

CAPITAL CASE

No. 20-6383

In the Supreme Court of the United States

VINCENT MCFADDEN,

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 – NO EXECUTION DATE

QUESTION PRESENTED

The Missouri Supreme Court denied Petitioner's claims of ineffective assistance of counsel on post-conviction appeal, utilizing a skewed construction of the well-established *Strickland* standard. Rather than following *Strickland* and its progeny, the Missouri Supreme Court employed an outdated approach to *Strickland*'s performance and prejudice prongs to deny relief in direct contradiction of this Court's precedent in *Rompilla*, *Wiggins*, *Williams*, *Lockett*, *Eddings*, and *Tennard v. Dretke*.

Because of this tortured application, these questions are presented:

1. Whether the Missouri Supreme Court's total deference to counsel's "deliberate decisions' without considering their actual reasonableness amounts to an irrebuttable presumption of effectiveness, violating *Strickland* and the Sixth and Fourteenth Amendments?
2. Whether the Missouri Supreme Court's application of a prejudice assessment that ignores the "one juror" test, never considers the totality of the evidence, and imposes a nexus requirement between the new mitigating evidence and the crime, violates *Strickland* and the Sixth and Fourteenth Amendments?

REPLY IN SUPPORT

Introductory Statement: The Missouri Supreme Court's treatment of *Strickland v. Washington* creates a "compelling" question for this Court's review.

This Court grants review "only for compelling reasons" under Rule 10. Respondent argues that because the Missouri Supreme Court cited *Strickland* and purported to apply its requirements to Petitioner's case, this case presents no adequate basis for this Court's review. Brief in Opposition, p. 9. However, the Missouri court has applied outdated performance and prejudice analysis that contravenes *Strickland* and this Court's subsequent rulings on claims of ineffective assistance of counsel. Therefore, under Rule 10(c), this Court should grant certiorari to protect its longstanding *Strickland* precedent against the outlier interpretation forwarded by the Missouri Supreme Court. Rule 10(c).

Mere citation to this Court's precedents is not enough. A court should follow and apply the holdings of this Court faithfully. Otherwise, states subvert the efficacy of this Court's constitutional norms and standards. The Missouri Supreme Court departed from *Strickland's* performance prong by avoiding review of trial counsel's strategic decisions according to "objective" measures of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This outlier interpretation narrows, if not eliminates, the protection of ineffective assistance of counsel claims for Missouri litigants, and ignores this Court's performance prong precedent.

Regarding *Strickland's* prejudice prong, the Missouri Supreme Court drastically departed from this Court's precedent. The Missouri Supreme Court jettisoned this Court's test and applied too high of a prejudice standard. The problems with the Missouri prejudice standard are manifold: first, the court looked at mitigating evidence in isolation and failed to consider the entirety of the mitigation case; second, the court raised the bar for finding prejudice when it required the approval of a hypothetical jury rather than single juror; and finally, the Missouri

Supreme Court imposed a nexus requirement on Petitioner's mitigating evidence in violation of the Eighth Amendment as interpreted by this Court.

To bring the Missouri Supreme Court's decision into harmony with this Court's jurisprudence, this Court should grant certiorari and clarify a state court's obligations under *Strickland* when assessing ineffective assistance of counsel claims. Alternatively, this Court should grant, vacate, and remand this case to the Missouri Supreme Court to ensure that the court assesses Petitioner's *Strickland* claims under the correct constitutional standard.

I. The Missouri Supreme Court created a nearly irrebuttable presumption of reasonableness and violated this Court's repeated rulings on *Strickland*'s performance requirement.

