No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TYRE BRADBURY – PETITIONER

VS.

STATE OF INDIANA – RESPONDENT

APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

To the Honorable Justice Amy Coney Barrett, Associate Justice of the Supreme Court and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

1. Pursuant to Supreme Court Rules 13.5, 21, 22, 30 and 33.2, Applicant Tyre Bradbury respectfully requests a 60-day extension of time, up to and including July 7, 2022, to file a petition for a writ of certiorari to the Indiana Supreme Court to review the judgment in *Bradbury v. State*, No. 21S-PC-00441. A petition for rehearing was timely filed in the Indiana Supreme Court, which on February 7, 2022, granted in part the petition for rehearing and modified its original majority and dissenting opinions. A copy of the modified opinions is attached as Exhibit A, and a copy of the Order on Rehearing is attached as Exhibit B. This Court has jurisdiction under 28 U.S.C. § 1257(a). Without an extension, the time to file a

petition for a writ of certiorari will expire on May 9, 2022. This application is timely because it is being filed more than ten days before the petition is due.

2. Good cause justifies the requested extension. This case involves the murder conviction of a fifteen-year-old defendant under the theories of accomplice liability and transferred intent, despite "testimony from the intended victim at trial suggest[ing] that Bradbury had in fact tried to stop the principal from shooting" and "evidence suggest[ing] that [the principal] merely intended to frighten the rival by recklessly firing the gun in his general direction." Exhibit A, dissenting opinion at 6. After the Indiana Court of Appeals held that Bradbury had received ineffective assistance of trial counsel and reversed the trial court's denial of Bradbury's petition for post-conviction relief, the Indiana Supreme Court granted transfer and reinstated Bradbury's murder conviction and sixty-year sentence in a 3-2 decision. The majority opinion of the Indiana Supreme Court presents important federal questions about whether trial counsel's failure to request a lesser-included-offense instruction without consulting with his client amounts to deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The dissenting opinion identified a split among other state courts of last resort about these questions, and found the majority opinion of the Indiana Supreme Court to be among the minority that require neither consultation with the client before counsel pursues an all-or-nothing strategy, nor evidence of a clear trial strategy, nor careful scrutiny of ineffective-assistance claims based on failure to submit a lesser-included instruction. Exhibit A, dissenting opinion at 4-5.

3. Undersigned counsel is a solo private practitioner and part-time public defender with limited experience in filing petitions for a writ of certiorari. He has had recently, and will have in the coming weeks, significant professional and personal commitments that would make it extremely difficult to complete the petition without an extension. An extension of time will help to ensure that the petition clearly and thoroughly presents the vitally important issues raised by the Indiana Supreme Court's 3-2 decision.

4. For the foregoing reasons, Applicant hereby requests an extension of time, up to and including July 7, 2022, within which to file a petition for a writ of certiorari.

Dated: April 27, 2022

Respectfully submitted,

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IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-PC-441

Tyre Bradbury,
Appellant/Petitioner,

–v–

State of Indiana,
Appellee/Respondent.

Argued: June 10, 2021 | Originally Decided: October 1, 2021
Modified on Rehearing: February 7, 2022
Corrected

Appeal from the St. Joseph Superior Court
No. 71D08-1801-PC-2
The Honorable Elizabeth C. Hurley, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-PC-620

Opinion by Justice David

Justices Massa and Slaughter concur.
Justice Massa concurs with separate opinion in which Justice Slaughter joins.
Justice Goff dissents with separate opinion in which Chief Justice Rush joins.

EXHIBIT A

David, Justice.

In this murder case, defendant alleges counsel was ineffective in several ways. However, reviewing the facts and circumstances here, we find that counsel was not ineffective and affirm the post-conviction court.

Facts and Procedural History

Fifteen-year-old Tyre Bradbury was charged as an adult and convicted of murder as an accomplice with a gang enhancement after his nineteen-year-old friend, Robert Griffin, shot and killed a toddler while opening fire on a rival during a gang dispute. Bradbury had provided Griffin with the handgun he used.

After Bradbury was arrested, he spoke with police at length and changed his story a few times. At one point he even claimed that he was the shooter, but later reneged and said he was just protecting his friends. He also admitted his responsibility to other inmates.

At trial, Bradbury argued that he was innocent and tried to stop the shooting. Nevertheless, Bradbury was convicted and received an enhanced sentence of ninety years. This sentence was modified to sixty years following his direct appeal.

