No.

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG D. MILLER, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Illinois courts' mechanical, outcome-based approach to the *Strickland* standard routinely denies indigent defendants their Sixth Amendment right to counsel. In Illinois, this violation primarily occurs because Illinois' approach routinely fails to adequately address the fundamental fairness of the trial proceedings. This Court has long held that when adjudicating a claim of ineffective assistance of counsel, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding" and the reliability of the adversarial process. *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Yet even though indigent defendants are stuck with the record made by the attorney who they assert is deficient, Illinois courts too often require affirmative proof of a different outcome rather than merely showing a fundamentally unfair and unreliable proceeding.[1]

This is particularly problematic because Illinois' post-conviction statute does not provide even a statutory right to counsel at the first stage of those proceedings. 725

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[1] Without analyzing or acknowledging the fairness or reliability standards, the Illinois Supreme Court seized on isolated language to assert: "*Strickland* requires a defendant to 'affirmatively prove' that prejudice resulted from counsel's errors." *People v. Johnson*, 2021 IL 126291, ¶ 55, quoting *Strickland*, 466 U.S. at 693 (finding no prejudice despite counsel's professionally unreasonable failure to have available swabs tested for DNA because defendant could not show a different outcome without the results of the unperformed testing). See *People v. Cherry*, 2016 IL 118728, ¶¶ 32-33; See also, *People v. McFadden*, 2021 IL App (5th) 170139-U, ¶¶ 108 (finding no prejudice despite finding multiple errors by counsel because the prosecution's case "was supported" by defendant's statement, even though it also acknowledged that the police had failed to honor the juvenile defendant's invocation of his right to remain silent and that the record was not clear that the juvenile had initiated subsequent conversation with police after also invoking his right to counsel).

ILCS 5/122-2 *et seq*; See *People v. Cotto*, 2016 IL 119006, ¶ 27. This problem is further exacerbated because Illinois' indigent defense system lacks "any oversight structure" to ensure that each county has "a sufficient number of attorneys with the necessary time, training, and resources to provide effective assistance of counsel at every critical stage of a criminal case for each and every indigent defendant."[2]

The substantial gap between our Constitution's requirements and Illinois' appellate review of ineffective assistance of counsel claims is particularly notable in the direct appeal of 17-year-old Craig Miller's first degree murder conviction. *People v. Miller*, 2020 IL App (5th) 170404-U, ¶¶ 51-55. The only question at trial was whether Craig's conduct could be mitigated to second-degree murder. In Illinois, that requires proof of all of the elements of first degree murder. 720 ILCS 5/9-2(a). Craig's trial counsel made numerous mistakes of law that impacted the litigation of Craig's confession and resulted in counsel arguing a theory to the jury that was unsupported by the law or the jury instructions. Counsel erroneously attempted to rely on prosecution witnesses for proof of essential facts yet was unaware that those witnesses would not be present or available at trial. Counsel also attempted to rely on Craig's age and background to mitigate his conduct to second degree murder, yet counsel did not offer available evidence to support that argument or litigate the matter before trial.

Despite these egregious errors, the appellate court summarily disposed of Craig's appeal without addressing the substance of trial counsel's numerous errors based on

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[2] Sixth Amendment Center, "The Right to Counsel in Illinois: Evaluation of Adult Criminal Trial-Level Indigent Defense Services," June 8, 2021, at 153; available at https://sixthamendment.org/the-state-of-illinois-defaults-on-its-constitutional-right-to-counsel-obligation/.

a mechanical outcome-based approach to the prejudice prong. *Miller*, 2020 IL App (5th) 170404-U, ¶¶ 44-46, 55. It concluded that Craig did not establish prejudice because the prosecution's evidence "establishe[d] the elements of first degree murder." *Id.* at ¶ 55. The court's conclusion is illogical – proof of the elements of first degree murder does mean counsel's inadequacies did not prejudice Craig's ability to mitigate his conduct to second degree murder because that too entails proof of these elements. Critically, it merits scrutiny not merely for its logical failures, but also because the court failed to follow *Strickland*'s mandate that it focus on the fundamental fairness and reliability of the proceeding. *Strickland*, 466 U.S. at 696.

