through the defendant's own words." App. 021. The prosecutor then gave a detailed re-telling of Mr. Chum's alleged statement to police.

> I told you we'd prove this case with witnesses; we'd also prove it with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told him that he was contacted by Erin Peterson and told that she needed him to take care of something; that she wanted them to take care of some kid named Frankie for smashing her windows; that he drove down to Peach Avenue with Matthew DePetrillo and Erin Peterson so that they could point out the house; that he approached the house with a friend, Vang Chhit; that he approached some guys on the porch; that he ordered Chhit to shoot the guys; that Erin Peterson, Matthew DePetrillo and Samnang Tep were in a different car waiting around the corner; and that he and Chhit fled in separate cars, one red, and one white. You'll hear that. You'll hear about the defendant giving that statement to the Providence Police.

App. 021-022.

---

[1] "Tr. I" refers to the state court trial transcript from March 16, 17, 18, and 23, 2010. "Tr. II" refers to the state court trial transcript from March 22, 2010. "MNT" refers to the motion for a new trial transcript from April 21, 2010. "Sent." refers to the sentencing transcript from June 9, 2010. The state court trial transcripts are part of the federal court record. "H. Tr." refers to the federal habeas hearing transcript from September 13, 2018.

[2] Before trial, the state dismissed the charge of carrying a dangerous weapon during the commission of a crime of violence. Tr. I 2.

The prosecutor never introduced this confession at trial.[3]

Defense counsel did nothing about this. He did not move for a mistrial, request a specific cautionary instruction, make an unfulfilled promise argument to the jury, or raise the issue in his motion for new trial.

The Evidence at Trial

A drug deal not involving Mr. Chum

This case began with a drug deal gone wrong. In the early morning of March 1, 2009, Matthew DePetrillo agreed to purchase marijuana from his girlfriend's brother, Frances "Frank" Meseck. Tr. II 24, 26. They agreed to meet in Cranston, Rhode Island, near 83 Chestnut Avenue where DePetrillo's cousin lived. Tr. II 24, 27.[4] When they met up, DePetrillo was with another friend[5] and they both got into Meseck's car to look at the marijuana. Tr. II 27. They drove around the block and when DePetrillo said he was satisfied with the marijuana Meseck pulled into his uncle's driveway, which was also near 83 Chestnut Avenue. Tr. II 27-28. Rather than pay for the marijuana, DePetrillo's friend jumped out of the car with the drugs, and DePetrillo told Meseck that he had just been robbed. Tr. II 27-28. Meseck thought this was a joke, and by the time he realized it was not, DePetrillo had already jumped out of the car. Tr. II 28. Meseck gave chase in his car but was unable to catch DePetrillo or his friend; he later met up with his friend James Monteiro to tell him what had happened. Tr. II 28-29, 55.

[3] The record is silent as to why the state ultimately decided not to put the confession into evidence after vigorously opposing the defendant's motion to suppress the confession, then presenting its substance during opening remarks. App. 029; H. Tr. 28.

[4] Frank Meseck, at trial, erroneously referred to the location as Chestnut Street.

[5] This person was not identified, but the state has never suggested that this was Mr. Chum.

Meseck and Monteiro then went back to 83 Chestnut Avenue where Meseck called DePetrillo. Tr. II 29. Meseck told DePetrillo that if he did not return the marijuana or pay for the drugs, he would smash the windows of 83 Chestnut Avenue. Tr. II 29. DePetrillo did not oblige so Meseck and Monteiro smashed the windows of the house with a tire iron and a brick. Tr. II 29, 45. A third person named Tim was also with Meseck and Monteiro when they smashed the windows.[6] Tr. II 45.

After breaking the windows, Meseck, Monteiro, and Tim went home to 33 Peach Avenue on the east side of Providence where they were living with several other people, including Lorenzo Saraceno and James McArdle. Tr. II 23, 30. Like Monteiro, McArdle and Saraceno were no strangers to criminal activity—they all had criminal records and had served time in prison. Tr. I 222-25; Tr. II 52-55, 113-114. Meseck stated that after he got home, he received a call from DePetrillo, who threatened him. Tr. II 31.[7]

Later that morning, Meseck went to visit his parents in Scituate, Rhode Island. Tr. II 31. Meseck claimed that he received several calls throughout the day from DePetrillo and that DePetrillo continued to threaten him. Tr. II 32. Concerned that DePetrillo was on his way over to Peach Avenue, Meseck called Monteiro and his other roommates to warn them. Tr. II 33-34. After receiving the call, Monteiro told his roommates, McArdle, Saraceno, and Tim about Meseck's call and, rather than contact the police, they all went out onto the porch to wait for DePetrillo. Tr. II 62, 119. All three claimed it was light out, although it was between 5:00 and

[6] Tim was a juvenile who had run away from his group home. Tr. II 21. Tim did not testify at trial.

[7] Meseck claimed that DePetrillo threatened to blow up his parents' camper and shoot up the house on Peach Avenue. Tr. II 31.

5:30 p.m. on the first day of March. Tr. I 237; Tr. II 61, 65, 115, 121. All three men also claimed that they saw two Acuras driving by the house, one red and one white. Tr. I 236; Tr. II 62, 117.

Inconsistent accounts

When questioned more about the details of these cars and their occupants, the roommates' stories diverged.

McArdle stated that the cars came from Camp Street and then drove down Grand View Avenue, while Monteiro and Saraceno stated that the cars came from Peach Avenue then turned left onto Grand View Avenue. Tr. I 236; Tr. II 64, 117.

McArdle said that the white Acura was being driven by a female, and DePetrillo was sitting in the rear passenger seat pointing at the house. Tr. I 236-37; Tr. II 6. He also said that the white car was first, and he did not notice anything unusual about the license plates or emblems on either car. Tr. II 5.

Saraceno, unlike McArdle, said that the red Acura was first. Tr. II 118. He stated that he could not see who was in the cars, nor did he notice anything unusual about the cars' exhausts. Tr. II 118.