Bradbury then sought post-conviction relief alleging that his trial counsel was ineffective in various respects. The post-conviction court denied Bradbury's petition, and a split Court of Appeals appellate panel reversed. The majority focused on just two claims of ineffective assistance: 1) whether counsel was deficient for stipulating that Griffin was convicted of murder as the principal (thus conceding that Griffin had the requisite intent to kill); and 2) whether counsel was ineffective for failing to request that the jury be instructed on lesser-included offenses. The majority found that counsel should not have agreed to the stipulation and should have sought an instruction on lesser included offenses and that counsel's failures prejudiced Bradbury (but does not explain how).

EXHIBIT A

Judge Vaidik dissented. She would affirm the trial court citing the standard of review and noting that while it is possible to read the record the way the majority did, she did not see it that way. She further noted that she agreed with the post-conviction court that counsel's decisions were strategic and noted evidence in the record not favorable to Bradbury that makes it less than clear that a new trial would produce a different result. For instance, there were multiple witnesses whose testimony supported Griffin's intent to kill and thus, not stipulating to it would not be helpful and further, given this evidence, a lesser included instruction would not be appropriate either.

The State petitioned for transfer which we now grant. Ind. Appellate Rule 58(A).

Standard of Review

In order to obtain relief on post-conviction, a petitioner must show "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020); *see also Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000). This Court has also stated that an appellate court should not reverse a denial of post-conviction relief unless "there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). A reviewing court accepts the post-conviction court's findings of fact unless they are "clearly erroneous." *Davidson v. State*, 763 N.E.2d 441, 443-44 (Ind. 2001). In that analysis, the post-conviction court is the "sole judge of the evidence and the credibility of the witnesses." *Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006).

Discussion and Decision

To succeed on ineffective assistance of counsel claims, Bradbury must show: (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) the deficiency was so prejudicial as to create a reasonable probability the outcome would have been different absent counsel's errors. *Hollowell v.*

State, 19 N.E.3d 263, 268-69 (Ind. 2014) (applying *Strickland* standard). Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018), *reh'g denied*. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

I. Stipulation to Griffin's conviction

In order to convict Bradbury of murder as an accomplice, the State was required to prove beyond a reasonable doubt that **Bradbury**, acting with the intent to kill his rival, knowingly aided, induced, or caused Griffin to commit the crime of murdering toddler J.S. [1] Bradbury's counsel stipulated to the fact that **Griffin** was convicted of murder. Bradbury and the Court of Appeals majority fault counsel for this decision, believing it undercut Bradbury's case and made it easier for the State to meet its burden of proof regarding Bradbury.

At an evidentiary post-conviction hearing, Bradbury's lead trial counsel testified that he agreed to stipulate to Griffin's conviction even though he believed the evidence could have been kept out because he did not want the jury to believe that if Bradbury were acquitted "this child died without anybody facing the music." PCR Tr. Vol. 4 at 20. He further stated: "[w]e were arguing that Mr. Griffin was acting on his own without any consultation or assistance from [Bradbury]. So [we] thought the fact that he had been convicted kind of supported that proposition." *Id*. at 21. Co-counsel articulated another reason for the stipulation as well. That is, Bradbury had initially confessed that he was the shooter and thus, the stipulation served to show that it was a false confession. *Id*. at 58-59.

[1] This was how the trial court instructed the jury on the charge. *See* Ind. Code §§ 35-42-1-1 (murder), 35-41-2-4 (accomplice liability). The State argues this instruction was erroneous and benefitted defendant.

More importantly though, this stipulation does not speak at all to **Bradbury's** intent, which the State still had to prove. While certainly counsel did not have to stipulate to Griffin's intent, this stipulation did not relieve the State of the burden to prove Bradbury's intent. Bradbury asserts he tried to stop the shooting, and lead counsel testified emphatically and repeatedly that this was what he wanted to get across to the jury any way he could. The stipulation in no way forecloses or contradicts that theory of the case. Thus, we find the Court of Appeals majority's conclusion that the stipulation "wholly undercut" the defense is inaccurate in light of Bradbury wanting not just to get a lesser conviction/sentence, but not wanting to be convicted at all. It seems counsel's strategy was to put some daylight between Bradbury and the shooter and only in retrospect, when the shooter and Bradbury were both convicted, does that seem to not have been the ideal plan.

Nevertheless, counsel was not ineffective here. He articulated his thought process for agreeing to stipulate, and doing so was not illogical or absurd. Further, the standard of review requires that we affirm unless "thereis no way within the law that the court below could have reached the decision it did." *Stevens*, 770 N.E.2d at 745.

