No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TYRE BRADBURY – PETITIONER

VS.

STATE OF INDIANA – RESPONDENT

On Petition for a Writ of Certiorari to the Indiana Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the decision not to tender available lesser included offense instructions in order to instead pursue an "all or nothing" strategy an "important decision" under *Strickland v. Washington*, 466 U.S. 668 (1984), such that trial counsel's decision to pursue an "all or nothing" strategy without consulting with the defendant amounts to deficient performance under *Strickland*?

RELATED PROCEEDINGS

State v. Bradbury, No. 71D08-1405-MR-000005, Superior Court of St. Joseph County, Indiana. Judgment entered May 16, 2016.

Bradbury v. State, No. 71A05-1606-CR-01280, Indiana Court of Appeals. Judgment entered August 21, 2017.

Bradbury v. State, No. 71D08-1801-PC-000002, Superior Court of Indiana in and for the County of St. Joseph. Judgment entered February 12, 2020.

Bradbury v. State, No. 20A-PC-00620, Indiana Court of Appeals. Transferred to Indiana Supreme Court October 1, 2021.

Bradbury v. State, No. 21S-PC-00441, Indiana Supreme Court. Judgment entered February 7, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tyre Bradbury respectfully prays for a writ of certiorari to review the Indiana Supreme Court's judgment affirming the trial court's denial of his petition for post-conviction relief.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and has been designated for publication but is not yet reported. The opinion of the Indiana Court of Appeals appears at Appendix C to the petition and is reported at 160 N.E.3d 256. The order of the state post-conviction trial court appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided the petitioner's case was February 7, 2022. A copy of that decision appears at Appendix A. An extension of time to file the petition for a writ of certiorari was granted to and including July 7, 2022, on May 3, 2022, in Application No. 21A664. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the ineffective assistance of counsel. A claim of ineffective assistance of trial counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687. To demonstrate a "reasonable probability" that the outcome in the case would have been different, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

Importantly for Bradbury's case, this Court in *Strickland*, while holding that more specific guidelines by which to measure attorney performance were not appropriate, nevertheless emphasized that "[c]ounsel's function is to assist the defendant," and that from this function derive certain "basic duties," including "the overarching duty to advocate the defendant's cause and the more *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.* at 688 (emphases added).

This case is about whether trial counsel fails in those basic duties when he makes the important decision to forgo available lesser included offense instructions to pursue an "all or nothing" strategy, without consulting with the defendant on that

important decision. In Bradbury's case, without such an instruction he faced up to 130 years in prison, and after his conviction was in fact sentenced to 90 years in prison, which was later reduced to 60 on direct appeal. On the other hand, if his trial counsel had requested a lesser included instruction on reckless homicide, and the jury had found him guilty of that offense instead of murder, the most he would have faced at sentencing was 12 years in prison. In practical terms, with day-for-day good time credit, the most he would have faced would have been 4 more years of actual incarceration beyond the 2 actual years he had already spent in jail at the time of his trial.

1. *Factual background.* Tyre Bradbury was fifteen years old when, on April 9, 2014, he was with a group of other teens who confronted another teen, Larry Bobbitt, in a public park in South Bend, Indiana. The confrontation began with Bobbitt being challenged to engage in a fistfight with one of the group, which Bobbitt was prepared to do, but before that could happen nineteen-year-old Robert Griffin and juvenile T.B. pulled out handguns and fired around fifteen shots in the direction of Bobbitt, as Bobbitt ran away. *Bradbury v. State*, No. 71A05-1606-CR-1280, 2017 Ind. App. Unpub. LEXIS 596 (Ind. Ct. App. May 15, 2017) at 12 (hereafter "Direct Appeal"). Bradbury had obtained and provided Griffin with the handgun he used. App. 2. None of the approximately fifteen shots hit Bobbitt, but one of Griffin's bullets traveled 390 yards and killed two-year-old J.S. as he was playing in the front yard of his house several blocks away. App. 37.