Finally, Monteiro claimed that the red car was first and that someone in one of the cars was pointing at the house, although he did not know who it was or which car that person was in. Tr. II 63, 92. He said that a girl was driving one car, although he could not say which one. Tr. II 64. He said there were three or four people in the white Acura, two "tan colored" men in the front, and one Asian female in the back. Tr. II 63-64, 93. He said a white husky kid was sitting in the back of the red Acura and two "tan colored" kids were sitting in the front seat. Tr. II 92-93. At trial he acknowledged that he did not see Mr. Chum in either Acura, despite first telling police that Mr. Chum was in the red Acura. Tr. II 71, 98. He did not see the license plates on either car,

and he did not see the emblem on the hood of the red car. Tr. II 92. He also said that one of the cars had a loud exhaust and racing rims. Tr. II 63.

After the two cars drove by the house they went out of sight. Tr. I 237. About five minutes later, two men, who McArdle, Monteiro, Saraceno, and Tim had never seen before, walked up the hill on Grand View Avenue. Tr. I 237; Tr. II 65-66, 120. The two men, who were standing twenty to twenty-five feet away, asked McArdle, Monteiro, Saraceno, and Tim about who had vandalized the home on Chestnut Avenue. Tr. II 66, 68, 121-23. They all responded that the person the men were looking for was Meseck, who was not there. Tr. I 240; Tr. II 68, 71, 123. Words were exchanged back and forth, but eventually the two men began to walk away, until Saraceno called them "a bunch of pussies." Tr. I 242. Saraceno denied this and claimed that as the men were walking away, they turned around and became upset because Tim was smiling at them. Tr. I 242; Tr. II 68, 124. At that point the man who had been doing all the talking told the other to shoot. Tr. I 242; Tr. II 68-69, 124-25. The other man then pulled out a gun, cocked it, and fired one shot, which hit the wooden porch railing. Tr. I 242; Tr. II 127-28. No one was shot, the two men left, and McArdle called 911. Tr. I 252.

Three unreliable cross-racial stranger identifications

When the police arrived at the scene, about five to seven minutes after the 911 call, McArdle, Monteiro, and Saraceno were all standing together. Tr. I 252; Tr. II 129. Tim had disappeared. Tr. II 106. At the beginning of the investigation, all three men lied to the police about who was present during the shooting to hide Tim's identity, and they also lied about who lived at 33 Peach Avenue since they did not want the landlord to learn that unauthorized people were living in the apartment. Tr. I 277; Tr. II 21, 82-83. The police needed formal statements, so Saraceno and McArdle drove together to the Providence Police Department on Washington

Street and talked about what happened on the ride over. Tr. II 130. Monteiro was put in a police cruiser and transported to the station, which took twenty to thirty minutes. Tr. II 108.

McArdle first told the police that he was inside 33 Peach Avenue the entire time, but then changed his story and claimed that he was outside on the porch for part of this incident, but then went inside and was looking out the window when the shooting occurred. Tr. I 243; Tr. II 6, 11. Monteiro, on the other hand, said that McArdle was inside 33 Peach Avenue the entire time. Tr. II 97. McArdle also said that he was looking at the men's clothes, and that he was nervous, scared, and concerned for his family. Tr. I 252; Tr. II 8. He described the taller man as wearing black jeans, a white t-shirt, and a blue satin jacket, and said the shorter man was chubby and wore black jeans and a gray hooded sweatshirt with the hood up. Tr. II 8. McArdle also stated that he saw the shorter man pull out the gun, cock it, and fire one time. Tr. I 242.

Monteiro was also looking at the men's clothes, although, unlike McArdle, he said both men had hoodies and blue jeans, and the person talking (not the shooter) had his hood off of his head. Tr. II 67. He focused his attention on the person with his hands in his pockets, the shooter, who he said was shorter. Tr. II 70, 71. Finally, Monteiro said that he focused on the gun and was looking at it as it was being drawn and fired. Tr. II 69-70.

Saraceno said the man with the hood up had his hands in his sweatshirt, although he did not provide any further details about the second man's clothing. Tr. II 121. He focused on the gun, describing it as a black and chrome semi-automatic. Tr. II 125-26. He explained that he was staring at the gun when it was drawn and looking down the barrel right before the shooting began, concerned that he would be shot. Tr. I 283; Tr. II 125-26.

Immediately after the shooting, when McArdle called 911, he described the men as Hispanics and "dark-skinned guys," but in his statement to police he said they were of mixed

Asian/Puerto Rican heritage, and at trial he said they were light skinned. Tr. I 252; Tr. II 8, 12. Monteiro described the suspects as both "tan" and Asian. Tr. II 66-67, 98.[8] None of the men provided ages of the suspects or mentioned seeing any scars, marks, or tattoos.

At 5:47 p.m., Patrolman Anthony Bucci of the Cranston Police Department heard a broadcast about a shooting in Providence and learned that the suspects may have been heading to the area of Chestnut Avenue in Cranston in a red or white Acura driven by Asian males. Tr. I 284. Sometime after 6:00 p.m., while he was driving in the area, Patrolman Bucci claimed that he saw a red Acura driven by an Asian male pass him in the other direction. Tr. I 286. He followed the car, although he lost sight of it for a bit, and eventually caught up to it because it had pulled over. Tr. I 287, 311. He said he saw the driver get out of the car and check one of the tires and saw the passenger jump into the driver's seat. Tr. I 287-88. He approached the two men who he identified as Yara Chum and Samnang Tep. Tr. I 290. Mr. Chum, the passenger, stated that they were coming from his house on Sterling Avenue in Providence. Tr. I 289.[9] Mr. Tep, the driver, had a suspended license, so he was arrested and brought to the Cranston Police Department. Tr. I 292-93. Mr. Chum was not charged with a crime, but he was placed in the back of a police cruiser and taken to the Cranston Police Department for questioning about the shooting. Tr. I 292. The car was properly registered, although the license plates did not match each other, and the car had Honda emblems despite being an Acura. Tr. I 290, 308. Officer Bucci did not note that the car had a loud exhaust and there were no guns found in the car. Tr. I 292.