Further, as for prejudice, Bradbury "must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Wilson*, 157 N.E.3d at 1177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Vaidik noted in her dissent, there is a quite a bit of evidence here to support a finding that Griffin had the intent to kill given that several witnesses, including the intended victim, testified about how Griffin shot many times at the intended victim. So even if Bradbury's counsel had not agreed to the stipulation, Griffin's intent likely would have been proven. Thus, there would be no difference in the outcome.

II. Lesser included instruction

Bradbury also claims that his attorneys were ineffective for failing to seek lesser alternatives to a murder conviction. According to Bradbury, he

would have been entitled to a jury instruction on reckless homicide as an accomplice to Griffin if his counsel had sought it. Further, he testified that counsel did not discuss the matter with him and had counsel done so, he would have wanted the instruction.[2] Although lead trial counsel could not remember his exact thought process at the time of trial, he testified that he did not submit a lesser included instruction because he did not believe that it was supported by the evidence. He also testified that he typically would seek a lesser included instruction if it were warranted. But here, his theory of the case was that the State didn't sufficiently prove Bradbury's intent, and more importantly it was counsel's position that:

> it was rogue action by Griffin that [Bradbury] did not contribute to and did not join and did not have any knowledge; if Griffin did have specific intent that [Bradbury] never had that intent beforehand because for Christ's sake he tried to stop it and the victim said that he did.

PCR Tr. Vol 4 at 28-29. Counsel expressed doubt that this theory was compatible with seeking a lesser included.

Defense counsel "enjoys 'considerable discretion' in developing legal strategies for a client, and this discretion demands deferential judicial review." *Gibson*, 133 N.E.3d at 682 (quoting *Stevens*, 770 N.E.2d at 746–47).Further, this Court has previously held that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included

[2] The dissent believes that this decision should have been discussed with Bradbury "[b]ut it wasn't", Dissent at 2, which suggests that counsel admitted he did not discuss the lesser included instruction strategy with his client. But counsel did not admit that he did not discuss such with Bradbury. Instead, counsel testified that he did not recall whether he had this conversation years ago, and under further questioning, he acknowledged that he should have, if he didn't. Defendants can and do occasionally make statements that may be self-serving and memories may fade over time. The record on this issue is not clear as to exactly what happened.

EXHIBIT A

in the greater offense. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (citing *Page v. State*, 615 N.E.2d 894, 895 (Ind. 1993)).

Here, counsel made a reasonable decision given the circumstances. As stated above, counsel sought to have the jury find that Bradbury was innocent. That is, Bradbury tried to stop the shooting and Griffin, the shooter, acted despite this. As this Court has previously held, "[i]t is not sound policy for this Court to second-guess an attorney through the distortions of hindsight." *Autrey*, 700 N.E.2d at 1141. Further, "[t]he all or nothing strategy employed by counsel was appropriate and reasonable based on the facts in this case." *Id.* Indeed, here a reasonable juror could have found that despite Griffin's action, Bradbury was not an accomplice because he tried to stop the shooting as counsel argued throughout trial. The fact that the jury decided otherwise does not mean that counsel was ineffective. To so hold would open the door to every unfavorable verdict being challenged and/or overturned on ineffective of assistance of counsel grounds. Accordingly, because we find that Bradbury's counsel's performance was not deficient, we decline to address the prejudice prong under *Strickland*. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) ("To prevail on an ineffective assistance of counsel claim, one must show **both** deficient performance and resulting prejudice") (emphasis added); *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) ("Failure to satisfy either prong will cause the claim to fail.").

III. Other claims of ineffective assistance of counsel not addressed by our Court of Appeals

Because our Court of Appeals found the above two issues dispositive, it did not address two other claims of ineffective assistance of counsel made by Bradbury on appeal. We briefly address them now.

Bradbury argues that counsel was ineffective by not using a defense witness' prior consistent statement to rehabilitate that witness during trial. However, as noted above, counsel is afforded considerable discretion in choosing a trial strategy and further, a post-conviction court can only be reversed if there is no way under the law such a result can be reached. Here, rather than using the witness' prior statement, which took the form of a recording that was hard to hear, counsel rehabilitated the witness

EXHIBIT A

with his own trial testimony. This is a reasonable trial strategy and Bradbury has not demonstrated counsel was ineffective here, nor that there was no way within the law this outcome could be reached.

Additionally, Bradbury argues that counsel was deficient for not raising a constitutional challenge at trial. That is, that Indiana's criminal gang enhancement is vague. However, Bradbury has not demonstrated a reasonable probability that this argument would have succeeded.