The dissent in *Strickland* worried that the performance standard was "so malleable" that it either lacked teeth or would "yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." *Strickland*, 466 U.S. at 707, J. Marshall, dissenting. It also expressed concern that the prejudice standard set forth by the majority was overly burdensome to defendants because proof of the impact of adequate representation was difficult – if not impossible – and it is "senseless" to require a defendant to prove prejudice through the very record that deficient counsel created. *Id.* at 710. It observed that the right to counsel is not limited to the innocent and urged that review should not be based on the potential impact of deficient representation on the outcome but on the receipt of "meaningful assistance" that ensures due process. *Id.* In light of the large variation of standards, implementation of those standards, and the specific deficiencies in Illinois' indigent defense system and appellate review of ineffective assistance of counsel

claims, this Court should grant review.[3] Craig Miller's case presents the ideal opportunity to revisit the prejudice standard set forth in *Strickland* and provide clear-cut guidance to lower courts to promote uniform guarantees to the effective assistance of counsel.

This Court should grant review to clarify the appropriate standards necessary when reviewing counsel's conduct on direct appeal – particularly in cases involving individuals such as Craig who are most vulnerable to systemic injustice base on age, race, and indigent status. This case exemplifies the trend of allowing the *Strickland* fairness-based standard to slide back towards an outcome-based standard. Lower courts need guidance, and Craig's case is an ideal vehicle for this Court to revisit *Strickland* in order to provide essential clarification and more specific standards for review of ineffective assistance of counsel claims on direct appeal.

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[3] See e.g., *McFarland v. Scott*, 512 U.S. 1256, 1259-60 (1994), J. Blackmun dissenting from the denial of cert; Cara H. Drinan, Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel, 70 Wash. & Lee L. Rev. 1309, 1312-14 (2013); Kellsie J. Nienhuser, Criminal Law-Prejudiced by the Prejudice Prong: Proposing A New Standard for Ineffective Assistance of Counsel in Wyoming After *Osborne v. State*, 2012 Wy 123, 285 P.3d 248 (Wyo. 2012), 14 Wyo. L. Rev. 161, 165-67 (2014); Adele Bernhard, Exonerations Change Judicial Views on Ineffective Assistance of Counsel, Crim. Just., Fall 2003, at 37-9 (2003); Sixth Amendment Center Evaluation, Supra note 1; and *People v. Miller*, 2020 IL App (5th) 170404-U, ¶¶ 44-5, 55.

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CRAIG D. MILLER, Petitioner,

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PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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To The Appellate Court Of Illinois

The petitioner, Craig D. Miller, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at *People v. Miller*, 2020 IL App (5th) 170404-U, ¶ 5, appeal denied, 169 N.E.3d 343 (Ill. 2021), and is not published. The order of the Illinois Supreme Court denying leave to appeal (Appendix B) is reported at 169 N.E.3d 343 (May 26, 2021).

JURISDICTION

On December 1, 2020, the Appellate Court of Illinois issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely filed petition for leave to appeal on May 26, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution

No state shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 11, 2014, an ongoing, years-long conflict between a group of kids from Brooklyn, Illinois, and nearby Madison, Illinois, came to a head. (R.7; R.E9, 21:20-30; 22:39-55; 23:19-36)[4] 17-year-old Craig Miller – one of the Brooklyn kids – got home from his summer job and took a nap. (R.606) At about 4:45 pm, a group of four kids from Venice and Madison drove to Brooklyn and shot at Craig's home where he lived with his adult cousin, Yolanda. (R.512,527,604) Craig viewed Yolanda as his "mama." (R.E6, 20:34:34-53; R.E9, 6:07-19) Craig woke up to learn that "the dirt gang came here shooting." (R.E6, 20:23:37) The bullet went through Yolanda's window and hit her headboard, right by where she had been laying down. (R.E6, 20:23:37)

Yolanda called the police and spoke to Brooklyn police chief Tony Tomlinson when he arrived; but she did not believe police tried to talk to Craig. (R.591,594-95) Tomlinson told Craig that the bullet almost killed Yolanda. (R.520) Craig told Tomlinson that the dirt gang was responsible. (R.521) The Brooklyn police did not block off the home, prevent people from entering, or do any formal interviews. (R.592-3)

After talking to Tomlinson, Craig joined the gathering crowd and "[e]verybody" told him that the shooting came from a black car with four kids. (R.E6, 20:41:37-44:20; R.E9, 29:51-30:05; R.520,625-26) A "close family member" told Craig that Malik Garrett was the shooter. (R.608) The crowd gave Craig a hard time for not shooting these kids during earlier altercations. (R.E9, 5:12-6:54) At that point, Craig's adrenaline was rushing, and he could only think about Garrett almost killing his

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[4] For brevity and to avoid duplicate numbers, exhibits will be referenced by corresponding page number and timestamp where applicable.