[8] Mr. Chum is Southeast Asian.

[9] Sterling Avenue is on the west side of Providence near its border with Cranston. Peach Avenue is on the other side of Providence, close to the city's eastern border with Pawtucket.

Back at the Providence Police Department several hours after the shooting, McArdle, Monteiro, and Saraceno were shown photo arrays. They were each shown a single-sheet of paper containing the images of six men—one of whom was Mr. Chum—and were asked if they could make an identification. The photo arrays were prepared by Detective Michael Otrando, who knew that Mr. Chum had been apprehended and was a suspect. Tr. I 320-21. Detective Otrando interviewed and presented the photo arrays to Saraceno, while other detectives, including Detective Ronald Riley and Detective Matricia, interviewed and presented arrays to Monteiro and McArdle. Tr. I 5, 321-24; Tr. II 74, 132. The photo arrays presented to McArdle and Monteiro both had the photographs arranged in the same order. At the time, Mr. Chum had no tattoos, but all the arrays included the photograph of at least one man with a neck tattoo, and the arrays shown to McArdle and Monteiro contained *two* men with neck tattoos. All three men picked out Mr. Chum and identified him as the person doing all the talking, and later identified him as such at trial. Tr. I 239, 260; Tr. II 67, 77, 122, 134-37.[10]

Mr. Chum's unrecorded statement which was not admitted as evidence at trial

After administering the photo arrays, Detectives Otrando and Riley went to the Cranston Police Department to interview Mr. Chum, along with Mr. Tep, DePetrillo, and Robert Murray, a resident of 83 Chestnut Avenue. Tr. I 42, 57. It was during this unrecorded interview that Mr. Chum allegedly admitted to participating in the shooting. The only memorialization of Mr. Chum's statement was in a police interview summary typed up by Detective Otrando a few hours after the interview—the summary was inaccurate as to the order of the interviews and the number of people interviewed by the police. Tr. I 16, 51, 55, 57-58.

[10] While at the Providence Police station, McArdle and Monteiro identified Samnang Tep as the shooter, but Saraceno could not definitively pick Mr. Tep out of a sequential photo array (one photo per sheet) ninety minutes after the shooting. Tr. I 260; Tr. II 80, 134-37.

Despite the confession and identifications made by McArdle, Monteiro, and Saraceno, Mr. Chum was released without being charged. Tr. I 23, 33, 59.[11] He was charged several weeks later.

Conviction and Appeal

At the close of the state's case, the trial judge, on his own motion, directed a judgment of acquittal on the charge of conspiracy[12], but Mr. Chum was convicted on all other counts as an aider and abettor. Tr. I 330, 372. His motion for a new trial was denied on April 21, 2010, and on June 9, 2010, he was sentenced to fifteen years in prison followed by a five-year suspended sentence with five years of probation. MNT 9; Sent. 17. His conviction was affirmed by the Rhode Island Supreme Court on October 25, 2012. App. 037.

State Post-Conviction Proceedings

Mr. Chum filed a *pro se* application for post-conviction relief on April 25, 2013, including several claims alleging the ineffective assistance of trial counsel. After counsel was appointed to represent Mr. Chum on post-conviction relief, she developed his ineffective assistance claims through the filing of a legal memorandum. This memorandum included the sole claim at issue here—trial counsel's ineffectiveness for failing to move for a mistrial after the prosecutor discussed a detailed version of Mr. Chum's confession in his opening statement, but then did not introduce the confession at trial.

[11] It is unclear what department Mr. Chum was released from: Detective Otrando could not recall whether it was from Providence or Cranston, and Detective Riley stated it was from Cranston. Tr. I 23, 33, 59.

[12] Trial counsel erroneously moved for a new trial and the court corrected counsel, instructing him that the appropriate motion was a motion for a judgment of acquittal. Tr. I 326. When asked, counsel could not provide the correct standard for this motion. Tr. I 327. Instead, the trial justice articulated the correct standard himself, and then addressed the motion as to one count, the conspiracy charge. Tr. I 327-30.

Following the state's written submission, Mr. Chum's application for post-conviction relief was denied in a written decision by Justice Krause—the judge who had presided over the trial—on December 1, 2014, and final judgment entered on that day. App. 028. Assuming, but not deciding, that the trial attorney should have requested a mistrial, the trial court denied the application for relief. App. 028-030. Although he cited *Strickland v. Washington*, 466 U.S. 668 (1984), the trial judge applied a different prejudice standard, using inapposite state court law to analyze whether defense counsel's failure to request a mistrial was "fatal error" that would have demanded a new trial. App. 029-030.[13]

In performing his own prejudice analysis untethered from *Strickland*, the trial judge relied on *State v. Perry*, 779 A.2d 622, 627-28 (R.I. 2001), and *State v. Ware*, 524 A.2d 1110, 1112 (R.I. 1987). App. 029. These non-*Strickland* cases stand for the "general rule" that a "prosecutor's remarks during opening statements do not constitute reversible error unless incurable prejudice is shown." *Perry*, 779 A.2d at 628 (quotations omitted); *accord Ware*, 524 A.2d at 1112. Applying this "incurable prejudice" standard, the trial judge concluded there was no prejudice: "Given the overwhelming other evidence of Chum's guilt, coupled with this Court's repeated cautionary admonitions to the jury, trial counsel's purported error, if it was error at all, does not satisfy the high *Strickland* standard." App. 030.

The trial court never analyzed whether, but for the trial attorney's unprofessional errors, there was a reasonable probability that the outcome of the proceeding would have been different.

[13] To prevail on an ineffective assistance of counsel claim under *Strickland*, a defendant must establish that counsel's representation fell below an objective standard of reasonableness and that the defendant was prejudiced. To establish prejudice, a defendant must show that, but for the attorney's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688-94.