When the validity of a statute is challenged, appellate courts begin with a "presumption of constitutionality." *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000) (quoting *State v. Downey*, 476 N.E.2d 121, 122 (Ind. 1985)). To survive a challenge, the statute "need only inform the individual of the generally proscribed conduct, [and] need not list with itemized exactitude each item of conduct prohibited." *Id*. A statute will not be found unconstitutionally vague if individuals of ordinary intelligence can comprehend it adequately to inform them of the proscribed conduct. *Id*. Thus, Bradbury faces a high bar to have the statute here declared unconstitutional.

While Bradbury has argued it is hard to defend a criminal gang enhancement charge, posited some hypotheticals about what may or may not be included in the statutory definition and indicated that the State's inclusion of video evidence of him rapping was prejudicial, he has not demonstrated that a person of ordinary intelligence cannot comprehend the statute, nor has he pointed to any evidence that the statute is vague as applied to him. For these reasons, we cannot say that there is a reasonable probability that there would have been a different outcome for Bradbury had counsel raised this constitutional challenge. As such, we find no ineffective assistance of counsel here either.

Conclusion

We affirm the post-conviction court.

Massa and Slaughter, JJ., concur.
Massa, J., concurs with separate opinion in which Slaughter, J., joins.
Goff, J., dissents with separate opinion in which Rush, C.J., joins.

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EXHIBIT A

Massa, J., concurring.

Not only was counsel here not constitutionally "ineffective," he was, in fact, extraordinarily effective, actually persuading the trial court to heighten the prosecution's burden, allowing him to pursue a reasonable and permissible all-or-nothing trial strategy.[1] That this clever and resourceful lawyering proved unsuccessful does not mean a violation of *Strickland* occurred.

Much ink has been spilled in Indiana appellate decisions over the past three decades on the elements of attempted murder. In *Spradlin v. State*, for better or worse, this Court for the first time required an extra element be added to jury instructions in attempted murder cases—that the defendant acted with the specific "intent to kill the victim." 569 N.E.2d 948, 950 (Ind. 1991). In practice, this has made attempted murder harder to prove than murder. If doctors fail to save the patient, the State need only prove a "knowing" killing by the shooter, i.e. he acted with awareness of the high probability that he would kill the victim—often a fair conclusion when someone shoots another person dead. If, however, the patient survives, the State must prove the shooter actually and specifically intended to kill. *Id.* Over time, this judicially imposed proof requirement was extended to accomplices in attempted murder cases, *Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind. 2000), so the State must prove they shared the principal's specific intent.

Whatever one might think of the wisdom of our *Spradlin* jurisprudence, this much is clear: it is confined to cases of attempted murder. And Tyre Bradbury was not charged with **attempted** murder. He was charged with **murder** as an accomplice to a shooter accused and convicted on a theory of transferred intent. All the State should have had to prove (prior to the stipulation) was that Robert Griffin committed a **knowing** killing, and that Bradbury aided and abetted him. Yet, this allegedly ineffective defense counsel was somehow able to convince a superb trial judge to instruct the jury that Bradbury had to have formed *Spradlin*-level specific intent to kill. That's not ineffective, that's Darrow-like adversarial

[1] Defense counsel argued that recent precedent of the United States Supreme Court, *Rosemond v. United States*, 572 U.S. 65 (2014), suggested his client was entitled to a specific intent to kill instruction as an accomplice to murder. The trial court agreed and instructed the jury that the State must prove Bradbury was "acting with the intent to kill Larry Bobbitt."

EXHIBIT A

advocacy that makes our system work. With this windfall in hand, counsel was able to argue to the jury that Griffin was the only truly responsible party, and that Bradbury lacked a mens rea that the State should not have had to prove in the first place. Such assistance was anything but constitutionally ineffective, even if it failed to gain an acquittal.

Stipulating to the principal's conviction and culpability was critical to counsel's trial strategy, especially once he was able to convince the court to commit instructional error to his client's significant benefit. It practically foreclosed—reasonably, if not successfully—asking for a lesser included instruction, an omission the dissent finds to be reversible error. One might second guess this strategic decision and assert that counsel would have been better off contesting the shooter's culpability and then asking for a lesser included instruction. Counsel could have employed a strategy that potentially led to his client being convicted of something less than murder. Or, armed with a jury instruction that overburdened the prosecution, he could argue that his client never meant for the shooter to kill anybody, and gain a full acquittal. There are "countless ways to provide effective assistance in any given case" and even the "best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). That his defense strategy was unsuccessful does not mean it was unreasonable.