The State charged Bradbury as an adult with murder as Griffin's accomplice. At Bradbury's trial, the jury was presented with testimony that Bradbury had said about the death of J.S., "It's my fault," and "if he would have never brought the guns over there it would have never happened." Direct Appeal 14. Bobbitt testified that Bradbury shouted "don't shoot" immediately before Griffin shot at Bobbitt, but one of Bradbury's fellow inmates testified that Bradbury had said his family was attempting to make a deal with Bobbitt's family so that Bobbitt would testify that he heard Bradbury shouting at his companions not to shoot during the confrontation. Direct Appeal 15. Bradbury's counsel argued in his closing statement that Bradbury tried to stop the shooting and that Griffin "obviously wasn't trying to kill" the victim, suggesting that "the state did not prove th[e requisite] mental intent" to establish murder. App. 17. But Bradbury's trial counsel did not request that the jury be instructed on any lesser-included offenses, such as reckless homicide.

Bradbury was convicted of murder as an accomplice with a gang enhancement and received an enhanced sentence of ninety years. This sentence was modified to sixty years following his direct appeal.

2. *Post-Conviction Proceedings in the Trial Court.* Bradbury filed a petition for post-conviction relief in the trial court, claiming that his counsels' failure to request a lesser included instruction on reckless homicide was deficient performance and that Bradbury was prejudiced as a result. At the evidentiary hearing on the petition, Bradbury's counsel testified that their failure to request a jury instruction on a lesser included offense was not the result of a "strategic" decision to pursue an "all or

nothing" strategy but instead was based solely on their belief that such an instruction would not have been supported by the evidence and therefore would not have been given if requested. Bradbury's lead counsel testified repeatedly that the only reason he did not ask for a lesser included instruction was because he did not believe it was supported by the evidence and would not have been given if requested, that "especially in murder cases" he asks for as many lesser included instructions as he can get, that his decision not to request a lesser included instruction in Bradbury's case was not "strategic," and that if he was wrong about Bradbury's entitlement to lesser included instructions then he had performed deficiently. PCR Tr. Vol 4 at 25-28. Bradbury testified at the hearing that his trial counsel never discussed with him the possibility of requesting a lesser included instruction, and that if he had known doing so was an option, he never would have forgone requesting a lesser included instruction in favor of pursuing an "all or nothing" strategy. *Id.* at 65-66.

The trial court denied Bradbury's petition for post-conviction relief in a written order. App. 37. On the issue of counsel's failure to request a jury instruction on a lesser included offense, the court relied on the Indiana Supreme Court's decision in *Autrey v. State*, 700 N.E.2d 1140 (Ind. 1998), which categorically held, without any reference to trial counsel's duty under *Strickland* to "consult with the defendant on important decisions" at trial, that a unilateral decision by trial counsel "not to tender lesser included offenses as part of an 'all or nothing' strategy . . . is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of

reasonableness." *Id.* at 1141. Furthermore, the post-conviction court, despite trial counsel's clear testimony at the evidentiary hearing that their failure to request a lesser included instruction "was not a strategic decision," found that counsels' "strategy was an acquittal" and that they had in fact pursued an "all or nothing" strategy. Trial counsel's testimony to the contrary was "belied by his arguments throughout the trial" and the "intense advocacy [he] brought to bear at every stage of the proceedings." App. 40-41.

3. *Post-Conviction Proceedings on Appeal.* Bradbury appealed the trial court's denial of his petition for post-conviction relief to the Indiana Court of Appeals, which reversed the judgment of the post-conviction court in a 2-1 decision. App. 23. The majority held that the evidence did not support the post-conviction court's finding that counsel's decision to omit lesser-included offense instructions was strategic. Not only did counsel specifically testify that the decision was not strategic, but he also

> specifically testified that he normally seeks as many lesser included offense instructions as the evidence will support, particularly in murder cases. Counsel also made clear that he would have tendered a lesser included offense instruction if the evidence against Bradbury supported it, and any failure to do so in the presence of such evidence was counsel's error.

App. 28, 29.

