No. _____

In The
Supreme Court of the United States

EDWARD ELLIS, III,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
To the Missouri Court of Appeals
Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in direct conflict with other federal and state decisions, the Missouri Court of Appeals correctly held that under the Sixth Amendment, trial counsel can be held to have an objectively reasonable strategy in not making a legal argument, precluding a finding of ineffective assistance of counsel, when he never considered that legal argument at all.

2. Whether Missouri's local doctrine that an attorney's failure to call a witness only can be prejudicial under an ineffective assistance of counsel analysis when the witness's testimony would unqualifiedly support the defendant comports with the Sixth Amendment, rather than just whether, with the missing witness's testimony, there is a reasonable probability the outcome would have been different.

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INTRODUCTION

The Court should issue its writ of certiorari to review and correct Missouri's departure from two well-known parts of this Court's Sixth Amendment ineffective-assistance framework in *Strickland v. Washington,* 466 U.S. 668 (1984).

First, objectively reasonable trial strategy – a strategic decision taken after appropriate investigation in the relevant facts and law – precludes a finding that trial counsel performed deficiently. In this case, citing no authority, the Missouri Court of Appeals held this can include counsel foregoing an objection under a legal doctrine when he had not considered or investigated that legal doctrine at all. But every other state and federal court to have considered this issue have held a decision made without this knowledge is not strategic at all and is owed no deference.

Second, prejudice under *Strickland* is established when the defendant shows a reasonable probability that but for counsel's failure, the outcome of the proceeding likely would have been different. When it comes to counsel's failure to call a witness, however, Missouri adds an additional requirement, originating pre-*Strickland*, that the witness must "unqualifiedly support" the defense. The Missouri Court of Appeals applied that doctrine here to hold lack of prejudice from a witness who would have undermined the credibility of the State's complaining witness.

This Court now should issue its writ of certiorari to review whether Missouri's singular changes to *Strickland*'s framework comport with the Sixth Amendment.

DECISIONS BELOW

The Missouri Court of Appeals' order affirming the trial court's judgment (App., *infra*, 1a) is reported at 643 S.W.3d 609. The Missouri Court of Appeals' memorandum opinion (App., *infra*, 2a-12a) is unreported. The Missouri Court of Appeals' order denying rehearing or transfer to the Supreme Court of Missouri (App., *infra*, 13a) is unreported. The Supreme Court of Missouri's order denying transfer from the Missouri Court of Appeals (App., *infra*, 43a) is unreported. The trial court's judgment (App., *infra*, 14a-42a) is unreported.

STATEMENT OF JURISDICTION

The Missouri Court of Appeals entered its judgment on February 15, 2022 (App., *infra*, 1a), and denied rehearing and transfer to the Supreme Court of Missouri on March 29, 2022 (App., *infra*, 13a). The Supreme Court of Missouri denied transfer on May 17, 2022 (App., *infra*, 43a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

A. Background and charges

Appellant Edward Ellis, his wife J.E. ("Wife"), and their three minor children – son E.E. (born 2006), daughter M.E. (born 2009), and another son – lived together with Wife's mother, Thelma Henry ("Grandmother"), in Jackson County, Missouri (App., *infra*, 38a). Wife testified she and Grandmother had a difficult relationship her whole life because Grandmother was crazy and very religious and did not approve of Mr. Ellis or the way he and Wife parented their children.

In early 2012, the Missouri Department of Social Services, Children's Division, received a "hotline" call alleging "sexual abuse, child abuse, and unsanitary living conditions" at the house where the family lived. Authorities responded, finding Grandmother, two of the children, and squalid conditions. The authorities testified Grandmother told them she was scared and admitted she had made the hotline call. (In her testimony at trial, Grandmother denied this.) Officers testified they saw no injuries on the children but decided to take them into protective custody due to the allegations and the house's conditions. Medical examinations found no signs of sexual abuse on any of the children.

Authorities interviewed E.E., then six years old, who testified he alleged to them sexual and physical abuse against Mr. Ellis: that Mr. Ellis "mess[ed] with" E.E.'s penis, "likes to feel butts at night," and "touches the babies and touches their pee-pees" (App., *infra*, 26a). E.E. told a forensic interviewer his parents made the

children watch them have sex. E.E. also variously stated and then denied Mr. Ellis put his finger in his butt (App., *infra*, 26a). He later made similar allegations to his foster parents and a therapist.

A grand jury in the Circuit Court of Jackson County, Missouri, indicted Mr. Ellis for three counts of first-degree statutory sodomy (two against E.E. and one against M.E.), three corresponding counts of incest, one count of child molestation (against M.E.), three counts of child endangerment (for the squalid home), and one count of child abuse (App., *infra*, 3a). The post-conviction court later summarized the evidence for each of the sexual offense counts (App., *infra*, 25a-26a).