"It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, that a particular act or omission of counsel was unreasonable." *Id.* A fair assessment of attorney performance requires that "every effort be made to eliminate the distorting effects of hindsight," and because of the difficulties inherent in making this evaluation, judicial scrutiny of counsel's performance must be "highly deferential." *Id.* Bradbury cannot overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* And even if he could, how can he show a reasonable probability of a different result? The jury convicted him of murder with a specific intent to kill, why would they have found him guilty of reckless homicide? Defense counsel's performance here was something to compliment, not second-guess.

Slaughter, J., joins.

EXHIBIT A

Goff, J., dissenting.

I respectfully dissent.

The Court holds that counsel was not ineffective (1) for stipulating, at Bradbury's trial for murder as an accomplice, to the principal actor's underlying conviction in the crime; and (2) for failing to request a lesser-included instruction. Because counsel sought to avoid suggesting to the jury that an acquittal would result in no accountability for the murder, I agree with the Court that counsel's stipulation was reasonable trial strategy. But because counsel failed to consult with Bradbury on whether to request a lesser-included instruction, and because *Strickland* imposes on counsel a specific duty to "consult with the defendant on important decisions" at trial, I would find counsel's performance deficient. And because this deficient performance resulted in prejudice to Bradbury, I would find ineffective assistance of counsel.

Discussion

When analyzing an ineffective-assistance-of-counsel claim, we apply the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, Bradbury must show (1) that counsel's performance fell short of prevailing professional norms, and (2) that counsel's deficient performance prejudiced his defense. *Id.* at 687. A showing of deficient performance under the first prong requires proof that legal representation lacked "an objective standard of reasonableness," effectively depriving Bradbury of his Sixth Amendment right to counsel. *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007) (citing *Strickland*). To establish prejudice, he must show a "reasonable probability" that, but for counsel's errors, the proceedings below would have resulted in a different outcome. *Wilkes v. State*, 984 N.E.2d 1236, 1241 (2013).

In my view, Bradbury has sufficiently met both requirements.

EXHIBIT A

I. With no intended strategy and without consulting his client, counsel's failure to request a lesser-included instruction was deficient performance.

Bradbury contends that, had counsel requested it, he would have been entitled to an instruction on reckless homicide, whether as an accomplice or as a principal. Appellant's Br. at 16. In rejecting this claim, the post-conviction court found it "clear that counsels' strategy was an acquittal," as shown by "the intense advocacy [he] brought to bear at every stage of the proceedings." Appellant's App. Vol. II, p. 120. Affirming this decision, the Court relies on our precedent for the proposition "that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel." *Ante*, at 6–7 (citing *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998)).

As a general rule, counsel may, "as part of an 'all or nothing' trial strategy," reasonably refrain from tendering instructions on a lesser-included offense. *Autrey*, 700 N.E.2d at 1141. And this rule holds true even when, like here, "the lesser included offense is inherently included in the greater offense." *Id.* (citing *Page v. State*, 615 N.E.2d 894, 895 (Ind. 1993)). *See Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (holding that "reckless homicide is an inherently included lesser offense of murder"). Counsel, however, testified that his failure to request such an instruction "was **not** a strategic decision." P-C Tr. Vol. IV, p. 27 (emphasis added). And even if it were strategic, that decision should have been discussed with Bradbury. But it wasn't, and counsel admitted that it should have been.

Strickland imposes few requirements on attorneys. Indeed, counsel enjoys considerable discretion in developing strategies and tactics at trial, and "[j]udicial scrutiny of counsel's performance" is "highly deferential." *Strickland*, 466 U.S. at 689. Still, "[r]epresentation of a criminal defendant entails certain basic duties," among which include "a duty of loyalty" and "a duty to avoid conflicts of interest." *Id.* at 688. *Strickland* also imposes on counsel the "**particular** duties to **consult with the defendant** on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* (emphases added).