"mama" in trying to kill him. (R.E6, 22:32:02; R.E9, 6:07-22, 29:20-39)

Craig got into a car with three young adults; they drove to Madison to look for Garrett. (R.504,506,509; E6, 4:44-50) They found him with three other people in a parking lot. (R.E9, 30:00-05) Two dark colored cars were in the lot. (R.E93) The adults dropped Craig behind the lot. (R.E9, 36:28-32) Craig approached with his gun in his pocket and yelled at Garrett: "hey bitch ass dude." (R.618; E6, 22:34:59) Then he "got paranoid" and "scared." (R.E6, 22:35:15-24) Craig thought Garrett and another person had a gun and were going to shoot, so he pulled a gun and shot at Garrett. (R.619; E6, 22:35:24-32) Police were called at about 5:15 pm. (R.309) Garrett was pronounced dead around 6:30 pm. (R.619; Supp.R.26)

Pretrial and trial proceedings

Before trial, counsel expressed doubt that he could be ready by the State's suggested dates due to his caseload and juvenile docket. (R.100) The court told him, "you'll be prepared" and that it would not continue the matter because "felony cases take precedence over juvenile cases." (R.100) Counsel then filed notice of his intent to request a second degree instruction and indicated that Craig might assert self defense. (R.C173-74)

The State moved to bar admission of any "other bad acts." (Supp.R.62) Counsel asserted that the State was aware of Craig and Garrett's prior history, but the State argued it was not aware of specific bad acts by Garrett against Craig. (R.296) The court said it was not aware of any history between Craig and Garrett or "gangs." (R.297) Counsel said he intended to introduce certain bad acts through the State's witnesses, including Donnie Sherrell, but he had not yet been able to talk to any of them. (R.297-

98) The State said that it did not intend to call Sherrell. (R.297-98) The court granted the motion. (R.298)

The next day, counsel asserted that he had learned that in March 2014, Garrett had pulled a gun on Craig and his friends, and someone in Craig's group shot Garrett. (R.331) The prosecutor agreed that she knew about this incident because she had "prosecuted it." (R.332) The court agreed to allow this evidence but only through Craig's testimony. (R.332)

In opening statements, the State asserted that Craig shot Garrett, an unarmed and unsuspecting 16-year-old, because of an earlier shooting at Craig's home that turned out to not involve Garrett – someone else pled guilty to it. (R.381,382-83) Defense counsel opened by asking the jury to "imagine what it's like to be Craig Miller," having grown up in Brooklyn with a corrupt police force, knowing the bullet shot at Yolanda's house "was meant for him." (R.386) Counsel assured the jurors that they would hear "about this ongoing feud" between the kids in Brooklyn and the Madison dirt gang. (R.386)

Garrett's mother and aunt testified that he had been shot previously. (R.394,425) Counsel attempted to ask Garrett's aunt about the rivalry between Brooklyn and Madison kids, but the State objected. (R.425) Counsel responded that they could call the aunt as their witness and that the jury would "hear a lot about it." (R.425)

The State complained to the trial court that defense counsel's remarks about corruption in the Brooklyn police violated the pretrial ruling regarding prior bad acts, and asked that the defense be barred from addressing this with Tomlinson. (R.439-40)

Counsel asserted that they only wanted to ask about corruption generally. (R.440-41,444-45) The court said that without specific detail, it was not relevant; Craig would be allowed to testify about his beliefs, but counsel could not question officers about it or make further comments. (R.444-445)

In discussing jury instructions, the State argued that second degree murder was not available where a defendant is "the initial aggressor," and that Craig was "the only aggressor." (R.635) The court granted counsel's request for second degree instructions on imperfect self defense; but over counsel's objections, it also instructed the jury on self defense and use of force by an initial aggressor. (R.641,725-27,728-29) Counsel asked the court to bar the State from arguing to the jury that a finding that Craig was the "initial aggressor is incompatible" with second degree murder. (R.649) He also urged that self defense instructions would be misleading. (R.643-44) The court declined but allowed counsel to argue this to the jury. (R.649)