B. First trial

The case proceeded to a jury trial in April 2015 (App., *infra*, 3a-4a, 15a). Grandmother testified for the State (App., *infra*, 11a, 38a). But Mr. Ellis's trial counsel later testified Grandmother's testimony was detrimental to the State, because she seemed uncredible and crazy, and her testimony contradicted the prosecution's case and E.E.'s credibility (App., *infra*, 40a).

Specifically, at trial, Grandmother contradicted a police officer's testimony, denying that she had called police or the Department of Social Services or that she had told police she called them because she feared what might happen to the children, including either being taken away or even killed. Also contradicting that police officer, Grandmother testified on cross-examination she was not afraid of Mr. Ellis or Wife. She also contradicted E.E.'s testimony that she had showed him "dev-

il movies" or told him the devil was in the family cat or in his parents, which he had testified she did.

In closing argument, Mr. Ellis's trial counsel elaborated on these contradictions and argued Grandmother was not credible and had concocted E.E.'s allegations and manipulated him into them. The jury was unable to reach a verdict on the sodomy, incest, or child molestation counts (App., *infra*, 3a, 15a).

C. Second trial

A second trial was held in June 2015 (App., *infra*, 3a, 15a). Mr. Ellis's trial counsel wanted Grandmother to testify at the second trial, so he unsuccessfully tried to have a private investigator locate and subpoena her (App., *infra*, 38a-39a).

As the post-conviction court later found (App., *infra*, 25a-26a), five of the counts against Mr. Ellis accused him of multiple-acts offenses in which, through E.E.'s testimony and others' testimony of what E.E. told them, the State alleged different instances in different places over a period of time: the statutory sodomy and corresponding incest charges alleging Mr. Ellis "knowingly placed his hand on E.E.'s penis" over an 18-month period; statutory sodomy and corresponding incest alleging he "knowingly penetrated the anus of E.E. with the defendant's finger" during that period; and first-degree child molestation alleging he "touched the genitals of M.E. with [his] hand" in March 2012. For each of these, E.E. and others testified to various instances in various places and manners in which Mr. Ellis allegedly committed these acts (App., *infra*, 25a-26a).

Mr. Ellis and Wife both testified they only ever touched their children's privates when cleaning them or applying medicine. They believed that as to some of the alleged instances, E.E. was misconstruing memories of Mr. Ellis helping E.E. go to the bathroom and both parents checking the younger children's diapers. As to other instances, they testified E.E. was either making them up or had been coached by Grandmother. Mr. Ellis adamantly denied doing anything sexual to his children. Wife said she believed the sexual abuse allegations originated with Grandmother because Grandmother did not approve of their parenting and wanted custody of the children.

In Missouri, in a "multiple acts" case, "wherein there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count," to "comply with" Missouri's state "constitutional mandate that the jury reach a unanimous verdict" in Mo. Const. art. I, § 22(a), in 2011 the Supreme Court of Missouri held the verdict-directing jury instruction for that count "not only must describe the separate criminal acts with specificity, but the court also must instruct the jury to agree unanimously on at least one of the specific criminal acts described in the verdict director." *State v. Celis-Garcia*, 344 S.W.3d 150, 155-56, 158 (Mo. 2011).

These are often referred to as *Celis-Garcia* instructions. The Supreme Court of Missouri further has held that when trial counsel fails to request *Celis-Garcia* instructions for a multiple-acts count without a strategy to do so, it is ineffective as-

sistance of counsel under the *Strickland* standard, because it is entirely possible the defendant did not have a unanimous verdict. *See Hoeber v. State*, 488 S.W.3d 648, 657-58 (Mo. 2016).

Mr. Ellis's trial counsel did not request *Celis-Garcia* multiple-acts and unanimity language in the corresponding verdict-directing instructions. He stated he thought *Celis-Garcia* meant "requiring the jury to find, specifically, the place, date and time of the act." When asked whether it meant the verdict director had to "list out what the acts are constituting the offense" and then "at the end" tell the jury "you must find at least one of these acts unanimous," he said, "I don't remember that." The post-conviction court acknowledged this was incorrect (App., *infra*, 27a). Counsel testified he did not have "a conscious strategy not to object to these instructions as failing to include [multiple] acts [with] specificity and state that they must be found unanimously," and his failure to request that language "wasn't a product of strategy" (App., *infra*, 29a). He had not considered *Celis-Garcia*'s instructional requirements at all (App., *infra*, 29a).

Grandmother was the only State witness from the first trial who did not testify at the second trial. Despite not being able to find Grandmother, trial counsel also did not seek to introduce a transcript of Grandmother's testimony from the first trial, even though he wanted the jury to hear her testimony to aid the defense as in the first trial (App., *infra*, 40a). He testified this was not the result of any strategy, but instead he did not know it was possible to introduce that transcript. Later, he

recognized he "might have been able to" do so, and this possibility just "went over my head" at the time of the second trial.