Our Rules of Professional Conduct likewise require counsel to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which they are to be pursued." Ind. Professional Conduct Rule 1.2(a). These Rules further require counsel to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." Prof. Cond. R. 1.4(b). Some of these decisions—including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"—implicate certain basic rights over which the defendant retains ultimate authority. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *See also Banks v. State*, 884 N.E.2d 362, 368 (Ind. Ct. App. 2008) (holding that counsel's concession that defendant was guilty of one of several charged offenses, "without any indication of the client's consent to the strategy," amounts to deficient performance under *Strickland*), *trans. denied*. Beyond these "fundamental decisions" lie strategic or tactical choices for which counsel assumes "professional responsibility" while conducting the case. *Jones*, 463 U.S. at 753 n.6. But even then, counsel should make these decisions only "after consulting with his client." *Id.*

Echoing these principles, the ABA's *Standards for Criminal Justice* specify that "[s]trategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate." American Bar Association Standards for Criminal Justice 4-5.2(b) (3rd ed. 1993).[1] And commentary to this standard considers it "important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury." *Id.*

It's clear, then, that counsel's duty of consultation on **all** important decisions at trial—whether fundamental or strategic—is more than just a prevailing professional norm; it's "an ethical cornerstone of the legal profession." *United States v. Holman*, 314 F.3d 837, 841 (7th Cir. 2002). And

[1] The U.S. Supreme Court has long referred to the ABA standards "as guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (quoting *Strickland*, 466 U.S. at 688–89). And this Court will "often consult" them too, not as "rigid, detailed rules" but rather for "advisory" purposes. *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (quoting *Weisheit v. State*, 109 N.E.3d 978, 998 n.2 (Ind. 2018)).

EXHIBIT A

there's no question in my mind that, under the circumstances here, the decision of whether to seek a lesser-included instruction, or to pin "all hope of a successful outcome on one roll of the dice" by seeking a full acquittal, was an important one. *See Hiner v. State*, 557 N.E.2d 1090, 1093 (Ind. Ct. App. 1990).[2] Indeed, with the charge of accessory to murder, along with a criminal-gang enhancement, Bradbury faced a maximum term of **130 years** in prison. *See* Ind. Code § 35-50-2-3 (2014) (specifying a 65-year maximum sentence for murder); I.C. § 35-50-2-15(d)(1) (criminal-gang enhancement for "an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony"). A conviction for reckless homicide, by contrast, even with the criminal-gang enhancement, would have landed him in prison for a maximum of only **twelve years**. *See* I.C. § 35-42-1-5 (defining reckless homicide as a level-5 felony); I.C. § 35-50-2-6(b) (specifying a six-year maximum sentence for conviction of a level-5 felony); I.C. § 35-50-2-15(d)(1) (criminal-gang enhancement for "an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony"). Given this **enormous** variation in potential sentencing outcomes, counsel's failure to request a lesser-included-offense instruction without consulting with his client, in my view, amounted to deficient performance.

This conclusion finds support in decisions from several jurisdictions. In *People v. Bell*, for example, the Illinois Appellate Court held that, with "no evidence that the decision was made by the defendant or that it was a component of any existing trial strategy," counsel's failure to request such an instruction reflected a "near total failure to act on behalf of his client." 505 N.E.2d 365, 371 (Ill. App. Ct. 1987). The Superior Court of New Jersey,

[2] In *Hiner*, the defendant-appellant raised an ineffective-assistance claim based in part on counsel's failure to request an instruction on a lesser-included offense. 557 N.E.2d 1090, 1093 (Ind. Ct. App. 1990). But, while ruling for the defendant, the Court of Appeals made no specific determination on the lesser-included-offense issue or whether counsel had discussed the decision with the defendant. Rather, the court's holding rested on the cumulative effect of counsel's errors, including—among other things—his refusal "to make opening arguments," "to object during the direct examination of any of the State's witnesses," "to cross-examine any of the State's witnesses," and "to make closing arguments." *Id.* at 1091.

EXHIBIT A

Appellate Division, recently found no ineffective assistance where the evidence showed that counsel "conferred with defendant" on the option of a lesser-included offense. *State v. Mells*, No. A-2575-18, 2021 WL 1749965, at *8 (N.J. Super. Ct. App. Div. May 4, 2021). And the Colorado Supreme Court has held that the decision to request such an instruction is a "tactical" one "that rests with defense counsel after consultation with the defendant." *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008). *See also Cannon v. Mullin*, 383 F.3d 1152, 1167 (10th Cir. 2004) (emphasizing that the question of "[w]hether to argue a lesser-included offense is a matter to be decided by counsel after consultation with the defendant"), *abrogated in part on other grounds by Simpson v. Carpenter*, 912 F.3d 542, 576 n.18 (10th Cir. 2018); *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct. App. 2004) (holding that counsel "has the ultimate authority" to decide whether to submit a lesser-included instruction while acknowledging the importance of client consultation under the ABA standard).