Mr. Chum timely appealed this decision to the Rhode Island Supreme Court and was represented by the Rhode Island Public Defender. The court denied his appeal on May 23, 2017, holding that Mr. Chum had failed to meet his burden of establishing a violation of his Sixth Amendment right to effective assistance of counsel. App. 024. Although the court criticized Mr. Chum's trial attorney for failing to act when the prosecutor did not introduce his unrecorded confession into evidence after discussing it in his opening statement, the court ultimately found that Mr. Chum was not prejudiced by this inaction. App. 023. In reaching this conclusion, the court cited the standard from *Strickland*, but following in the trial judge's path, relied on state court precedent including *Perry* and *Ware* for the proposition that "a prosecutor's remarks during opening statements do not constitute reversible error unless incurable prejudice is shown." App. 023.

Guided by this erroneous law, the Rhode Island Supreme Court framed the "narrow issue" before it as "whether a prosecutor's reference to an admission in an opening statement and subsequent failure to introduce it into evidence amounts to incurable prejudice." App. 023. The court then held that Mr. Chum failed to establish prejudice for the three reasons articulated by the trial judge: the "overwhelming" evidence against Mr. Chum, the trial judge's claim that he would not have granted a mistrial, and general instructions provided to the jury that statements of counsel are not evidence. App. 023-24.

Like the trial judge, the Rhode Island Supreme Court never analyzed whether, but for the trial attorney's unprofessional errors, there was a reasonable probability that the result of the proceeding would have been different.

Federal Habeas Proceedings in the District Court

Mr. Chum filed a section 2254 habeas petition in the Federal District of Rhode Island on November 20, 2017, and the case was assigned to District Judge John J. McConnell. Following the submission of memoranda and a hearing, Judge McConnell denied and dismissed the habeas petition in a written decision. App. 013. Judgment was entered on October 2, 2018.

In his written decision, Judge McConnell found that trial counsel's performance was constitutionally deficient, and that Mr. Chum had satisfied the first prong of *Strickland*:

> There is no doubt that Mr. Chum's counsel's failure to move for a mistrial, or at the very least argue to the jury about the prosecution's unfilled promise of evidence of a confession, was "outside the wide range of professionally competent assistance," and represents constitutionally deficient performance by Mr. Chum's trial counsel. . . . Failure by a defense attorney not to challenge in some way the fact that the prosecution did not present evidence of the referenced confession is, without a doubt, seriously deficient representation.

App. 015 (citation omitted). The decision to deny habeas relief hinged on the District Court's review of the state court's application of the second prong of *Strickland*—whether trial counsel's constitutionally deficient representation prejudiced Mr. Chum. Ultimately, Judge McConnell held that the state court's decision that there was no prejudice was neither contrary to, nor an unreasonable application of, federal law. App. 016.

On October 17, 2018, Mr. Chum timely filed a notice of appeal, a motion to proceed *in forma pauperis*, and a motion for a certificate of appealability in the District Court. Judge McConnell granted the motion to proceed *in forma pauperis* and the motion for a certificate of appealability on October 18, 2018, because Mr. Chum made a substantial showing of the denial of a constitutional right, and reasonable jurists could debate whether the petition should have been resolved in a different manner.

Federal Habeas Proceedings in the First Circuit

After briefing and oral argument in the COA, the court affirmed the denial of Mr. Chum's federal habeas petition in a written opinion on January 27, 2020. App. 005. The COA determined that the RISC considered a state law standard when analyzing prejudice. It also agreed with Mr. Chum that RISC's reliance on the trial justice's comments that he would not have granted a mistrial if one had been requested was improper under *Strickland*.[14] App. 010. The COA additionally identified the primary problem with the RISC decision: that the state court never linked its incurable prejudice analysis with *Strickland* prejudice, and never expressly performed the analysis required by *Strickland*. In other words, the RISC "did not conclude its analysis by stating explicitly that there is no reasonable probability that, if counsel had moved for a mistrial, the outcome of the proceeding would have been different." App. 010.

Nevertheless, the COA concluded that the RISC did not replace or otherwise equate *Strickland* with its own prejudice standard. App. 009. It held that in order to determine *Strickland* prejudice in this case, the state court had to answer the question of whether there was a reasonable probability that, had trial counsel moved for a mistrial, it would have been granted. App. 009. According to the COA, this in turn required consideration of the state law direct appeal standard, the incurable prejudice analysis. App. 009-010. The COA went on to hold that it was clear from the RISC's recitation of the *Strickland* prejudice standard, coupled with the incurable prejudice analysis, that the state court concluded that had a motion for a mistrial been made, there was no reasonable probability that such motion would be granted—even though the RISC never expressly reached that conclusion. App. 010.

[14] The COA held that the rest of the analysis by the RISC illustrated that the court did not simply defer to the trial justice's decision. App. 010.

REASONS TO GRANT THE PETITION

I. THE COURT OF APPEALS ERRED BECAUSE, WHEN REVIEWING MR. CHUM'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THE STATE COURT ANALYZED PREJUDICE BY APPLYING A STATE LAW DIRECT APPEAL STANDARD, NOT THE *STRICKLAND* PREJUDICE TEST, AND THIS WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

There is no dispute that the RISC used the incurable prejudice test when analyzing prejudice. App. 010. In fact, the COA held that it was necessary for the RISC to apply this state court direct appeal standard in order to determine whether, with competent counsel, there was a reasonable probability that Mr. Chum's trial could have resulted in a different outcome. App. 010. This was contrary to federal law, which requires application of *Strickland*—not a version of *Strickland* modified by state law.

Strickland, not Rhode Island state law, provides the test for measuring prejudice in ineffective assistance of counsel cases. Indeed, *Strickland* is clearly established federal law. A state court decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth" by United States Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). In *Williams*, Justice Sandra Day O'Connor, writing for this Court, provided an illustration of such a decision—one that closely resembles the state court decision in this case:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id.* at 694. A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a

> federal court will be unconstrained by [28 U.S.C.] § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

Id. at 405-06. In that fictional example, the state court applied a preponderance standard; here, the state court applied an incurable prejudice test. In both cases, the state court applied law contrary to *Strickland's* prejudice standard.