Mr. Ellis was found guilty on all counts and sentenced to a total of 60 years in prison (App., *infra*, 15a-16a). He timely appealed to the Missouri Court of Appeals, Western District, which affirmed the judgment of conviction and sentence. *See State v. Ellis*, 538 S.W.3d 335 (Mo. Ct. App. W.D. 2017).

D. Post-conviction proceedings

Mr. Ellis then timely sought post-conviction relief in the Circuit Court of Jackson County under Mo. S. Ct. R. 29.15 (App., *infra*, 4a, 17a). After a two-day evidentiary hearing, the post-conviction court entered a judgment denying relief (App., *infra*, 14a). Mr. Ellis then timely appealed to the Missouri Court of Appeals, Western District (App., *infra*, 4a).

One of Mr. Ellis's arguments was trial counsel rendered unconstitutionally ineffective assistance in failing to object to the lack of *Celis-Garcia* multiple acts and unanimity language in verdict directing instructions for the statutory sodomy, incest, and child molestation counts (App., *infra*, 24a).

The post-conviction court agreed that two of the statutory sodomy instructions, their two corresponding incest instructions, and the child molestation instruction all "involve multiple acts," requiring *Celis-Garcia* multiple acts and unanimity language (App., *infra*, 25a). It also agreed trial counsel's failure to request that lan-

guage prejudiced Mr. Ellis, as "these non-specific verdict directors present a risk that the jury verdicts were not unanimous" (App., *infra*, 27a).

But the post-conviction court nonetheless denied relief, holding counsel had a "reasonable trial strategy" in not objecting, even though he had not considered requesting the required *Celis-Garcia* language, because the same instructions were issued in the first trial and resulted in a hung jury, and counsel wanted "to duplicate the result for the second trial" (App., *infra*, 28a-31a).

The Missouri Court of Appeals affirmed. Citing no authority, it held while "counsel testified that his decision not to object was not a matter of trial strategy" (App., *infra*, 5a), "[n]evertheless" he "understood his success in the first trial and wanted to work with identical conditions for the second trial in an attempt to repeat the same, favorable outcome," a "[c]alculated decision" that "amount[s] to reasonable trial strategy" (App., *infra*, 5a).

Another of Mr. Ellis's arguments for post-conviction relief was that trial counsel rendered unconstitutionally ineffective assistance in failing to introduce Grandmother's transcript testimony from the first trial (App., *infra*, 37a). Despite counsel's statements that he did not know he could have done so, the motion court denied this claim, holding this was "trial strategy" (App., *infra*, 40a).

The Missouri Court of Appeals affirmed denying relief on this ground, too (App., *infra*, 12a). Not reaching whether this failure was objectively reasonable trial strategy, it held instead that because Grandmother "was a prosecution witness,

and she claimed [her grandchildren] had disclosed to her abuse by their parents," her testimony did not "unqualifiedly support" Mr. Ellis, so the failure to introduce it could not have prejudiced him (App., *infra*, 12a). It quoted prior Missouri case law holding, "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance" (App., *infra*, 12a) (quoting *Worthington v. State*, 166 S.W.3d 566, 578 (Mo. 2005)). It did not analyze whether there was a reasonable probability the outcome of trial would have been different with Grandmother's testimony (App., *infra*, 11a-12a).

Mr. Ellis then timely sought the Missouri Court of Appeals to rehear the appeal or transfer it to the Supreme Court of Missouri, which was denied (App., *infra*, 13a). He then timely sought the Supreme Court of Missouri to transfer the appeal, which also was denied (App., *infra*, 43a).

This petition follows.

REASONS FOR GRANTING THE PETITION

The Missouri Court of Appeals' opinion in this case exemplifies two important ways in which Missouri's local analysis of claims of ineffective assistance of counsel departs from and conflicts with this Court's well-known standards in *Strickland v. Washington,* 466 U.S. 668 (1984) – and with every other state and court following them. Missouri's standards for "objectively reasonable trial strategy" and for proving prejudice when trial counsel fails to call a witness have raised the bar a post-conviction litigant must reach to establish an ineffective-assistance claim, making it more onerous than the standard this Court holds the Sixth Amendment sets. This Court should grant its writ of certiorari to review and correct Missouri's departure.

First, the Missouri Court of Appeals' holding that trial counsel failing to consider a constitutional requirement at all and never considering whether to lodge an objection under it can be objectively reasonable trial strategy so as to overcome *Strickland*'s first prong is a lone outlier and directly conflicts with other state and federal decisions. To the contrary, the established law of the United States is that to have an objectively reasonable strategy not to lodge an objection or not to undertake some potential procedural avenue, a lawyer first must consider that objection or procedural avenue and make a strategic decision to forego it that is reasonable under the circumstances. This Court should issue its writ of certiorari to clarify whether the Sixth Amendment allows an objectively reasonable trial strategy to be something trial counsel never considered in the first place.