Some courts, to be sure, impose no requirement of consultation before counsel pursues an all-or-nothing strategy. But even those decisions, with few exceptions, either cite evidence of a clear trial strategy or carefully scrutinize ineffective-assistance claims that raise the issue. In *Mathre v. State*, for example, the North Dakota Supreme Court held that counsel's failure to consult with the defendant about the decision not to submit a lesser-included instruction was "a reasoned decision based upon trial strategy." 619 N.W.2d 627, 631 (N.D. 2000). And, while declining to impose a blanket rule, the Georgia Supreme Court, in *Van Alstine v. State*, found it "critically important for defense lawyers in a jury trial to consult fully" with the defendant when pursuing "an 'all or nothing' defense," adding that the effect of counsel's failure to submit a lesser-included instruction "must be rigorously scrutinized when ineffective assistance of counsel is asserted." 426 S.E.2d 360, 363 (Ga. 1993).[3]

[3] An exception is *Reed v. State*, in which the Florida Supreme Court held that defense counsel may waive instructions on lesser-included offenses to non-capital crimes without showing that defendant knowingly or intelligently joined in the decision. 560 So.2d 203, 206–07 (Fla. 1990).

EXHIBIT A

II. Counsel's deficient performance resulted in prejudice to Bradbury.

I would also hold that that counsel's deficient performance resulted in prejudice to Bradbury. The State prosecuted the principal for the toddler's death under a theory of transferred intent—*i.e.*, that the principal intended to murder the rival gang member but mistakenly killed the toddler instead. *Griffin v. State*, 40 N.E.3d 1282 (Ind. Ct. App. 2015) (mem. dec.). So, to convict Bradbury of murder as an accomplice, the State had to prove beyond a reasonable doubt that Bradbury, acting with the intent to kill the rival gang member, knowingly aided, induced, or caused the principal to commit the crime of murdering the toddler. *See* I.C. § 35-42-1-1 (murder), I.C. § 35-41-2-4 (accomplice liability). *See also Brown v. State*, 770 N.E.2d 275, 281 (Ind. 2002) (holding that "conviction of an accomplice requires sufficient proof of the underlying crime").

In arguing that Bradbury wasn't prejudiced by counsel's failure to request a lesser-included instruction, the State cites Bradbury's admissions of involvement in the shooting and points to evidence that "the shooting was not merely reckless" but intentional. Appellee's Br. at 19–20. But the evidence, from my reading of the record, isn't so clear cut.

To begin with, Bradbury, despite his initial statement of responsibility, later retracted his admissions (as the Court itself acknowledges), and testimony from the intended victim at trial suggested that Bradbury had in fact tried to stop the principal from shooting. What's more, while several witnesses testified that the principal shot "at" the rival gang member, other evidence suggested that he merely intended to frighten the rival by recklessly firing the gun in his general direction. The spray of gunfire, after all, killed the toddler, **not** the intended victim. In fact, counsel even argued to the jury—his stipulation to the underlying conviction notwithstanding—that the principal "obviously wasn't trying to kill" the victim, suggesting that "the state did not prove th[e requisite] mental intent" to establish murder. P-C Tr. Vol. IV, pp. 23–24.

This conflicting evidence, in my view, would likely have created a serious enough dispute over Bradbury's culpability as an accomplice for

the court to have given the lesser-included instruction, had counsel requested one. *See Brown*, 770 N.E.2d at 281 (holding that defendant charged with being an accomplice to murder was entitled to a jury instruction on reckless homicide where there was "a serious evidentiary dispute" about the culpability of the principal actor). And the probability that Bradbury could have received such an instruction, but for counsel's error, is reasonably sufficient, in my opinion, to "undermine confidence in the outcome" of the case. *See Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018).

Still, the State insists that, given Bradbury's "repeated admissions of responsibility, a jury would have had little difficulty finding him guilty of a lesser offense" and he "still may have received a significant sentence because he was also facing a criminal gang enhancement." Appellee's Br. at 16 (record citations omitted). But it's no answer to suggest "that a defendant may be better off without [a lesser-included] instruction." *Keeble v. United States*, 412 U.S. 205, 212 (1973). To be sure, when "the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal." *Id.* But a defendant is entitled to such an instruction "precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory." *Id.* After all, when "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 212–13. But if given the option to convict on a lesser-included offense with a substantially reduced sentence (even with a criminal-gang enhancement), the jury may well have chosen that option.

The State's suggestion also conflicts with the "basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments." *State v. Stidham*, 157 N.E.3d 1185, 1188 (Ind. 2020). At fifteen years old at the time of his conviction, Bradbury had much "greater prospects for reform" than an adult offender, effectively "diminish[ing] the penological justifications for imposing" on him the harshest of sentences. *See id.* at 1194 (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)).