The actual scenario presented in *Williams* is also instructive. In that death penalty case, defense counsel failed to discover and present significant mitigating evidence at the sentencing phase. *Id*. at 370-71. In state habeas proceedings, a trial judge found that counsel's performance was deficient, and that had defense counsel been competent, there was a reasonable probability that the outcome of the sentencing proceeding would have been different. *Id*. at 371. The Virginia Supreme Court reversed the trial court, holding that the defendant had failed to establish prejudice. *Id*. at 371. In denying relief, the state court interpreted *Lockhart v. Fretwell*, 506 U.S. 364 (1993), as requiring a separate inquiry into fundamental fairness when analyzing prejudice under *Strickland*. *Williams*, 529 U.S. at 393. The defendant then filed a petition for habeas corpus in federal court; a federal trial judge granted relief, and the United States Court of Appeals for the Fourth Circuit reversed. *Id*. at 372, 374.

This Court reversed the Fourth Circuit, finding the Virginia Supreme Court's decision to be both contrary to, and an unreasonable application of, federal law. *Id*. at 397. Specifically, this Court held that the Virginia Supreme Court erred in holding that *Lockhart* "modified or in some way supplanted the rule set down in *Strickland.*" *Id.* at 391. In failing to apply the *Strickland* outcome determinative standard, the Virginia Supreme Court's decision was contrary to federal law. *Id.* at 397.

The same is true here. The COA held that the RISC was required to make a separate prejudice inquiry by applying the incurable prejudice test. This, in turn, modified the *Strickland* standard and is contrary to federal law.

A. The Incurable Prejudice Test And The *Strickland* Prejudice Test Are Not Interchangeable.

The incurable prejudice test cannot replace or equate to the *Strickland* prejudice test, because the two tests are different. The incurable prejudice test is a generic state court reversibility standard—it is a standard tailored for a higher court when reviewing a trial court's denial of a motion for a mistrial. The higher court must decide whether an error at trial that prompted a mistrial motion was sufficiently prejudicial to justify reversal of the decision below. *State v. Ware*, 524 A.2d 1110, 1112 (R.I. 1987). This test is only applied when reviewing a discretionary decision made by a trial justice, and has nothing to do with trial counsel's performance. *See State v. Micheli*, 656 A.2d 980, 982 (R.I. 1995) ("A trial justice's decision to deny a motion for a mistrial is given great weight and will not be disturbed on appeal unless it is clearly wrong."); *Ware*, 524 A.2d at 1112 ("We have repeatedly stressed that a decision on a motion to pass a case and declare a mistrial is within the sound discretion of the trial justice and will not be disturbed on appeal unless clearly wrong."). As a reversibility standard, the incurable prejudice test puts a premium on leaving trial court rulings and convictions undisturbed.

By contrast, *Strickland* prejudice is clear federal law and a test applied only in ineffective assistance of counsel cases. It applies when trial counsel's action or inaction is constitutionally deficient and focuses on whether there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. Ultimately, *Strickland* asks if a proceeding with competent counsel might have led to a different outcome.

Here, the RISC used an entirely inapt standard in its assessment of prejudice to Mr. Chum. The state court's sleight of hand fundamentally altered the burden of proof under which Mr. Chum had to prove prejudice.[15] Rather than asking whether a reasonable probability that a hypothetical proceeding with competent counsel might have led to a different result, the state court analyzed the proceedings below as if the trial judge had denied a (non-existent) motion for mistrial from Mr. Chum's counsel. In doing so, the RISC utilized a state court standard, contrary to *Strickland,* and relied on two elements missing from this case—a discretionary decision below and competent defense counsel. The COA's approval of this decision was also contrary to federal law and should not stand.

B. The Incurable Prejudice Test Cannot Be Incorporated Into the *Strickland* Prejudice Analysis.

Strickland is its own distinct standard and it does not incorporate other tests. In *Premo v. Moore*, 562 U.S. 115 (2011), for example, this Court reversed the decision of the Ninth Circuit because, when reviewing a habeas case involving the ineffective assistance of counsel, it

[15] *See also Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005), where the Seventh Circuit held that the state court applied the wrong prejudice standard to Martin's ineffective assistance of counsel claims and, by doing so, rendered a decision that was contrary to *Strickland*. *Id*. at 592. In *Martin*, the state court incorrectly placed a higher burden on the petitioner to show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. *Strickland*, however, required less of a burden—"but for defense counsel's unprofessional errors, there is a *reasonable probability* that the result of the proceeding would have been different." *Id*. (emphasis added); *Moseley v. Atchison*, 689 F.3d 838, 850-51 (7th Cir. 2012). Likewise in *Gray v. Branker*, 529 F.3d 220, 234-35 (4th Cir. 2008), the Fourth Circuit held that when determining whether trial counsel was ineffective at the capital sentencing phase, the state court imposed a more onerous burden than both the preponderance of the evidence standard, which was rejected in *Strickland*, and the prejudice standard announced in *Strickland*. In *Gray*, the Fourth Circuit found that the state court required certainty that the jury would have reached a different result at sentencing, and that the use of this standard was contrary to federal law. *Id*. *See also Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir. 2003) (holding that an additional inquiry into the fairness of the proceeding was a more onerous prejudice standard and contrary to *Strickland*).

erroneously found that the state court decision was contrary to *Arizona v. Fulminante*, 499 U.S. 279 (1991) (the admission of an involuntary confession is subject to harmless error analysis), not *Strickland*. *Premo*, 562 U.S. at 128. In reversing the Court of Appeals, this Court stated that because *Fulminante* could not be incorporated into either prong of the *Strickland* analysis, the decision of the Court of Appeals that the state court holding was "contrary to" *Fulminante* was error. *Id*. at 128-30. This Court also noted that *Fulminante* "says nothing about the *Strickland* standard for effectiveness," and says nothing "about prejudice for *Strickland* purposes, nor does it contemplate prejudice in the plea bargain context." *Id*. at 128-29. Likewise, in this case, the incurable prejudice test says nothing about prejudice for *Strickland* purposes, and does not contemplate prejudice based on trial counsel's errors.