Second, the Missouri's singular "unqualified support" doctrine – that a witness must "unqualifiedly support a defendant" in order for trial counsel's failure to call that witness to be prejudicial – that the Missouri Court of Appeals applied here cannot be squared with *Strickland*'s standard. The doctrine comes from Missouri's pre-*Strickland* law of ineffective assistance of counsel, and originally dealt only with whether the failure to call an alibi witness was strategic. *See Eldridge v. State*, 592 S.W.2d 738 (Mo. 1979). But as the Missouri Court of Appeals' decision in this case quotes (App., *infra*, 12a), it now is Missouri's standard for prejudice when trial counsel failed to call a witness. *See Hosier v. State*, 593 S.W.3d 75, 88 (Mo. 2019) (quoting *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. 2005)).

This pre-*Strickland* standard of Missouri's own creation, used in no other American jurisdiction, directly conflicts with – and raises – the standard this Court and every state and federal court following it have applied for prejudice from trial counsel's failure to call a witness. The *Strickland* standard only requires a reasonable probability that, with the missing witness's testimony, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. Numerous courts have held this was met with witnesses like Grandmother here who, while not unqualifiedly supporting the defense, would provide key testimony undermining the prosecution's case and from which the jury might reasonably have reached a different result. This Court should issue its writ of certiorari to review Missouri's different standard.

A. The Missouri Court of Appeals' holding that an attorney's failure to consider a constitutional requirement at all and whether to lodge an objection under it can be "objectively reasonable trial strategy" to overcome *Strickland*'s first prong improperly applies the Sixth Amendment's guarantee of effective assistance of counsel and conflicts with numerous other state and federal courts holding that to have such a strategy in not objecting, trial counsel must first consider the objection and then strategically reject it.

Mr. Ellis argued to the post-conviction trial court and the Missouri Court of Appeals that his trial counsel was ineffective for failing to object to multiple-acts verdict directing instructions on the ground that they did not set out the acts constituting the offenses or require a unanimous verdict. The Supreme Court of Missouri previously had held in *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. 2011), that Mo. Const. art. I, § 22(a) requires this to ensure a unanimous verdict (App., *infra*, 5a).

The post-conviction court agreed with Mr. Ellis both that these instructions "involve multiple acts" (App., *infra*, 25a) and this failure prejudiced Mr. Ellis, as "these non-specific verdict directors present a risk that the jury verdicts were not unanimous" (App., *infra*, 27a). Nonetheless, even though counsel testified he never considered a *Celis-Garcia* objection and had no conscious strategy in not making such an objection, it held counsel had a "reasonable trial strategy" in not objecting, because the same jury instructions were issued in Mr. Ellis's first trial and resulted in a hung jury (App., *infra*, 28a-31a).

The Missouri Court of Appeals affirmed, holding that though "trial counsel testified that his decision not to object was not a matter of trial strategy" (App., *infra*, 5a), and indeed testified the *Celis-Garcia* requirements never even crossed his

mind, "[n]evertheless," because of the hung jury in the first trial, trial counsel "understood his success in the first trial and wanted to work with identical conditions for the second trial in an attempt to repeat the same, favorable outcome," which was a "[c]alculated decision" that "amount[s] to reasonable trial strategy" (App., *infra*, 6a). The Missouri Court of Appeals cites no authority for this holding that trial counsel's unconsidered failure to object on *Celis-Garcia* grounds was objectively reasonable trial strategy anyway (App., *infra*, 6a).

As Missouri courts have recognized, of course, "failure to object to an improper instruction is error and satisfies the performance prong of the test for ineffective assistance of counsel …." *Williams v. State*, 490 S.W.3d 398, 406 (Mo. Ct. App. W.D. 2016) (quoting *Tilley v. State*, 202 S.W.3d 726, 734 (Mo. Ct. App. S.D. 2006)). Then, "to satisfy the prejudice prong of the test, [the movant] must establish that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different." *Williams*, 490 S.W.3d at 406 (citing *Tilley*, 202 S.W.3d at 733-34 (quoting *Strickland*, 466 U.S. at 694)).

Accordingly, the failure to object to the absence of multiple-acts and unanimity language in a Missouri verdict-directing instruction without strategy is both deficient performance and prejudicial. *Hoeber v. State*, 488 S.W.3d 648, 657-58 (Mo. 2016). This is because where there is "evidence of multiple, separate incidents of" an offense, "any of which would have supported the charged offenses, and" the ver-

dict-directing instruction did not "specif[y] a particular act or incident, there was no requirement that jurors agree on the same act to find [the defendant] guilty …." *Id.*

Here, the post-conviction court found five counts against Mr. Ellis were "multiple acts" offenses in which Missouri's constitutional unanimity language was required, and that not including it prejudiced Mr. Ellis. Counsel was obviously unfamiliar with these requirements and testified he did not consider them at all. Nonetheless, the post-conviction court denied relief, holding it was reasonable strategy because counsel testified he wanted the same instructions as in the first trial that resulted in a hung jury, and the Missouri Court of Appeals affirmed, citing no authority but holding this was a "[c]alculated decision" that "amount[s] to reasonable trial strategy" (App., *infra*, 6a).