EXHIBIT A

Conclusion

In sum, I agree that counsel's stipulation to the principal actor's conviction was reasonable trial strategy. I respectfully dissent, however, from the Court's holding that counsel's failure to request a lesser-included instruction amounted to effective assistance. Given the "particular" duties imposed by *Strickland*, codified in our Rules of Professional Conduct, and urged by the American Bar Association, I would hold that counsel's failure to consult with Bradbury on whether to request a lesser-included instruction amounted to deficient performance. And because conflicting evidence would likely have created a serious enough dispute over Bradbury's culpability as an accomplice for the court to have given the instruction, I would also hold that counsel's deficient performance resulted in prejudice.

Rush, C.J., joins.

EXHIBIT A

In the Indiana Supreme Court

Tyre Bradbury,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
21S-PC-441

Court of Appeals Case No.
20A-PC-620

Trial Court Case No.
71D08-1801-PC-2

Order on Rehearing

This matter comes before the Court on the petition for rehearing that Tyre Bradbury ("Bradbury") filed on November 1, 2021, and the parties' briefing on the petition.

Being duly advised, the Court grants Bradbury's petition in part and modifies its original majority opinion, issued October 1, 2021, as follows:

> To so hold would open the door to every unfavorable verdict being challenged and/or overturned on ineffective of assistance of counselgrounds. Accordingly, because we find that Bradbury's counsel's performance was not deficient, we decline to address the prejudice prong under *Strickland*. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) ("To prevail on an ineffective assistance of counsel claim, one must show **both** deficient performance and resulting prejudice") (emphasis added); *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) ("Failure to satisfy either prong will cause the claim to fail.").
>
> ~~We also find no prejudice here. Tendering the lesser included instruction would have given the jury another option to convict Bradbury.As the State correctly notes, Bradbury was unlikely to be acquitted of a lesser charge in light of the evidence that the shooting was not just reckless, but intentional, as well as Bradbury's own repeated admissions of responsibility. As such, he was not prejudiced by counsel not seeking a lesser included instruction.~~

Slip op. at 7.

Further, Justice Goff modifies his separate opinion as follows:

> In ~~concluding~~ arguing that Bradbury was~~n~~'t ~~not~~ prejudiced by counsel's failure to request a lesser-included instruction, the ~~Court~~ State cites ~~"~~Bradbury's ~~own repeated~~ admissions of involvement in the shooting ~~responsibility~~" and points to ~~"~~evidence that "the shooting was not ~~just~~ merely reckless"~~,~~ but intentional.~~"~~ Appellee's Br. at 19–20.~~*Ante*, at 7.~~

Dissent at 6.

EXHIBIT B

Still, the ~~Court~~ State insists that, given Bradbury's "repeated admissions of responsibility, a jury would have had little difficulty finding him guilty of a lesser offense" and he "still may have received a significant sentence because he was also facing a criminal gang enhancement." Appellee's Br. at 16 (record citations omitted). ~~"[t]endering the lesser included instruction would have given the jury another option to convict Bradbury." Ante, at 7.~~ But it's no answer to ~~insist~~ suggest "that a defendant may be better off without ~~such an~~[a lesser-included] instruction." *Keeble v. United States*, 412 U.S. 205, 212 (1973). . . . But if given the option to convict on a lesser-included offense with a substantially reduced sentence (even with a criminal-gang enhancement), the jury may well have chosen that option.

The ~~Court's~~ State's suggestion also conflicts with the "basic notion that juveniles are different from adults when it comes to sentencing and are generally less deserving of the harshest punishments." *State v. Stidham*, 157 N.E.3d 1185, 1188 (Ind. 2020).

Id. at 7.

Additionally, it has come to the Court's attention that the original majority opinion contains typographical errors on page 5 of the slip opinion. Specifically, the underlined words below were inadvertently omitted from the original opinion:

. . . Further, the standard of review requires that we affirm unless "there is no way within the law that the court below could have reached the decision it did." *Stevens*, 770 N.E.2d at 745.

Further, as for prejudice, Bradbury "must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Wilson*, 157 N.E.3d at 1177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Slip op. at 5.

Contemporaneous with the entry of this Order, the Court is filing its Opinion on Rehearing reflecting these changes.

Done at Indianapolis, Indiana, on 2/7/2022.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

EXHIBIT B

All Justices concur, except Rush, C.J. and Goff, J., who vote to grant rehearing in full for the reasons expressed in the dissent to the opinion on rehearing.