The exclusivity of *Strickland* is also highlighted in cases where the attorney's error involved an issue that, if objected to or raised on direct review, would have triggered prejudice by shifting the burden of proof to the state to prove the error was harmless. In these cases, courts maintain that notwithstanding what would have happened at trial or on direct appeal, on collateral review, prejudice must still be analyzed through the lens of *Strickland*. *See, e.g., Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1320-21 (11th Cir. 2016); *Stephenson v. Wilson*, 619 F.3d 664, 671 (7th Cir. 2010); *Marquard v. Sec'y, Fla. Dep't of Corr.*, 429 F.3d 1278, 1313-14 (11th Cir. 2005) (cases stating that when a defendant that is shackled in the absence of a special need, if objected to, the state has the burden of proving beyond a reasonable doubt that the shackling error did not contribute to the verdict; however, if shackling is raised as an ineffective assistance of counsel claim, the defendant must still show that if the attorney had objected to the shackling at trial, there is a reasonable probability the outcome would have been different.). Similarly, prejudice must be analyzed under *Strickland* in cases that involve

fundamental defects, which if properly raised on direct appeal would warrant reversal, but are now raised in collateral proceedings *via* ineffective assistance of counsel claims. *See e.g.*, *Earhart v. Johnson*, 132 F.3d 1062, 1067-68 (5th Cir. 1998) (failure to retain an expert to testify about the composition of both the bullets that killed the victim and the bullets that were seized in the defendant's belongings); *Ricalday v. Procunier*, 736 F.2d 203, 207-08 (5th Cir. 1984) (failure to object to a variance between the indictment and jury instructions).

Here the COA held that it was not only permissible, but also necessary for the state court to incorporate the incurable prejudice test into the *Strickland* prejudice analysis. This was contrary to federal law. Whereas a state court may need to consider state law in determining whether there is a reasonable probability that a mistrial motion would be granted, that is not what the RISC did or what the COA sanctioned. The incurable prejudice standard is not the test that a trial justice applies when a party moves for a mistrial. Rather, it is the standard that is applied on appeal. *See supra* Section I (A). Thus, in upholding the state court decision, the COA licensed the state court to ask whether—had a motion for a mistrial been made and denied and the conviction appealed—Mr. Chum would have prevailed on direct appeal. This is not what *Strickland* requires.

C. The State Court's Passing Reference to *Strickland* Was Not Enough To Insulate Its Decision From Being Contrary To Federal Law.

In determining that the state court decision was not contrary to federal law, the COA relied almost exclusively on the state court's citation to *Strickland*. App. 010. However, mere citation to *Strickland* does not mean that the state court actually conducted a *Strickland* analysis. There must be more. As this Court held in *Andrus v. Texas*, No. 18-9674, 2020 U.S. LEXIS 3250, *25 (U.S. June 15, 2020), it must be clear that the reviewing court analyzed prejudice under *Strickland* and engaged with the evidence related to the prejudice prong. Indeed, there

must be certainty that the court conducted this "weighty and record-intensive analysis." *Id*. at *25-*26. Here, while the RISC may have correctly referenced the *Strickland* standard, this fleeting mention does not remedy the fact that it failed to analyze prejudice under *Strickland* or engage with the evidence relevant to *Strickland* prejudice. On the contrary, it applied the wrong prejudice test, and considered information irrelevant to the *Strickland* prejudice analysis. Notably, there was no mention of the impact that confession evidence has on a jury when heard in opening statement—critical information to consider when conducting the *Strickland* prejudice analysis in this case. *See infra* Section II.

After paying lip service to the *Strickland* standard, the Rhode Island Supreme Court looked to state court decisions to determine whether Mr. Chum was prejudiced by his attorney's failure to move for a mistrial:

> The "general rule" is that "a prosecutor's remarks during opening statements 'do not constitute reversible error unless incurable prejudice is shown.'" *State v. Perry*, 779 A.2d 622, 628 (R.I. 2001) (quoting *State v. Micheli*, 656 A.2d 980, 982 (R.I. 1995)); *see also State v. Ware*, 524 A.2d 1110, 1112-13 (R.I. 1987) (concluding that there was no incurable prejudice by the prosecutor's opening statement that referenced a witness who did not testify because the prosecutor did not act in bad faith and there was "ample independent evidence" to find the defendant guilty). Chum maintains, however, that his trial attorney's inaction in response to the prosecutor's opening statement "fell below the objective standard of reasonableness and prejudiced the defense * * * ."

App. 023. Based on this state decisional law, the RISC then went on to define the "narrow issue" before it as "whether a prosecutor's reference to an admission in an opening statement and subsequent failure to introduce it into evidence amounts to incurable prejudice . . . ." App. 023. This was incorrect.

Rather, to prevail on an ineffective assistance of counsel claim, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id*. That said, reasonable probability is a lower standard than preponderance of the evidence and an applicant need not prove that it is more likely than not that the outcome would be altered. *Id*. at 693; *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002).

The RISC did not apply this federal prejudice standard. It did not ask the question of whether, but for the defense attorney's failure to move for a mistrial, the result of the proceeding would have been different. Instead, it asked whether the prosecutor's reference to the confession resulted in "incurable prejudice." This was contrary to clearly established federal law. In *Andrus*, this Court vacated the judgment of the Texas Court of Criminal Appeals because there was doubt as to whether it considered, in its prejudice analysis, the effect that mitigating evidence elicited at the post-conviction hearing would have on the jury during the penalty phase. 2020 U.S. LEXIS 3250 at *25-*26. Likewise, in this case, the RISC failed to consider what would have happened had trial counsel moved for a mistrial. A court cannot simply cite to *Strickland* and move on; there must be a "weighty and record-intensive" analysis. *Id*.