In closing arguments, the prosecutor asserted that Craig shot Garrett "in retaliation for a shooting that he had nothing to do with." (R.685-86) She argued that Craig shot Garrett "at point blank range," stood over him shooting multiple times, shot Garrett while he was "begging for his life"; and that testimony established that Craig shot Garrett twice while he was on the ground. (R.686,697) The prosecutor urged that Craig was the aggressor because he had left Brooklyn to find Garrett. (R.691) She also argued that despite "railing against the Brooklyn Police," the defense had not presented evidence of corruption or neglect of the shooting at Yolanda's. (R.693) She reiterated that Craig shot Garrett "while he was on the ground begging for mercy." (R.701)

Defense counsel argued that Craig shot Garrett because he feared for himself and

his family. (R.702-6) He emphasized Craig's environment and exposure to gun violence. (R.703) He countered the State's assertions that the shooting at Craig's house was solved by noting witness statements that four people were in the car, but only one person was prosecuted, and reminding the jury that that person was with Garrett in the parking lot less than 30 minutes after the shooting. (R.710) Had Craig not gone to Madison, he might not be there that day because "this wasn't the first time" Garrett shot at Craig and would not have been the last. (R.710)

In rebuttal, the state asserted that counsel: "paints a very sad, woe is me story. Let's remember . . . [t]his is not Brooklyn, New York . . . this is not the Wild Wild West. This is Brooklyn, Illinois, about 15 minutes outside this front door." (R.715) She noted that the defense had elicited the fact that Garrett had been shot previously and asked the jury: "Who do you think did that?" (R.716) She called the defense argument "ridiculous," because there is no "imminent danger when you go seek out your victim." (R.720) The jury found Craig guilty of murder.

Sentencing

The pre-sentencing investigation detailed Craig's early life. (Appendix C 5-6) Brooke Kraushaar, Psy.D. conducted a psychological evaluation of Craig. (R.SEC.C40-48; Appendix E) Craig was cooperative but frustrated that the evaluation had delayed sentencing; he remarked that he had "learned how much he took for granted before" his incarceration. (R.SEC.C43-44) Kraushaar noted that Craig had "seen a lot of things that most people have never seen." (R.SEC.C44) At age 8, he saw his father in the hospital after being shot, his brother jumped into Craig's arms when he was shot, Craig witnessed others getting shot, and he himself had been shot at.

(R.SEC.C44) Craig observed that you could not forget seeing people killed or someone you love in pain. (R.SEC.C44)

Dr. Kraushaar opined that at "barely 17," the developmental factors of adolescence contributed to Craig's actions. (R.SEC.C45) He responded to the "highly emotional situation" of the drive-by shooting at his home, was influenced by peer pressure, and reacted with violence in a manner that was "the norm in his environment and among his peer group." (R.SEC.C45) His lack of future orientation meant that he did not consider the abstract consequences of his actions or "the magnitude" of the results until later. (R.SEC.C45) Craig "was unable to consider alternative responses other than the emotionally-driven spur-of-the-moment reaction of seeking retaliation." (R.SEC.C45) She noted that it is normal for adolescents to experience narcissism or ego-centrism which explains the lengths teenagers sometimes go through to appear right or save face. (R.SEC.C46) This developmental phase explains Craig's focus on his own "victimhood" and blaming others. (R.SEC.C46)

Dr. Kraushaar explained that Craig's traumatic childhood and frequent exposure to gun violence impacted his brain development and made him hypersensitive to threats. (R.SEC.C47) This "warzone mentality" "is actually a normal psychological reaction to a very abnormal situation." (R.SEC.C47) This explains why Craig "acted on impulse to strike back" before he or his family could be harmed and why he might not think of alternatives. (R.SEC.C47)

Finally, Dr. Kraushaar opined that Craig differed from "persistent offenders," because he had no long-standing pattern of antisocial behavior; Craig was in school, "intent on graduating," employed, and had no prior convictions. (R.SEC.C47-48) The

battery charge obtained shortly after his transfer to adult custody was consistent with peer pressure and an attempt to avoid victimization. (R.SEC.C48) Dr. Kraushaar concluded that – like most adolescents – Craig "has the capacity for change." (R.SEC.C48)

Several family members and friends wrote letters to the judge on Craig's behalf detailing his character and potential. (R.SEC.C16-34,36-37)