While the Missouri Supreme Court has not always avoided the reasonableness inquiry required under *Strickland*, see, e.g., *Strong v. State*, 263 S.W.3d 636, 649 (Mo. banc 2008) (examining defense counsel's strategic choice of a lack of deliberation strategy by considering the facts and considerations such as opening the door to harmful evidence), it has shortchanged this inquiry herein. See *McFadden v. State*, 2020 WL 1861425 at *3 (Mo. banc Apr. 14, 2020) (presuming that the decision of Petitioner's counsel not to impeach a witness was "a matter of trial strategy") (citation omitted). Petitioner is not denying the high bar for deference required by *Strickland* for trial counsel's strategic decisions. See *Strickland*, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). So long as trial counsel thoroughly investigates and considers their options, their reasonable strategic decisions are "virtually unchallengeable." *Id.* However, the Missouri Supreme Court, by failing to consider the reasonableness of the strategic decisions of Petitioner's trial counsel, has transformed a high bar into an insurmountable one contrary to this Court's rulings. Instead, as noted in the Petition, p. 15-17,

the truncated performance excluded a consideration of the reasonableness component thereby creating a disfavored irrebuttable presumption. *See United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

By failing to measure the reasonableness of trial counsel's decisions under this Court's *Strickland* standard, which requires measurement according to "an objective standard of reasonableness," the Missouri Supreme Court has excluded valid ineffective assistance of counsel claims and contravened this Court's *Strickland* line of cases. *Strickland*, 466 U.S. at 688; *see also Rompilla*, 545 U.S. 374, 381 (2005) ("A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules, and the merits of a number of counsel's choices in this case are subject to fair debate."); *Wiggins*, 539 U.S. 510, 511 (2003) ("In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable*."); *Porter v. McCollum*, 558 U.S. 30, 31 (2009) ("[I]t was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented."); *Sears v. Upton*, 561 U.S. 945, 953 (2010) (*per curiam*) ("[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [Petitioner]."). Respondent argues that Petitioner's trial counsel made reasonable decisions, BIO p. 10, but this argument has no basis in the Missouri Supreme Court's opinion. Indeed, the Missouri Supreme Court's claim that trial counsel's failure to question Petitioner's codefendant about the motion was reasonable is conclusory. Though the words are present, the analysis is not.

The court concluded that a decision was made rendered it reasonable without assessing the reasonableness of the decision.

This Court should grant certiorari to clarify a state court's responsibilities under *Strickland* prejudice analysis or alternatively grant, vacate, and remand so the Missouri court conducts a reasonableness analysis of the decisions of Petitioner's trial counsel.

II. The Missouri Supreme Court's "viable defense" language foreclosed any totality-of-evidence review of potentially mitigating evidence and violates this Court's repeated rulings on *Strickland*'s prejudice requirement.

Regarding a court's obligations under *Strickland*, this Court has been clear: a reviewing court must consider the "totality of evidence" when analyzing prejudice. 466 U.S. at 669. "In assessing prejudice, we reweigh the evidence in aggravation against the *totality* of available mitigating evidence." *Wiggins*, 539 U.S. at 534 (emphasis added). The totality of evidence is more than simply the testimony of one other witness; it includes "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding." *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–398 (2000)). Contrary to the rulings of this Court, the Missouri Supreme Court severed the mitigation evidence offered by Petitioner and weighed it separately instead of examining it against the "totality" of the evidence.

Respondent wrongly argues that the Missouri Supreme Court complied with this Court's precedent when the court discarded the new or additional mitigating evidence using its "viable defense" standard. BIO p. 13–14. This standard unconstitutionally precludes review of the complete mitigation picture or, as this Court requires, the totality of available mitigating evidence. As acknowledged by Respondent, the Missouri court rested its finding of no prejudice because the "additional mitigating evidence" would not have outweighed the aggravation. BIO p.

14 citing to Pet. App., p. 6. Respondent’s acknowledgment that the Missouri Supreme Court discarded this Court’s totality of the available mitigating evidence provides ample basis for this Court to act. Viewing only the additional mitigating evidence in isolation (as Respondent agrees occurred) without consideration of the totality of evidence violates this Court’s decisions in *Wiggins*, *Sears*, and *Andrus*. Contrary to Respondent’s assertion, it cannot be presumed that the Missouri Supreme Court conducted a totality-of-evidence review given the language the court employed, and there is no indication otherwise from its opinion.