Citing *Brown v. State*, 770 N.E.2d 275, 280-81 (Ind.2002) (holding that defendant charged with being an accomplice to murder was entitled to jury instruction on reckless homicide where there was "a serious evidentiary dispute" about the culpability of the principal actor), the majority concluded that the evidence in Bradbury's case would indeed have supported an instruction on reckless homicide,

since from the evidence a reasonable juror could have concluded Griffin did not intend to kill Bobbitt but instead was only trying to frighten him by recklessly firing the gun in his general direction. App. 28.

It is also significant that in its statement of Facts the majority found that as a simple matter of fact "Bradbury unsuccessfully tried to stop Griffin from shooting." App. 24. Bradbury had argued in his petition for post-conviction relief, both in the trial court and on appeal, that his counsel also performed deficiently by failing to present to the jury a recording of a prior consistent statement that Bobbitt made to his mother during a break in an interview with investigators, to rebut the State's evidence suggesting that Bobbitt had agreed to fabricate his testimony that Bradbury had tried to stop Griffin from shooting. The post-conviction court and ultimately the Indiana Supreme Court denied this claim on the ground that the recording was "hard to hear," and therefore it was a reasonable trial strategy to rehabilitate Bobbitt with his own trial testimony instead, but presumably the recording was clear and reliable enough to convince the Indiana Court of Appeals that Bradbury did in fact try to stop Griffin from shooting. App. 7-8, 45-46.

The State filed a Petition to Transfer in the Indiana Supreme Court. Notably, the victim's father, J.S., Sr., filed an amicus brief in support of Bradbury and opposing transfer, in which he stated that he "does not believe that Bradbury should have been convicted of murder," and "hopes Bradbury's case goes back to the trial court and is resolved in a way whereby Bradbury does not have to serve any more time than he already has." Nevertheless, the Indiana Supreme Court granted transfer, thereby

vacating the decision of the Indiana Court of Appeals, and affirmed the trial court's denial of post-conviction relief in a 3-2 decision, with two of the Justices in the majority joining a separate concurring opinion.

The two dissenting Justices would hold that Bradbury's counsel performed deficiently "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," and "would also hold that counsel's deficient performance resulted in prejudice" to Bradbury, and therefore that Bradbury received ineffective assistance of counsel at trial and was entitled to post-conviction relief. App. 12.

For its rejection of Bradbury's claim that his attorneys were ineffective for failing to seek lesser alternatives to a murder conviction, the majority, like the post-conviction court, first relied on its own decision from 1998 in *Autrey* for the proposition that "a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel," without any reference to counsel's duty under *Strickland* to "consult with the defendant on important decisions" at trial. As the second premise of its syllogism justifying the denial of relief, it also, like the post-conviction court, appeared to find that trial counsel, despite their own testimony to the contrary, had made a conscious and "reasonable decision" to employ an "all or nothing" strategy. The majority's basis for this finding was its claim that counsel "expressed doubt" at the post-conviction hearing that his theory that Bradbury never had the requisite intent because Bobbitt said that he tried to stop the shooting "was

compatible with seeking a lesser included," although the majority did not quote or cite where in counsel's testimony they had expressed this doubt. The "all or nothing" strategy employed by Bradbury's counsel was reasonable because "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." Because counsel had made a reasonable strategic decision to pursue an "all or nothing" strategy, the majority reasoned, to hold that counsel had performed deficiently in these circumstances "would open the door to every unfavorable verdict being challenged and/or overturned on ineffective of assistance of counsel grounds." App. 5-7.

An earlier version of the majority's opinion also included the following paragraph:

> 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.

App. 20.

Bradbury had filed a Petition for Rehearing which argued, among other things, that the majority's prejudice analysis was clearly contrary to *Strickland*, since giving the jury the option to convict Bradbury of reckless homicide would have given them the option to convict him of that *instead* of murder, even if it might have increased somewhat his overall chances of being convicted of *something*. The court granted the Petition for Rehearing in part and removed the prejudice analysis from its opinion entirely. App. 20.

REASONS FOR GRANTING THE PETITION

I. The Indiana Supreme Court's 3-2 decision conflicts with counsel's duty to consult with the defendant on important decisions under *Strickland*.