The sentencing judge remarked that Craig was "calm and cool" during his statement to police. (R.773-75) She noted his family's letters, but asserted that she had "never experienced that side of [Craig] at any time." (R.775) The judge stated that she wished she could see into the future and know that Craig would not hurt anyone else, but she could not. (R.775-76) The judge stated that she had considered all factors in mitigation, including Craig's age; she applied the aggravating factor, deterrence of others, and in mitigation, found that Craig had no prior history of delinquency and acted under a strong provocation. (R.775-76) The court found that the shooting was not "premeditated" but that Craig had just "immediately reacted" to the shooting at his home. (R.775) The court noted Craig's conduct in detention, and sentenced him to 40 years in prison. (R.777-778) The judge denied counsel's motion to reconsider, stating that 40 years was appropriate because the incident "was that violent" and "cold-blooded." (R.C283, Supp.R.74) The judge emphasized that she did not apply the gun enhancement; she said that "may not seem like a lot to" Craig, but that she could have sentenced him up to 65 years. (Supp.R.73)

Decision on direct appeal

Craig Miller's direct appeal of his murder conviction raised three issues. First,

that his statements to police – at age 17 – were neither voluntary nor made after a valid *Miranda* waiver, but that trial counsel's errors allowed the statements to be used against him. Second, that trial counsel's additional mistakes of law and procedure denied Craig the opportunity to mitigate his conduct to second degree murder. Third, that Craig's 40-year prison term is unconstitutional, disproportionate, and excessive. The Appellate Court declined to address the merits of the first two issues. Instead, it held that the admission of Craig's statements was harmless and that no prejudice resulted from any of trial counsel's actions or inactions because "the evidence strongly supported his conviction," and that the trial evidence "establishe[d] the elements of first degree murder." *Miller*, 2020 IL App (5th) 170404-U, ¶¶ 47, 55. The appellate court also upheld Craig's sentence. *Id.* at ¶¶ 57-64.

REASON FOR GRANTING CERTIORARI

This Court should grant review to provide important guidance on the proper analysis of the prejudice prong of the *Strickland* test in cases where the sole issue is whether a juvenile's conduct can be mitigated to second degree murder.

Direct appeal is the only proceeding where Craig is entitled to effective assistance of counsel in presenting errors at trial, including the ineffective assistance of trial counsel. Yet, on direct appeal, Illinois' approach puts Craig in a Catch-22 situation where he is stuck with the factual record created by trial counsel who he alleged to be seriously ineffective. Here, the appellate court rejected Craig's claims of ineffective assistance of counsel – based on scant analysis and no consideration of the reasonableness of counsel's performance – based on its finding that the prosecution proved the elements of first degree murder. However, the appellate court failed to acknowledge that the issue at trial was whether Craig's conduct could be mitigated to second degree murder – which also entails proof of the elements of first degree murder. The appellate court also ignored the fact that the record facts also supported a possible self-defense claim. Trial counsel's deficiencies directly impacted the evidence presented to the jury regarding Craig's state of mind and, necessarily, the evidence in the appellate record. That is why the focus is supposed to be – and must be – the fundamental fairness of the proceedings.

It is undisputed that someone shot at 17-year-old Craig Miller's house on July 11, 2014, and that the bullet almost hit his adult cousin who he called his "mama."

(R.512,527,587,593,604) It is also undisputed that Craig believed that Malik Garrett was the shooter. (R.608) After goading from the gathering crowd, Craig got into a car with three young adults who drove him to Madison to look for Garrett. (R.E9, 5:12-6:54, R.504,506,509; E6, 4:44-50) Within 30 minutes they had found Garrett standing with a group of three others in a parking lot. (R.E9, 30:00-05, R.512,527,604,309) Craig approached with his gun in his pocket and yelled out to Garrett. (R.618; E6, 22:34:59) Then he "got paranoid" and "scared." (R.E6, 22:35:15-24) Craig thought Garrett and another person had a gun and were going to shoot, so he pulled a gun and shot at Garrett. (R.619; E6, 22:35:24-32)