The RISC also did not cite to any cases analyzing prejudice under *Strickland*, and it relied on factors that were irrelevant to the *Strickland* prejudice analysis, including the trial justice's comments that he would not have granted a mistrial even if one were requested. App. 024. Consideration of comments like this, as recognized by the COA, is explicitly prohibited by *Strickland*. Indeed, the assessment of prejudice should proceed on the assumption that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland*, 466 U.S. at 695.

The COA acknowledged that the RISC never linked its assessment of the likelihood of a mistrial under state law with *Strickland* prejudice. App. 010. Indeed, it never linked the incurable prejudice analysis to *Strickland* prejudice because it never considered *Strickland* prejudice at all. Furthermore, the COA recognized that the RISC never answered the only question before it—whether, but for trial counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. App. 010. This is *the* question *Strickland* requires courts to answer when analyzing prejudice and here it was never answered by the state court. Clearly this question was never answered because the state court never actually analyzed prejudice through the *Strickland* lens.

* * *

Prejudice is often the first prong to be analyzed by courts when reviewing ineffective assistance of counsel claims and it is also often the dispositive prong.[16] *Strickland*, 466 U.S. 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."). In turn, it is imperative for the courts[17] in Rhode Island to apply the correct federal law when analyzing

[16] In Rhode Island, the dispositive nature of prejudice is heightened because of Rhode Island's raise-or-waive rule. Indeed, on direct appeal, the RISC regularly cites waiver as a reason for refusing to consider issues that arose at trial, but were not adequately preserved for review. *See, e.g., State v. Moten*, 187 A.3d 1080, 1088 (R.I. 2018) (noting the Rhode Island Supreme Court's long-standing adherence to the raise-or-waive rule). On collateral review, when there is a direct review opinion noting the waiver of an issue by trial counsel, the deficient performance prong of *Strickland* is often an easier hurdle to overcome, making prejudice the conclusive prong.

[17] In Rhode Island this is the trial court. Ineffective assistance of counsel claims are not reviewed on direct appeal; instead, defendants must file an application for post-conviction relief in the trial court. *State v. Page*, 709 A.2d 1042, 1046 (R.I. 1998). The decision of the trial judge on post-conviction relief will only be reviewed by the Rhode Island Supreme Court if the court grants certiorari. Review was automatic until 2015, but then it became discretionary. R.I.G.L. § 10-9.1-9; P.L. 2015, ch. 91 §1. As a result, many defendants will never have their ineffective assistance of counsel claims reviewed by the state's only appellate court.

prejudice.[18] Intervention by this Court is necessary not only to remedy the errors that have occurred in the state and federal courts here, but also to ensure that future claims of ineffective assistance of counsel are being resolved by the state court *via* the correct application of clearly established federal law.

[18] This case is not an isolated incident. In a recent trial court decision in a case where a defendant was seeking to vacate a plea, the hearing justice found that the second prong of *Strickland* had not been met because the defendant "failed to provide adequate evidence to suggest he would have been acquitted of the charges had the trial proceeded or that his sentence would have been less than twenty years if convicted . . . ." *Feliciano v. State*, No. PM/19-9762, 2020 R.I. Super. LEXIS 6, *14 (R.I. Super. Ct. Feb. 5, 2020). The trial judge went on to cite *Hassett v. State*, 899 A.2d 430, 437 (R.I. 2006), which also misstates *Strickland's* prejudice prong, noting "it is well settled that a claim of ineffective assistance requires an applicant for postconviction relief to prove that the result of the proceeding would have been different were it not for the performance of his attorney."

Other state trial court decisions also misstate and apply the wrong federal law when analyzing prejudice in cases involving the failure of trial counsel to give adequate immigration advice in light of this Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). *See, e.g.*, *Ferreira v. State*, No. PM/10-0023, 2015 R.I. Super. LEXIS 98, *16 (R.I. Super. Ct. July 31, 2015) (when applying *Padilla* and analyzing prejudice '"in a plea situation, the defendant must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial and *importantly* that the outcome of the trial would have been different.'" (quoting *Nuefville v. State*, 13 A.3d 607, 610-11 (R.I. 2011))) (emphasis in original); *Peguero v. State*, No. PM/16-0014, 2016 R.I. Super. LEXIS 71, *5 (R.I. Super. Ct. June 20, 2016) ("Nonetheless, it is worth noting that in cases decided after *Padilla*, our Supreme Court continues to hold that a defendant . . . 'must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial, and importantly, that the outcome of the trial would have been different.'" (quoting *Nuefville*, 13 A.3d at 610-11)). This Court held in *Padilla* that to establish prejudice "on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 559 U.S. at 372. There is no requirement that the petitioner must show he or she would have received a different outcome at trial.

II. IF THE STATE COURT HAD ANALYZED PREJUDICE UNDER *STRICKLAND,* THERE IS A REASONABLE PROBABILITY THAT THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

Had the state court applied the *Strickland* standard properly, it would have concluded that prong two had been met because there is a reasonable probability that the trial justice would have granted a mistrial.

"A confession is like no other evidence. Indeed, [it] is probably the most probative and damaging evidence that can be admitted against [a defendant]," and in turn has a profound effect on the jury. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quotations omitted); *United States v. Carpenter*, 403 F.3d 9, 13 (1st Cir. 2005) (same). "No other class of evidence is so profoundly prejudicial." *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting); *see also* Saul M. Kassin & Katherine Neuman, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & Hum. Behav. 469, 481 (1997).