The entire basis for the majority's conclusion that Bradbury's trial counsel made a "strategic" decision to employ an "all or nothing" strategy, despite his testimony to the contrary, was its claim that "Counsel expressed doubt that [his theory that Bradbury did not have the requisite intent because he had tried to stop the shooting] was compatible with seeking a lesser included." App. 6. The majority did not quote or cite counsel's testimony in support of this claim, but presumably was referring to the testimony immediately preceding and following the testimony it quoted:

> As a practical matter I almost always include, especially in murder cases I will include as much of an array of lesser includeds as I can. I have even submitted battery as a C misdemeanor as a lesser included in murder cases. So I'm a believer in doing that where I believe it is appropriate.
>
> However, in this case I got to say we were arguing that they were simply – that it was clear that the state had not proven beyond a reasonable doubt what Griffin's intent was. We were arguing that regardless of that, it was rogue action by Griffin that Tyre did not contribute to and did not join and did not have any knowledge; if Griffin did have a specific intent that Tyre never had that intent beforehand because for Christ's sake he tried to stop it and the victim said that he did. So those were our arguments there.
>
> How would I have been able to argue that? Because Griffin was just being careless and, no, we had not presented any evidence either about what Griffin's state of mind was, would I have argued that to the jury, I don't know. I didn't. I haven't thought about it since. I just say that if there was evidence to support it and I didn't raise it, then I think that was an error on my behalf.

PCR Tr. Vol 4 at 27-28.

In fact, counsel recalled elsewhere in his testimony at the post-conviction hearing that he had argued to the jury that Griffin "obviously wasn't trying to kill" the victim, suggesting that "the state did not prove th[e requisite] mental intent" to establish

murder. App. 17. "Moreover, counsel specifically raised the issue of Griffin's intent in a pretrial motion to dismiss, during pretrial hearings, in opening argument, during discussions of instructions, in his motion for a directed verdict, and during closing argument." App. 27.

Furthermore, under Indiana law, requesting a lesser included instruction on reckless homicide would not have hindered in any way, or been *incompatible* with, counsel's argument for an acquittal based on Bradbury's lack of homicidal intent. *Webb v. State*, 963 N.E.2d 1103, 1107 (Ind. 2012) (holding that defendant charged with murder was entitled to jury instruction on lesser offense of reckless homicide even though he testified at trial that he was not present and therefore not the shooter, because in determining whether a serious evidentiary dispute exists the trial court must look at the evidence presented in the case *by both parties*).

Moreover, as the dissent acknowledged, Bradbury had argued in post-conviction proceedings that he would have been entitled to an instruction on reckless homicide not only as an accomplice, but also as a *principal*. App. 13.

Murder is the knowing or intentional killing of another human being. Ind. Code § 35-42-1-1(1). Reckless homicide is the reckless killing of another human being. Ind. Code § 35-42-1-5. Because the only distinction between murder and reckless homicide is the level of culpability, reckless homicide is an inherently included offense of murder. *Wright v. State*, 658 N.E.2d 563, 567 (Ind. 1995). The Indiana Supreme Court has stated that "[i]f the evidence warrants it, a requested instruction on Reckless

Homicide should always be given in a case in which Murder has been charged." *Wright*, 658 N.E.2d at 567.

There was evidence that Bradbury provided to Griffin the gun that Griffin used to fire in the direction of Bobbitt, which tragically resulted in the death of J.S. two blocks away. Most people would agree that it is reckless to provide a handgun to another individual who is planning to engage in a fight on your side, but that does not at all mean that you knowingly or intentionally killed another human being (by aiding, inducing or causing the other individual to fire the handgun). If Bradbury could be found guilty of having knowingly or intentionally caused the death of J.S. by providing Griffin with the handgun prior to the fight with Bobbitt, he certainly also could instead have been found guilty of having recklessly caused the death of J.S. by that same conduct – if his trial counsel had requested an instruction that allowed the jury to do so.