Based on these facts, the jury was tasked with deciding whether Craig had committed first degree murder or if his conduct could be mitigated to second degree murder based on an unreasonable belief that he was acting in self defense. However, numerous errors by his court-appointed counsel impacted the evidence, arguments, and jury instructions that influenced the jury's assessment of this issue. Counsel's errors include, but are not limited to: citing overruled case law and misstating the law when litigating the admissibility of Craig's interrogations; failing to secure key witnesses because he mistakenly believed the State planned to call them; failing to object to irrelevant testimony from police officers that Garrett was not involved in the shooting at Craig's home; failing to object to inaccurate and improper prosecution arguments; and misconstruing the law on second degree murder resulting in incomplete jury instructions and inaccurate arguments to the jury. (R.C86; R.90; Supp.R.46; R.297-98, 534-38; R.526; R.686-701; R.715-20; R.635, R.643-44; R.388,706-14) Counsel's comments make clear that the missing witnesses would have provided key evidence

regarding Garrett's prior bad acts and details of the earlier shooting at Craig's home. (R.297-98; C193; R.534,538,435) These facts were relevant to the critical issue at trial – Craig's state of mind. At the same time, counsel's legal errors and lack of objections allowed the jury to hear improper prejudicial evidence and argument from the prosecution that damaged Craig's defense. (R.383,515,524,526,533,571,685-86,688,693,697-98,716-17)

Surely the scope and potential impact of these errors cast doubt on the fairness of Craig's trial. Even "[s]eemingly impregnable cases can sometimes be dismantled by good defense counsel." *Strickland v. Washington*, 466 U.S. 668, 710 (1984), J. Marshall, dissenting. Overwhelming evidence that Craig was the shooter is not the same as overwhelming evidence that his conduct was not second degree murder. Where Craig's testimony was the key evidence presented regarding his state of mind, any other witness testimony or evidence supporting his credibility was not merely redundant. It was critically important, yet not presented due to the ineffective assistance of counsel. The appellate court, however, failed to acknowledge or recognize that counsel's errors had adversely affected the fairness of his trial.

Critically, counsel's cumulative errors had dire consequences. For adults, the sentencing range for first degree murder is 20 to 60 years.730 ILCS 5/5-4.5-20(a). Because Craig was a juvenile, had he been convicted of second degree murder, he would have been sentenced under the Juvenile Court Act (the Act) unless the State sought a hearing to sentence him under the code of corrections which applies to adults. 705 ILCS 405/5-130(1)(c)(I). If Craig had been sentenced under the Act, then he would have been committed to the Department of Juvenile Justice, and his detention would

have terminated on his 21st birthday, June 6, 2018. 705 ILCS 405/5-750(3). Moreover, even if sentenced as an adult, the sentencing range for second degree murder is significantly more lenient at only 4 to 20 years. 730 ILCS 5/5-4.5-30(a). Craig also would be eligible for day-for-day sentencing credit. 730 ILCS 5/3-6-4(2017). Even with the maximum available adult sentence of 20 years for second degree murder, Craig could have been eligible for release after 10 years. The minimum term for first degree murder is 20 years; Craig actually received 40 years and must serve every day of it. The prejudice could not be more obvious or more serious. Moreover, counsel's errors deprive the sentencing court of evidence that would have mitigated Craig's conduct even if it did not change the result at trial.

This Court should grant review of Craig's case to make clear that the appellate court's review of counsel's conduct here is not acceptable. The prejudice analysis set forth in *Strickland* states: "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-94. It clarified that its decision did "not establish mechanical rules." *Id.* Instead, " the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged" and the reliability of the result. *Id.* at 696. The appellate court's dismissive, limited, and outcome-based analysis in Craig's appeal does not meet these requirements and merits review.

Not only does its scant consideration of the issue fail to follow *Strickland*, but it gives new weight to the concerns of the *Strickland* dissent. The dissent in *Strickland*

feared that the majority's performance standard was "so malleable" that it either lacked teeth or would "yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." *Strickland*, 466 U.S. at 707, J. Marshall, dissenting. It also expressed concern that the prejudice standard set forth by the majority was overly burdensome to defendants and required a difficult – if not impossible – task of showing how adequate representation could have impacted the prosecution's case. *Id.* at 710. The dissent found it "senseless" to require a defendant to bear the burden of showing prejudice when his lawyer "has been shown to have been incompetent" and that same lawyer was responsible for developing the record. *Id.* Finally, the dissent critically observed that the right to counsel is not restricted to the innocent and "also functions to ensure that convictions are obtained only through fundamentally fair procedures." *Id.* at 711. Therefore, review should not be based on the potential impact of deficient representation on the outcome but on the receipt of "meaningful assistance" that ensures due process. *Id.*

Craig's case is not isolated, rather it is representative of a trend in Illinois towards an outcome-based standard. In *People v. Cherry*, 2016 IL 118728, ¶ 27, the Illinois Supreme Court noted that it had only found *per se* ineffectiveness under the second *Cronic* exception twice in the 30 years since this Court's decision in *US v. Cronic*, 466 U.S. 648, 659-61 (1984). In both cases, the attorney had admitted the defendant's guilt to the jury in opening statements and had failed to advance any defense. *Cherry*, 2016 IL 118728, ¶¶ 27-28.