Respondent’s focus on “refusal to speculate” misses the point of Petitioner’s discussions of the Missouri Supreme Court’s analysis. Petitioner’s discussion of the speculation required by this Court’s decision in *Sears* (see Petition, p. 19-21), was to emphasize that the Missouri Supreme Court did not engage in a “totality of evidence” review required by this Court. The Missouri Supreme Court’s review failed to focus on what a properly instructed jury would have done with the entire body of mitigating evidence.

III. The Missouri Supreme Court utilized a “jury” standard in its prejudice analysis that contradicts this Court’s standard under *Strickland* and imposes too high a burden on Petitioner.

Through its plain language, the Missouri Supreme Court violated this Court’s “one juror” standard. *Wiggins*, 539 U.S. at 537 (noting this Court, in assessing prejudice under *Strickland*, asks whether “there is a reasonable probability that at least one juror would have struck a different balance”); see also *Porter*, 558 U.S. at 42. Respondent’s argument that the requirement for Missouri capital juries to return a unanimous verdict effectively nullifies any misuse of language by the state supreme court does not hold up. The Missouri Supreme Court repeatedly used “jury” language rather than “one-juror” language in its opinion. See *McFadden*, 2020 WL 1861425, at *2 (“In death penalty cases, “a defendant must show with reasonable probability that

the jury, balancing all the circumstances, would not have awarded the death penalty.”) (internal quotations omitted); *id.* at *6 (“McFadden has failed to prove there is a reasonable probability that the jury . . . would not have recommended the death penalty”); *id.* at *11 (“A ‘viable defense’ is one in which there is a reasonable probability that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty.”) (internal quotations omitted).

The Missouri Supreme Court’s persistent use of the incorrect “jury” standard rather than a “one-juror” standard shows that the court required a higher standard from Petitioner than is constitutionally required. Indeed, the court’s requirement that Petitioner prove that the entire jury “would not have awarded the death penalty” holds Petitioner to a constitutionally impermissible standard under *Wiggins*. 539 U.S. at 537.

IV. The Missouri Supreme Court required an unconstitutional nexus for Dr. White’s mitigating evidence that violated Petitioner’s Eighth Amendment rights.

Respondent agrees (see BIO p. 16-17) that imposition of a nexus requirement between mitigating evidence and the underlying offense in capital cases is unconstitutional under *Smith v. Texas*. 543 U.S. 37 (2004) (*per curiam*); *see also Tennard v. Dretke*, 542 U.S. 274 (2004); *Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting from cert denial). This Court in *Smith* rejected a Texas court’s imposition of a requirement that the defendant provide evidence of a “link or nexus” between mitigating evidence of his troubling childhood and the capital offense for which he was convicted. 543 U.S. at 44–45; *see also Tennard*, 542 U.S. at 287 “cannot countenance” the rejection of relevant mitigation “unless the defendant also establishes a nexus to the crime.”) However, the Missouri Supreme Court’s express language refutes

Respondent's contention that the Missouri Supreme Court did not impose a constitutionally prohibited nexus requirement.

The Missouri Supreme Court required an unconstitutional nexus this Court has termed violative of the Eighth Amendment. This nexus requirement between proffered mitigating evidence and the capital offense was used not only for Dr. White's testimony; the Missouri court dismissed other ineffective assistance of counsel claims alleged by Petitioner requiring a nexus to establish *Strickland* prejudice. See *McFadden*, 2020 WL 1861425, at *8 ("Although Dr. White's testimony would have further supported the defense's mitigation theory, Dr. White was unable to opine **how** growing up in Pine Lawn actually **impacted** McFadden's decision to murder Victim."); *id.* at *9 ("Dr. Gelbort was unable to testify that McFadden's brain abnormalities **caused him** to kill. . . .") (emphasis added).