In contrast to and complementing the lesser included instruction on accomplice to reckless homicide, this instruction would have focused the jury's attention on the mens rea of Bradbury himself and allowed them to find that he himself acted recklessly.

> Thus, if the accomplice recklessly endangers life by rendering assistance to another, he can be convicted of manslaughter if a death results, even though the principal actor's liability is at a different level. In effect, therefore, the homicidal act is attributed to both participants, with the liability of each measured by his own degree of culpability toward the result.

Model Penal Code Pt. I § 2.06 Comment, at 321 (1985). (Indiana's included-offense statutes were taken in 1976 from the Model Penal Code. *Wadle v. State*, 151 N.E.3d 227, fn.23 (Ind. 2020).)

The Indiana Supreme Court inexplicably ignored Bradbury's argument that his trial counsel could and should have requested a lesser included instruction on reckless homicide as a *principal*.

While the dissent based their opinion on trial counsel's breach of their duty to consult with Bradbury on whether to request lesser included offense instructions, the majority ignored this central issue, except in a footnote, where the majority took issue with the dissent's belief that the decision whether to request a lesser included instruction "should have been discussed with Bradbury '[b]ut it wasn't.'" The majority did not admit that counsel had any duty to consult with Bradbury on this important decision, but instead only expressed agnosticism on the question of whether Bradbury's trial counsel ever discussed with him the possibility of requesting a lesser included instruction. App. 6. But why would trial counsel have discussed such a possibility with Bradbury, when according to their testimony at the post-conviction hearing they had concluded that the evidence did not support such an instruction and it would not be given if they asked for it? Or even if they did bring up the issue with Bradbury, contrary to Bradbury's testimony, what could they have told him, except that they had considered the possibility and concluded that it was not an option?

More starkly than any other decision from a state court of last resort or a United States court of appeals, the Indiana Supreme Court's majority opinion stands for the

proposition that defense counsel may decide not to request an available lesser included instruction and thereby subject the defendant to a significantly increased risk of a decades-longer prison sentence, without ever bothering to consult with the defendant himself about this decision first. This is error, first and foremost because it directly conflicts with one of the very few "basic duties" of defense counsel specifically set forth by this Court in *Strickland* – the particular duty to "consult with the defendant on important decisions."

There can be no doubt that, in general and in the circumstances of Bradbury's case especially, the decision whether to request an available lesser included instruction is an "important" one. "Indeed, with the charge of accessory to murder, along with a criminal-gang enhancement, Bradbury faced a maximum term of **130 years** in prison. 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**." App. 15 (citations omitted) (emphasis in original). With day-for-day good time credit, that would have been six years in actual time, and by the time of his trial Bradbury had already served almost two actual years in jail. Even with a maximum sentence, he would have been out by age twenty-one. But as things now stand, even after the reduction by the Indiana Court of Appeals of his sentence from ninety to sixty years, Bradbury will be forty-five years old before he is eligible for release from prison for actions he committed when he was fifteen years old. There is no comparison.

Under these circumstances, it is arguable whether, even if the decision were to be regarded solely as that of trial counsel, with no duty to consult the client, a decision by defense counsel to "go for broke" and pursue an "all or nothing" strategy could meet "objective standards of reasonableness." It is not as if, even "armed" with what the concurrence characterized as an erroneously favorable ruling by the trial judge requiring the State to prove Bradbury intended the death of Bobbitt for him to be convicted as an accomplice to murder, app. 11, Bradbury was not still in very serious jeopardy of being convicted as an accomplice to murder, in light of the evidence that he had provided the handgun to Griffin and had told people that the death of J.S. was his fault, especially after a State's witness testified that Bobbitt's testimony that Bradbury tried to stop the shooting was fabricated, and especially when the jury was presented with no other option besides accomplice to murder to convict Bradbury of a crime.