The Missouri Court of Appeals' holding that failing to consider a constitutional requirement at all and never considering whether to lodge an objection under it can be objectively reasonable trial strategy so as to overcome *Strickland*'s first prong overlooks that the Sixth Amendment does not allow for this. To the contrary, as this Court and every other state and federal court to have addressed this issue have held, to have an objectively reasonable strategy not to lodge an objection or not to undertake some potential procedural avenue, a lawyer first must make a strategic decision to forego that particular objection or procedural avenue.

A reasonable trial strategy entails "calculated risk …." *Yarborough v. Gentry*, 540 U.S. 1, 9 (2003). As this Court held in *Strickland* itself, [w]hile "strategic

choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," decisions made by counsel after less consideration "are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington,* 466 U.S. 668, 690-91 (1984).

So, it is well-established that where, as here, trial counsel does not consider some potential avenue of legal or factual investigation *at all*, his failure to engage in that avenue cannot be a matter of objectively reasonable trial strategy, because it is not the product of strategy at all.

"A lawyer's duty to investigate is virtually absolute …." *Sanders v. Davis*, 23 F.4th 966, 984 (9th Cir. 2022). "*Strickland* makes clear that one critical element of the constitutionally reasonable performance is an adequate investigation of relevant facts and law." *Wright v. Clarke*, 860 F. App'x 271, 277 (4th Cir. 2021). In *Wright*, the Fourth Circuit held decisions made after counsel's failure to investigate and consider the relevant law cannot be strategic, and so, under 28 U.S.C. § 2254 review, a state court holding otherwise unreasonably applied *Strickland*. *Id.* at 277-79. This is because:

> as the Court explained in *Strickland*, that an act or omission undertaken by counsel in ignorance of the law can be deemed objectively reasonable if and only if the failure to conduct legal research itself reflected a "reasonable professional judgment[ ]." *Strickland*, 466 U.S. at 690-91. It is the "particular decision not to investigate" the law, that is, that must be "assessed for reasonableness in all the circumstances." *Id.* at 691. And if that decision was *not* reasonable – if counsel unreasonably failed to "demonstrate a basic level of competence regarding

> the proper legal analysis governing" his case, *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017) – then no deference is owed to purportedly "strategic" actions that follow. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (finding that counsel's failure to request discovery cannot be deemed "strategic" where it rests on "mistaken belief[ ]" about the law); *Carthorne*, 878 F.3d at 469 (explaining that presumption that counsel is acting strategically is "defeated when counsel fails to do basic legal research, because lack of preparation and research" cannot themselves be considered strategic (internal quotation marks omitted)); *see also Thompson v. Gansler*, 734 F. App'x 846, 855 (4th Cir. 2018) ("[M]yriad controlling opinions stand[ ] for the proposition that acts or omissions made by counsel under a mistaken belief or an ignorance of law are rarely – if ever – 'reasonable' in light of prevailing professional norms.").

Id. (emphasis in the original; internal citations modified).

So, in *Wright*, where counsel did not investigate whether grand larceny was a lesser-included offense of robbery in Virginia, his decision not to object to an instruction stating it was, when that was not so, "was not a reasonable decision or trial strategy and that unreasonable ignorance of the law left counsel wholly unable to make the kind of tactical decision regarding" the instruction, despite the attorney stating he would not have objected to the instruction either way for strategic reasons. *Id.* at 279. "Because no reasonable professional judgments can justify counsel's lack of investigation into the relevant law, his failure to object to" the instruction at issue "is similarly unreasonable, and his performance deficient under *Strickland*." *Id.*

For, "an unreasonable failure to investigate the law is *itself* deficient performance." *Id.* (citing *Hinton v. Alabama*, 571 U.S. 263, 273 (2014)) (emphasis in the original). Failure to investigate the law means counsel "failed to put himself in a

position to make an informed strategic judgment" on his client's behalf. *Id.* at 282; *see also Hernandez v. Campbell*, 923 F.3d 544, 550 (9th Cir. 2019) (what attorney who did not investigate legal issue could have decided had he made reasonable investigation into the law does not make for objectively reasonable trial strategy); *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996) (counsel's failure to object to jury instruction could not have been strategic because he did not understand the law at issue) (citing *Martinez-Marcias v. Collins*, 810 F.Supp 782, 786 (W.D.Tex. 1991), *aff'd*, 979 F.2d 1067 (5th Cir. 1992) (defense counsel's strategy was unreasonable because he had not researched the relevant law)).