Not only is a confession or admission "[t]he most devastating evidence against one accused of crime," *Commonwealth v. Wilson*, 485 Pa. 409, 412, 402 A.2d 1027, 1029 (Pa. 1979), but the prejudicial value of that evidence is also compounded when it is delivered to the jury in opening statement through the experienced voice of a prosecutor. "Jury studies have demonstrated that most jurors ultimately vote in a manner consistent with their first impression gained during opening statement." 7 Criminal Law Advocacy § 111.01, *Argument to the Jury: The Opening Statement* § 111.01 [1] (2018). In fact, many jurors, despite the judge's instructions to the contrary, form a tentative verdict early in the trial. *Id.* "[W]hat is heard first is remembered the longest and shapes the perception of what is heard later." 1A Criminal Defense Techniques § 22.02, *The Primacy Effect* (2018). "The attorney who is successful in seizing the opening moment will have an advantage throughout the trial because the jury will tend to filter

all the evidence through a lens that she [or he] has created." Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 309 (3rd ed. 2010).

Given the singular prejudice of confessions, it is reasonably likely that the trial judge would have granted the motion to pass the case when the confession—detailed in opening statement—was never introduced in evidence. After all, it is well-settled that the court should grant a motion for a mistrial when evidence mentioned in the state's opening statement is never admitted at trial, prejudicing the defendant. *E.g.*, *United States v. Novak*, 918 F.2d 107, 109-10 (10th Cir. 1990) (holding that the trial court erred in denying the defendant's request for a mistrial after the prosecutor failed to substantiate claims made in opening that 1) a citizen informed the DEA that the defendant was selling cocaine from his house and 2) the cocaine found in the defendant's house was 91% pure); *Jones v. United States*, 338 F.2d 553, 554-55 (D.C. Cir. 1964) (vacating a conviction in a housebreaking and larceny case when the prosecutor, in opening, said that a witness would testify that he saw one of the defendants coming out of the doorway of the store and loading something into a truck, but then failed to elicit that testimony at trial); *see also Splunge v. Clark*, 960 F.2d 705, 709-10 (7th Cir. 1992) (affirming the decision of the District Court to grant habeas on other grounds, but criticizing both the prosecutor and the trial court where the prosecutor in opening summarized testimony of a witness who would incriminate the defendant, and then never called the witness to the stand, but tendered her written statement into evidence over the defense's objection: "We are confident that the prosecutor and the trial court will ensure that this troubling trial error will not reoccur at Splunge's retrial.").

Indeed, it is fairly uncontroversial that the detailed retelling of a confession not admitted into evidence is exactly the type of remark that demands a new trial. *See, e.g.*, *Hayes v. State*, 932 So.2d 381, 382 (Fla. Dist. Ct. App. 2006) (finding denial of mistrial was error when the state

told the jury in opening that the defendant admitted to the crime to a fellow inmate, and that fellow inmate did not testify about the alleged confession); *see also People v. Tenny*, 224 Ill. App. 3d 53, 66, 586 N.E.2d 403, 412 (Ill. App. Ct. 1991) (finding the cumulative effect of the prosecutor's reference to the defendant's admission during opening—and the prosecutor's later requests to restrict the defendant's use of the statement—entitled the defendant to a new trial); *State v. Zachmeier*, 151 Mont. 256, 263-64, 441 P.2d 737, 741 (Mont. 1968) (granting a new trial where prosecutor discussed a purported confession in his opening statement that was never introduced at trial); *People v. Luberto*, 209 N.Y.S. 544, 546-47, 212 A.D. 691, 694 (N.Y. App. Div. 1925) (ordering a new trial when the prosecutor told the jury in opening that the defendant confessed to the acts in the indictment, but chose not to introduce the confession at trial after defense counsel raised objections); *Wilson*, 485 Pa. at 412, 402 A.2d at 1029 (remanding for a new trial where prosecutor referred to the defendant's confession in opening statement, but did not introduce the confession at trial).[19]

In Mr. Chum's case, the prosecutor not only went through every detail of Mr. Chum's alleged confession in the opening statement, but also boasted that it would prove the state's case "through the defendant's own words." App. 021-022. The prosecutor's remarks prevented the jurors from dispassionately examining the actual evidence and distracted them from the true

[19] Cross-examination of the police officers present during Mr. Chum's interview would have shown the jury the weaknesses of the alleged confession, which the jury could have considered when analyzing this evidence. The infirmities of Mr. Chum's purported confession here are significant, specifically its unrecorded nature, the lack of an electronic refusal form, the inaccuracies in the interview summary notes authored by the detective shortly after the interrogation, and Mr. Chum's release from custody after he was picked out of a photo array by three witnesses and after he supposedly confessed to ordering a shooting. Tr. I 33, 55, 58-59. The state successfully shielded the jury from hearing these unfavorable facts, which would have revealed a much different version of Mr. Chum's alleged confession than the one told to the jury in the opening statement. Instead, the state benefited from a deliberate decision not to introduce a vulnerable confession it had already discussed in sanitized detail during its opening statement.

issues before them. Ultimately, Mr. Chum's jury heard the most damning—and misleading—evidence at the beginning of the trial, when they were the most attentive and interested. *See Smith v. State*, 205 Ark. 1075, 1081, 172 S.W. 2d 248, 251 (Ark. 1943) (noting that the impact on the jury when a prosecutor details a confession in opening statement could not be overstated: "[N]o juror could eradicate from his mind what the prosecuting attorney had said in detailing the confession. Just as ink cannot be erased from snow, so the alleged confession, as detailed by the prosecuting attorney, could not be erased from the minds of the jury in this case . . . .").

The prosecutor's opening statement in Mr. Chum's case set the scene for the remainder of the short four-day trial and served as the lens through which the jury viewed the evidence. Had the defense attorney requested a mistrial, there is a reasonable probability that the trial judge would have granted a mistrial satisfying the prejudice prong under *Strickland*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

YARA CHUM

By His Attorney,

/s/ Camille A. McKenna
Camille A. McKenna
Counsel of Record
Member of Supreme Court Bar
Assistant Public Defender
Appellate Division
Rhode Island Public Defender
160 Pine Street
Providence, RI 02903
401-222-1510 (phone)
401-222-5225 (fax)
cmckenna@ripd.org

Counsel for Petitioner

Date Submitted: June 22, 2020