On the other hand, there was no downside to requesting a lesser included instruction on reckless homicide, other than perhaps increasing somewhat the chance that Bradbury would have to spend another four actual years incarcerated relative to the chance of an outright acquittal, in order to decrease the chance that he would be convicted of accomplice to murder and sentenced to up to 130 years in prison. Trial counsel did in fact argue Griffin's intent to the jury, albeit briefly, and if he had requested lesser included instructions on reckless homicide he still could have spent as little or as much time arguing the recklessness of Griffin or Bradbury or both relative to arguing for an acquittal as he deemed appropriate, while still giving the

jury the option to decide that the actions of Griffin or Bradbury or both had been reckless rather than murderous, as in *Webb, supra.*

What was at stake was not complicated and did not call upon the technical expertise of counsel to decide. To hold, as a majority of the Indiana Supreme Court has done, that trial counsel is free to make such a momentous decision without the input of his client is to hold that trial counsel is free to gamble with the life and freedom of his client, perhaps even for personal ambitions of his own, and apart from "counsel's function as assistant to the defendant."

Most courts have indeed held that "whether or not to ask the trial judge to instruct the jury on lesser-included offenses is a matter of strategy and tactics ceded by a defendant to his lawyer." *People v. Colville,* 20 N.Y.3d 20, 955 N.Y.S.2d 799, 979 N.E.2d 1125, 1130 (2012) (collecting cases). But *Colville*, for example, involved a defense attorney who most definitely *had* consulted with his client about lesser-included instructions. After that consultation, the defense attorney wanted to have the jury instructed on lesser-included offenses, but the defendant himself did not. Their disagreement was presented to the trial court on the record, and the trial court felt bound to honor the wishes of the defendant over the objection of his defense attorney. The appellate court held that this was error. However, it is important to recognize that in that kind of scenario the defendant still retains ultimate control over his fate, because if he feels strongly enough about the issue he has the right to terminate the representation and to represent himself, or to retain different counsel.

A defendant who is never even informed that requesting such an instruction is an option, as in Bradbury's case, cannot take such a course.

The assertion that the failure to request a lesser included instruction was a strategic decision is undermined if counsel never even consulted with the client in making the decision. How can counsel's decision be called strategic if he hasn't even informed himself of the client's basic goals and risk averseness, by informing the client of and discussing with him the pros and cons of requesting a lesser-included offense instruction? The fact that such a consultation was had helps establish that the attorney's ultimate decision was in fact a strategic one, rather than the result of an oversight or a misunderstanding of the law, as it was in Bradbury's case.

It is impossible to imagine that, if Bradbury's counsel *had* consulted with him on this issue, and Bradbury had told him that he wanted to request a lesser included instruction and did not want to pursue an "all or nothing" strategy, and if Bradbury's counsel had nevertheless overridden Bradbury's decision and insisted on pursuing an "all or nothing" strategy, that this course of action by defense counsel would have satisfied an "objective standard of reasonableness."

As noted above, the Indiana Supreme Court majority decision declined to address the "prejudice" prong of *Strickland*. This prong would have been satisfied for all the reasons discussed by the dissent. App. 17-18. There is at least a reasonable probability that if given the opportunity Bradbury's jury would have convicted him of reckless homicide rather than murder. Given the fact that approximately fifteen shots were fired in the direction of Bobbitt but none of them hit him as he fled from

close range, a reasonable juror, if given an instruction on reckless homicide as an accomplice, could have had a reasonable doubt that Griffin really intended to kill Bobbitt rather than just scare him. Moreover, even though a different jury did convict Griffin of murder, *Griffin v. State*, 40 N.E.3d 1282 (Ind. Ct. App. 2015) (mem. dec.), it is not inappropriate to admit that an argument that Griffin acted recklessly rather than intentionally might have had a much better chance of succeeding in Bradbury's trial than the very same argument in Griffin's trial, given their relative levels of culpability in the homicide. Furthermore, if Bradbury's counsel had requested an instruction on reckless homicide as a *principal*, the focus would have been on the intent of Bradbury *himself* when he provided the handgun to Griffin, in light of the fact that when Griffin started to shoot in the direction of Bobbitt Bradbury tried to stop him.

The concurrence asked, "how can [Bradbury] 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?" App. 11. But as the dissent noted, app. 18, this Court has already answered that question in *Keeble v. United States*, 412 U.S. 205, 212 (1973). 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.