In other words, "[c]ounsel is expected to know and follow applicable law." *Commonwealth v. Robinson*, No. 1127 EDA 2021, 2022 WL 2299224 at *6 (Pa. Super. Ct. June 27, 2022) (citing *Commonwealth v. Pou*, 201 A.3d 735, 741-42 (Pa. Super. Ct. 2018) (finding no reasonable strategy where failure to raise an issue was due to ignorance of the law); *Commonwealth v. McClellan*, 887 A.2d 291, 300-01 (Pa. Super. Ct. 2005) (finding counsel's strategy to be unreasonable based on counsel's unawareness of procedural rules)). The "point is that strategic choices must be informed. … Thus, failing to raise a claim due to misapprehension of the law applicable to that claim cannot be considered a strategic choice." *Pou*, 201 A.3d at 741 (citing *Strickland*, 466 U.S. at 690-91).

In *Robinson*, for example, trial counsel was unsure whether he read a case regarding the presentation of expert testimony in a misidentification defense, but

said regardless, he did not think expert testimony was needed for his defense in that particular case. 2022 WL 2299224 at *7-8. Had he read the case and understood the law, however, he would have known expert testimony would have been beneficial. *Id.* Because counsel did not know the law before making his decision about his defense, the Superior Court of Pennsylvania rejected this could have been a reasonable trial strategy. *Id.* at *8. This is the opposite result of the Missouri Court of Appeals here, where trial counsel did not consider Missouri's unanimity language requirements before deciding not to object to the verdict-directing instructions, but the Missouri court held that could be reasonable trial strategy anyway.

The Utah Court of Appeals has held specifically that where, as here, trial counsel fails to consider or investigate the law requiring jury instructions on unanimity in a multiple-acts sexual offense case, that failure to object cannot be objectively reasonable trial strategy. *See State v. Alires*, 455 P.3d 636, 644 (Utah Ct. App. 2019). "[T]he failure to request a proper unanimity instruction was not due to tactical reasons, but mistaken oversight. Had trial counsel properly investigated the governing law, it would have been apparent that [the case law] required the court to instruct the jury that it must agree on the specific criminal act for each charge in order to convict." *Id.*

This is because to be objectively reasonable trial strategy, "[a] decision by counsel" must "reasonably weig[h] the risks and benefits of available strategic approaches before choosing one as preferable to others …." *State v. Rivera*, 509 P.3d

257, 264 (Utah Ct. App. 2022). "In determining what constitutes ineffective assistance, a critical distinction is made between inadequate preparation and unwise choices of trial tactics and strategy." *Slade v. State*, 509 S.E.2d 618, 620 (Ga. 1998) (citation omitted). It is only "an attorney's strategic or tactical choices made after thorough investigation of the relevant law and facts" that "are virtually unchallengeable." *Green v. State*, 238 A.3d 160, 174 (Del. 2020). "[T]o be considered an exercise of professional skill and judgment, a lawyer's tactical decision must be grounded on a reasonable investigation." *Jackson v. Franke*, 507 P.3d 222, 237 (Or. 2022) (citation omitted).

So, "[s]trategic decisions of counsel are given deference but only when such choices are informed ones based upon adequate preparation." *Moore v. State*, 485 S.W.3d 411, 419 (Tenn. 2016). In *Moore*, where trial counsel was not aware of a new procedural requirement that lesser-included offense instructions had to be requested in writing, but testified that was not why he had foregone requesting such instructions, his decision could not be reasonable trial strategy because it "was not an informed choice based upon adequate preparation." *Id.* (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982); *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Ct. Crim. App. 1992) ("deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation").

In all these cases, Mr. Ellis's trial counsel failed to undertake an investigation into the facts and the law, which prejudiced Mr. Ellis. In each, counsel put forth some reason for proceeding as he or she did. But in each, that failure could not be strategy, because counsel did not investigate or consider the missing legal avenue at all.

Here, under these uniform nationwide standards announced time and time again, Mr. Ellis's trial counsel could not have engaged in an objectively reasonable trial strategy in deciding not to object to the instructions at issue on constitutional unanimity grounds. By his own admission, he had no idea about what was constitutionally required, and he did not *decide not* to object at all. As he testified, he *did not* take a calculated risk after investigation the plausible options, such as considering including the constitutionally required language per *Celis-Garcia* but then rejecting it for some strategic reason. Instead, he did not know or understand the requirement and did not consider it at all.

The Missouri Court of Appeals' decision that trial counsel failing to consider an objection to violation of a constitutional requirement at all can be objectively reasonable trial strategy in not objecting to the absence of that requirement and thereby overcome *Strickland*'s first prong conflicts directly with *Strickland*'s standards. This Court should issue its writ of certiorari to review and correct Missouri's departure.