These terms are not ambiguous. They mean what the Missouri Supreme Court says they mean. "How" is defined as "in what manner or way" or "for what reason." *How*, MERRIAM WEBSTER'S UNABRIDGED DICTIONARY (2021). And "impact" means "to have a **direct** effect or impact on." *Impact*, MERRIAM WEBSTER'S UNABRIDGED DICTIONARY (2021) (emphasis added). Using these standard definitions, the Missouri state supreme court's focus on "how" Petitioner's childhood in Pine Lawn "impacted" his decision can be understood only as requiring said testimony to show the "manner or way" in which McFadden's proffered mitigating evidence had "a direct effect or impact" on the decision to commit the crime. The precise language the court employed should neither be ignored nor reimagined.

Respondent cites, then avoids, and finally seeks to impute a strained understanding of the Missouri court's language with Respondent's tortured interpretation of the English language. BIO, p. 17–18. However, Respondent cannot avoid the terminology used by the court and the

common usage and meaning of these terms. The Missouri court did more than grant limited weight to Dr. White's testimony under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), BIO p. 17; it categorically excluded Dr. White's evidence based on its lack of nexus. The court specifically required a showing of "how" the evidence "impacted" McFadden's actions that day – a nexus.

Contrary to Respondent's contention that the excluded evidence was not powerful, there is a "reasonable probability" that Dr. White's testimony regarding Petitioner's upbringing in Pine Lawn and the circumstances of the neighborhood would lead at least one juror to find that mitigating evidence outweighed the aggravating evidence in Petitioner's case. *Wiggins*, 539 U.S. at 516; *see also Rompilla*, 545 U.S. at 378. Dr. White's testimony would have focused the individual jurors on a community filled with death and violence, and corruption and community distrust of the police. As a child, adolescent and as a teen, Petitioner was left-behind to endure the day-to-day trauma of survival in a community where there was simply no hope. This testimony will establish the reasonable probability required by *Wiggins* and *Rompilla*.

Insofar as Respondent says the Missouri Supreme Court could have rejected Dr. White's testimony for reasons other than the unconstitutional nexus requirement it actually based its decision on, Respondent misunderstands the inquiry required under *Strickland*'s prejudice prong. BIO, p. 18. In *Hodge v. Kentucky*, Justice Sotomayor addressed the impropriety of such a line of argument in noting that even if the Kentucky state supreme court had "afforded proper consideration to the mitigation evidence" proffered, it may still have found that the evidence did not satisfy the "reasonable probability" prejudice standard. 568 U.S. at 1056 (Sotomayor, J., dissenting from cert denial). However, Justice Sotomayor recognized that the Kentucky court's "brief discussion of the weight and impact of [the defendant's] mitigation evidence" lent

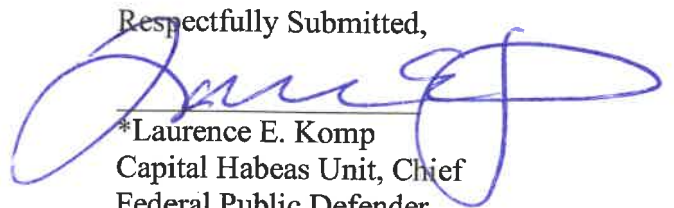
credence to the assumption that its prejudice ruling came from “legal errors” and not the mitigation evidence itself. *Id.*

Similarly, the Missouri Supreme Court’s refusal to find ineffective assistance of counsel for failure to call Dr. White can be attributed to its “legal error” of imposing a nexus requirement between the proffered mitigation evidence and the commission of the offense for which the Petitioner has been convicted. Absent this error, as well as the prejudice analysis errors discussed *supra*, the Missouri Supreme Court must decide whether trial counsel’s failure to include Dr. White’s testimony would satisfy *Strickland*’s prejudice prong.

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 for reconsideration so the Missouri Supreme Court may apply the full and proper standard for ineffective assistance of counsel claims as mandated by this Court.

Respectfully Submitted,



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