Cherry also illustrates the strict outcome-based standard applied in Illinois. In that case, the defendant complained of ineffective assistance of counsel to the trial

court and the court appointed counsel to advance his claims at a post-trial hearing on the issue. *Id.* at ¶ 23. Appointed counsel adopted the *pro se* claims and arguments, but he failed to take any action to develop the claims or counter arguments from the prosecution. *Id.* On appeal, the *Cherry* defendant complained that it is impossible to prove prejudice – that "the outcome of that hearing would have been different" – because that proof would require the record "to contain the very evidence that counsel failed to introduce." *Id.* at ¶ 32. While agreeing with that "characterization of the record," the supreme court refused to remand for a new hearing and denied that the defendant was in "an 'impossible situation.' " *Id.* at ¶ 33. It maintained that *Strickland* claims commonly "turn on matters outside the record" and that the Post-Conviction Hearing Act is the solution to that issue. *Id.*

However, "development of ineffectiveness claims almost always requires the aid of counsel."[5] And yet, defendants are not entitled to appointed counsel *at all* at the first stage of post-conviction proceedings. 725 ILCS 5/122-2 *et seq*; See *People v. Cotto*, 2016 IL 119006, ¶ 27. Further, they are never entitled to effective assistance in these proceedings, only reasonable assistance offered "as a matter of legislative grace." *People v. Custer*, 2019 IL 123339, ¶ 30. This is an untenable situation. Particularly so, where Illinois fails to provide any oversight of its public defense system, and because appointed counsel in Illinois "are first beholden for their livelihoods to the political and judicial branches of government" attorneys have excessive caseloads that prevent effective assistance and "fail to advocate for the constitutional and statutory rights of

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[5] Ty Alper, Toward A Right to Litigate Ineffective Assistance of Counsel, 70 Wash. & Lee L. Rev. 839, 844 (2013); See Eve Brensike Primus, The Illusory Right to Counsel, 37 Ohio N.U.L. Rev. 597, 608-9 (2011).

indigent defendants."[6] Illinois is not the outlier; these practical problems with Illinois' indigent defense system that routinely deny indigent persons the right to counsel are emblematic of nationwide problems.[7] These systems improperly interfere with appointed counsel's independence and practical ability to provide adequate advocacy. Given this context, this Court should not sanction the careless review and improper analysis of Craig's ineffective assistance claims. In addressing a trial court's actions, the Seventh Circuit observed: "If the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted. It is not right that the state should be able to say, 'sure we impeded your defense—now prove it made a difference.' " *Walberg v. Israel,* 766 F.2d 1071, 1076 (7th Cir. 1985). This is precisely the situation in Illinois and beyond.

The problem that Craig's case exemplifies is that counsel can be deficient in all the key areas of criminal defense – investigation, research, presentation of evidence, etc. – and reviewing courts can still refuse to find prejudice without affirmative proof of a different outcome. This is so even though the accused is bound by the record created by that attorney in the only proceeding where he is entitled to the effective assistance of counsel in establishing prior counsel's deficiencies. Yet, how can there be any confidence in the fairness of a trial and the reliability of the process when counsel has failed at the most basic duties – knowing the law and knowing the evidence? Because of counsel's errors, the jury deciding Craig's case suffered an onslaught of

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[6] Sixth Amendment Center Evaluation, at iix, 156, Supra note 1.

[7] Cara H. Drinan, Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel, 70 Wash. & Lee L. Rev. 1309, 1312-15 (2013).

irrelevant and highly prejudicial evidence and argument; and counsel's argument for mitigation was inconsistent with the instructions given to the jury. Similar to *Hinton v. Alabama*, 571 U.S. 263, (2014), this Court should review Craig's case because the appellate court misunderstood the nature of the issue, and thus it failed to adequately assess the impact of counsel's deficient assistance. For these reasons, this Court should revisit *Strickland* to provide necessary guidance on proper analysis of the prejudice prong and guide lower court's away from an outcome-based analysis that disregards the critical context of indigent defense and places too onerous a burden on indigent defendants.

CONCLUSION

For the foregoing reasons, petitioner, Craig D. Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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