B. Missouri's pre-*Strickland* doctrine that a witness must "unqualifiedly support the defendant" in order for trial counsel's failure to call that witness to be prejudicial, which the Supreme Court of Missouri continues to require and the Missouri Court of Appeals applied here, cannot be squared with *Strickland*'s standard only requiring a reasonable probability that with the missing witness's testimony, the result of the trial would have been different, and conflicts with numerous other state and federal courts applying this to missing witnesses.

Mr. Ellis also argued to the post-conviction trial court and the Missouri Court of Appeals that trial counsel was ineffective in "failing to introduce the transcript testimony of [Grandmother] from the first trial," which the Missouri Court of Appeals noted "contradicted or confused State evidence" (App., *infra*, 11a). And after the first trial (from which Grandmother was the only missing witness at the second trial), the jury could not reach a verdict (App., *infra*, 6a).

Trial counsel admitted his failure to introduce Grandmother's testimony from the first trial at the second trial when he could not locate her was not a result of any strategy. Instead, he testified he was unsure whether he even had ordered a transcript of her testimony from the first trial. When asked why this was, and why he did not seek to admit it at the second trial, he said he did not know whether he could have admitted it. Later, he recognized he "might have been able to" admit Grandmother's "transcript testimony" from the first trial. He said this possibility just "went over my head."

To affirm the post-conviction court's denial of relief on this ground, the Missouri Court of Appeals applied a singular Missouri doctrine predating *Strickland*

that no other American court has announced. Stating that "[i]f a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance," the court held that because Grandmother's testimony was not 100% for the defense, its absence could not be prejudicial (App., *infra*, 12a) (quoting *Worthington v. State*, 166 S.W.3d 566, 578 (Mo. 2005)). It held therefore, as Grandmother "was a prosecution witness, and she claimed [her grandchildren] had disclosed to her abuse by their parents," the fact her testimony was missing could not have prejudiced Mr. Ellis (App., *infra*, 12a). The court cited no other law in support of its holding that the fact Grandmother's testimony was missing did not prejudice Mr. Ellis (App., *infra*, 11a-12a).

Missouri's "unqualified support" doctrine originated five years before *Strickland* in *Eldridge v. State*, 592 S.W.2d 738, 741 (Mo. 1979). There, addressing whether trial counsel's reasoned decision not to call an alibi witness was deficient under the then-existing law of ineffective assistance of counsel, the Supreme Court of Missouri held, "If an attorney believes that the testimony of an alibi witness would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand." *Id.*

This holding, about deficient performance, not prejudice, then was first applied in the non-alibi-witness context ten years later in *Hamilton v. State*, 770 S.W.2d 346, 348 (Mo. Ct. App. E.D. 1989). There, the Missouri Court of Appeals stated, "The law is clear that if a potential witness' testimony would not unquali-

fiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance of counsel, again, it is a matter of trial strategy." *Id.*

Finally, beginning in *State v. Jones*, 921 S.W.2d 28, 35 (Mo. Ct. App. W.D. 1996), this doctrine began to be applied to the prejudice prong of *Strickland*. There, the court held, "If the testimony [of the missing witness] would not unqualifiedly support the defendant, failure to call that witness does not constitute ineffective assistance of counsel." *Id.* Now, Missouri courts apply this doctrine to mean that unless a witness would support the defense without qualification, there cannot ever be any *Strickland* prejudice from the failure to call that witness. *See Hosier v. State*, 593 S.W.3d 75, 88 (Mo. 2019) (quoting *Worthington*, 166 S.W.3d at 577). This is what the Missouri Court of Appeals applied below to hold counsel's non-strategic failure to introduce Grandmother's testimony could not have been prejudicial (App., *infra*, 12a).

Missouri's "unqualified support" doctrine cannot be squared with *Strickland*'s actual prejudice standard, which is not as onerous or exacting. *Strickland*'s prejudice prong *is not* outcome-determinative and does not require the testimony of a missing witness *only* favor the defense. Instead, it only requires a reasonable probability the result of the trial would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Indeed, no other American jurisdiction has applied a doctrine like Missouri's "unqualified support." To the contrary, every jurisdiction to have addressed this issue applies *Strickland*'s "reasonable probability" standard to the determine the prejudicial effect of a missing witness's testimony. *See, e.g.*:

- *Matthews v. Mazzuca*, 120 F.App'x 856, 858 (2d Cir. 2005) (using reasonable probability standard);
- *Gregg v. Rockview*, 596 F.App'x 72, 78 (3d Cir. 2015) (prejudice from failure to present witness is shown when reasonable jurors might have come to a different verdict had that witness been introduced);
- *Brady v. Pfister*, 711 F.3d 818, 827-28 (7th Cir. 2013) (using reasonable probability standard);
- *McCauley-Bey v. Delo*, 97 F.3d 1104, 1106 (8th Cir. 1996) (prejudice goes to the impact of the missing witness, requiring a reviewing court to consider "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution");
- *Madayag v. Evans*, 442 F. App'x 354, 355 (9th Cir. 2011) (using reasonable probability standard);
- *United States v. Holder*, 248 F.App'x 863, 872 (10th Cir. 2007) (using reasonable probability standard);