II. This issue is unsettled, important, and recurring.

There is a surprising dearth of federal or state court decisions directly holding what should be obvious – the decision whether to request a lesser included instruction or to instead pursue an "all or nothing" strategy at trial is an "important decision," and therefore counsel has a "basic duty" under *Strickland* to "assist the defendant" by consulting with the defendant in making this important decision.

Coincidentally, one of the few such opinions that does is an Indiana Court of Appeals *dissent* cited by Bradbury in his appeal below:

> Undoubtedly, it may be an appropriate strategy for the trial counsel to submit to the jury only the option of acquittal or conviction in a murder case. However, like the decision to plead guilty, the decision is not simply a matter of strategy, but is a decision which affects the substantial rights of the defendant and should be adopted only where the counsel has made the decision *in consultation with the defendant.*

Sarwacinski v. State, 564 N.E.2d 950, 955 (Ind. Ct. App. 1991) (emphasis in original).

In *Sarwacinski v. McBride*, No. 93-2814, 1995 U.S. App. LEXIS 6001 (7th Cir. Mar. 21, 1995), the Seventh Circuit in an unpublished opinion reviewing the district court's denial of the same defendant's petition for habeas corpus relief from the same conviction, assumed a duty to consult but did not find prejudice under *Strickland* and therefore affirmed. It noted that the majority opinion in the Indiana Court of Appeals "did not refer to the duty to consult." *Id.* at 6.

In *Barnett v. Godinez*, No. 93-2011, 1995 U.S. App. LEXIS 16614 (7th Cir. July 6, 1995), the Seventh Circuit clearly and forthrightly held

> While the all-or-nothing choice was reasonable, Barnett's attorneys did not have the authority to make the decision to adopt this strategy alone. Although an attorney possesses great latitude to shape trial strategy, the client must participate in the decisionmaking process when important decisions are concerned or fundamental rights are at issue.

Id. at 13 (citations omitted).

The Seventh Circuit remanded to the district court for an evidentiary hearing on Barnett's allegation that "he did not make an informed decision to forego the robbery instruction," which if proven would entitle him to a new trial. *Id.* at 15. But this opinion too is unpublished.

The Indiana Supreme Court's dissent in Bradbury's case did cite to a handful of decisions from other jurisdictions which appear to support a conclusion that counsel's failure to request a lesser-included-offense instruction without consulting with his client amounts to deficient performance, but obviously the majority found none of them binding or persuasive. App. 15-16.

On the other side of the scale, there is no shortage of published decisions, in both state and federal court, which stand for the proposition that "whether or not to ask the trial judge to instruct the jury on lesser-included offenses is a matter of strategy and tactics ceded by a defendant to his lawyer." *People v. Colville,* 20 N.Y.3d 20, 955 N.Y.S.2d 799, 979 N.E.2d 1125, 1130 (2012) (collecting cases).

This Court should grant certiorari to reconcile these decisions with the duty of counsel to consult with the defendant on important issues.

Nor should the Court wait for Bradbury's claims to be decided first in federal habeas proceedings. Although the Indiana Supreme Court's decision does indeed

appear to represent not just a wrong but an "unreasonable application" of *Strickland*, a petitioner's burden in federal habeas proceedings is notoriously difficult to meet, and this Court should right this wrong now, not only for the benefit of Bradbury – who is indeed worthy of it, as even the victim's father believes – but to vindicate nationally the fundamental principle espoused by this Court in *Strickland* when it recognized that "[c]ounsel's function is to assist the defendant":

> Until recently, this Court rarely granted review of state-court decisions in collateral review proceedings, preferring to allow the claims adjudicated in such proceedings to be decided first in federal habeas proceedings. . . . When cases reach this Court after habeas review in the lower federal courts, the standards of review set out in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, apply. Recently, this Court has evidenced a predilection for granting review of state-court decisions denying postconviction relief.

Foster v. Chatman, 578 U.S. 488, 523-24 (2016) (Alito, J., concurring in the judgment) (citations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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