- *Joyner v. State*, 621 S.W.3d 124, 129 (Ark. 2021) ("To demonstrate prejudice" from the failure to call a witness, a defendant "is required to establish that there was a reasonable probability that, had counsel performed further investigation and presented the witness, the outcome of the trial would have been different");
- *In re Gay*, 457 P.3d 502, 524 (Cal. 2020) (prejudice shown where missing witnesses could have offered additional explanation for defense and supported defense's arguments);
- *State v. Walker*, 758 S.E.2d 836, 839 (Ga. Ct. App. 2014) (prejudice shown where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different");
- *People v. Johnson*, 700 N.E.2d 996, 1004 (Ill. 1998) (using reasonable probability standard);
- *Nichols v. State*, 868 So.2d 355, 362 (Miss. Ct. App. 2003) (using reasonable probability standard);
- *Wright v. State*, 707 N.W.2d 242, 244-45 (N.D. 2005) (prejudice from failure to call witness shown where there was a reasonable probability of a different result had the witness testified);
- *State v. L.A.*, 76 A.3d 1276, 1284-85 (N.J. Super. Ct. App. 2013) ("In addressing an ineffective assistance claim based on counsel's failure to call an absent witness, a PCR court must unavoidably consider whether the absent wit-

ness's testimony would address a significant fact in the case, and asses the absent witness's credibility");

- *Fast Horse v. Leapley*, 521 N.W.2d 102, 106 (S.D. 1994) (using reasonable probability standard);
- *Rubio v. State*, 596 S.W.3d 410, 433-34 (Tex. Ct. Crim. App. 2020) (prejudice from failure to call witnesses shown where "the defendant would have benefitted from their testimony" and "that but for counsel's failure to call these witnesses to testify, the result of the proceeding would have been different …"); and
- *State v. Edwards*, 294 P.3d 708, 716 (Wash. Ct. App. 2012) (using reasonable probability standard).

This, rather than Missouri's "unqualified support" doctrine, makes sense. It is entirely possible for a missing witness not to unqualifiedly support the defense, but at the same time still make for a reasonable probability that had the jury heard their testimony, it would not have convicted the defendant. (Indeed, here, having heard Grandmother's testimony, the jury at the first trial was unable to reach a verdict.)

In *Toliver v. McCaughtry*, 539 F.3d 766, 775 (7th Cir. 2008), the Seventh Circuit held that even where witnesses were biased, where had their testimony been considered there was a reasonable probability the outcome would have been different, the *Strickland* prejudice standard was satisfied. In *Gay*, the missing witnesses

whose testimony the Supreme Court of California found to be prejudicial were law enforcement officers who heard another witness confess and could have cast doubt on that other witness's credibility. 457 P.3d at 524-25. None of these witnesses would "unqualifiedly support" the defense, but with their testimony there was a reasonable probability the outcome of the proceeding would be different.

Here, Grandmother's testimony would have supported a viable defense, as trial counsel recognized and tried to find her to testify. It created reasonable doubt that E.E.'s allegations were credible, just as the jury saw in the first trial. There is a reasonable probability that, with Grandmother's testimony, the result of Mr. Ellis's second trial would have been different, just as it was in the first trial where Grandmother did testify.

The only reason trial counsel did not introduce Grandmother's testimony from the first trial, however, is – as he openly admitted – he did not know he could have. (And to be sure, the law of Missouri is it would have been admissible: "1) … it was before a judicial tribunal; 2) … the witness was sworn and testified; 3) … the accused was present and had an opportunity for cross examination; 4) … the parties and issues were substantially the same in the case on trial; and, 5) the witness [would have been] unavailable after due diligence." *State v. Sumowski*, 794 S.W.2d 643, 648 (Mo. 1990). Many Missouri decisions have applied this to allow the admission of testimony at a second trial of a witness from a prior trial. *See, e.g.*, *State v. Mosely*, 599 S.W.3d 236, 245-47 (Mo. Ct. App. W.D. 2020).)

By continuing a pre-*Strickland* standard for strategic choices and now using it to avoid all prejudice inquiries for missing witnesses unless the witness unqualifiedly would support the defense, Missouri has adopted a different and more onerous standard for these Sixth Amendment claims like Mr. Ellis's than this or any other court has stated. In doing so, Missouri has shirked the more nuanced balancing in which courts faced with these prejudice inquiries must engage. This Court now should issue its writ of certiorari to review and correct Missouri's departure from the *Strickland* standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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