IN THE
MISSOURI SUPREME COURT

DAVID A. McNEAL,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC92615
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 15
THE HONORABLE RALPH JAYNES,

THE HONORABLE MICHAEL MULLEN, JUDGE,
presiding during post-conviction stage

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No. 0822-CR02832-01, the State of Missouri charged Appellant, David McNeal, as a prior and persistent offender, with the class C felony of burglary in the second degree in violation of § 569.170, RSMo (count I), and the class A misdemeanor of stealing in violation of § 570.030, RSMo (count II).[1]

Mr. McNeal was convicted of each count following a jury trial on September 8 and 9, 2008. On October 28, 2008, the Honorable Ralph Jaynes sentenced Mr. McNeal to consecutive terms of imprisonment of ten years in the Missouri Department of Corrections on count I and 150 days in jail on count II.

Mr. McNeal moved for post-conviction relief pursuant to Rule 29.15. On April 13, 2011, the motion court denied Mr. McNeal's request for an evidentiary hearing and his sole claim for post-conviction relief. Mr. McNeal timely filed notice of appeal on May 23, 2011.

The Court of Appeals, Eastern District, issued an opinion affirming the motion court's judgment. This Court ordered transfer on September 25, 2012 after Ms. McNeal's application. Mo. Const., Art. V § 9; Rule 83.04

[1] All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

This appeal is from the denial, without an evidentiary hearing, of Mr. McNeal's sole Rule 29.15 claim of ineffective assistance of counsel. Mr. McNeal alleged that his trial counsel should have requested a lesser-included instruction on trespass in the first degree in connection with the State's (count I) charge of burglary in the second degree (*See* PCR L.F. 12-35, 36-39, 41-43).

The State of Missouri charged Mr. McNeal with count I of the class C felony of burglary in the second degree, "in that on . . . May 8, 2008 . . . the defendant knowingly entered unlawfully in an inhabitable structure, located at 4720 South Broadway and possessed by Riverbend Apartments, for the purpose of committing stealing therein" (App. L.F. 128-129).[2] In count II, the State charged Mr. McNeal committed the class A misdemeanor of stealing, in that on the same date he appropriated an electric drill that was in the possession of Matthew Harrison and located in apartment 510 (App. L.F. 128-129; *see also* Tr. 125-128).

Mr. McNeal contested neither count II, nor evidence showing that he decided to steal the drill after he entered the apartment (Tr. 234-235, 250).

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[2] Specifically, from the evidence, Mr. McNeal was alleged to having knowingly entered, for the purpose of committing the crime of stealing, apartment number 510, within Riverbend Apartments (*See e.g.*, Tr. 125-128, 196).

He denied, however, entering the apartment for the purpose of committing any crime (Tr. 234-235, 250).

At trial, Mr. McNeal testified in his defense on count I (Tr. 224-253). He told jurors that at about noon on May 8, 2008, he went into apartment 510 looking for a woman named Tracy, the previous tenant (Tr. 227, 235). He testified that he knew Tracy through Ms. Arlene Sanders, the mother of his son, who lived next door in apartment 511 (Tr. 231-232). Mr. McNeal testified that he had been in Tracy's apartment a number of times before, but did not testify that he had been given general permission to enter Tracy's apartment at will (Tr. 224-253, 247). Fanita Wilson, the property manager of Riverbend Apartments testified that Mr. McNeal did not have permission to be in apartment 510 (Tr. 186, 196).

Mr. McNeal explained that Tracy did not have a phone and often used Ms. Sanders' phone (Tr. 234). Mr. McNeal said that he would often go to Tracy's apartment to tell her that she had a call on Ms. Sanders' phone (Tr. 234).

He testified that about a month before the alleged burglary, on March 29, 2008, he visited Ms. Sanders, and had a carton of cigarettes in his hand (Tr. 233). That day, he ran into Tracy in the hallway of the apartment building (Tr. 233). Mr. McNeal said that Tracy asked him if she could buy some cigarettes (Tr. 233). He told jurors that he and Tracy struck a deal -

eight packs for $15 dollars (Tr. 233). Tracy said she had only $5 and asked if she could give him the remaining $10 later (Tr. 233).

On May 8, 2008, the date of the alleged burglary, Mr. McNeal testified that he visited Ms. Sanders in her apartment and, after about fifteen minutes, she asked him to go buy her a drink (Tr. 227, 233-234). He left Ms. Sanders' apartment and, as he did, he saw two men leave Tracy's apartment (Tr. 234). He testified, consistent with what a surveillance video showed, that he shook hands with one of these men, Mr. Harrison (Tr. 234).[3] Not wanting to interrupt Tracy, he said that he followed the two men to the elevator to find out if Tracy was busy (Tr. 232, 234). He said he shook Mr. Harrison's hand because he thought that Mr. Harrison had just visited Tracy, who he had also considered visiting (Tr. 231). Mr. McNeal said that he asked the men to get off the elevator because he wanted to ask about Tracy in private; there was another person on the elevator (Tr. 244).[4] He said that the men declined to

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[3] Riverbend Apartments had a video surveillance system that recorded Mr. McNeal and Mr. Harrison in the hallway (Tr. 189-190). The video was played for the jury (Tr. 196).

[4] In the amended motion he later filed, he explained this exchange, or his request for the two men to exit the elevator; he stated, "Though not addressed at trial, if granted an evidentiary hearing, movant will testify that he knew that Tracy sold drugs out of her apartment. He believed that the

exit the elevator and, after waiting around a moment and checking his bus schedule, "that's when I went down there looking to see for myself if Tracy had my $10 that she owed me" (Tr. 232). He testified that he was under the impression that Tracy still lived in apartment 510 (Tr. 231).

Mr. McNeal testified that he walked down to Tracy's apartment (Tr. 234). He knocked on the door and also heard a radio playing (Tr. 234). He testified:

> I opened the door up, 'Hey Tracy,' but now I'm in shock. It's empty. I step in there and I look over and see the radio playing, you know, because it's a shock to me. I didn't have any idea that the lady had moved and so I'm standing there.

(Tr. 235).

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men who had just left the apartment had bought drugs from Tracy, and that would explain why he wanted to speak with the men in private. Trial counsel asked the property manager about this issue, but the court sustained the state's objection to relevance (Tr. 202). In any event, movant did testify that he did not want to disturb Tracy (Tr. 232); *see also* testimony of Fanita Wilson indicating that Tracy Hemphill used to live in apartment number 510 (Tr. 201-202)." (PCR L.F. 20, footnote #5) (citations in original).

Mr. McNeal denied that, in going to Tracy's apartment, he had an intent to steal anything and said that he just wanted to get his money from Tracy (Tr. 232, 235, 250). Instead, he testified that once already in the apartment:

> I saw the radio playing and I'm on my way back out now, got to figure out how I'm going to buy [Ms. Sanders] something to drink with these $2, and I looked at the radio because it drawed [sic] my attention, there was a drill laying there. I picked the drill up and 'Grrrr, rrrr, rrrr,' that's when the thought came to my mind, 'Hm, I might could sell this here.' Now, that was wrong on me, but that's what happened.

(Tr. 235).

The State presented evidence through the testimony of the drill owner, Mr. Harrison, the arresting officers, Mario Burns and Ervin Lockhart, and the Riverbend Apartments' manager, Fanita Wilson (*See* Tr. 123-144, 144-164, 165-184, 186, 211). No one testified that Mr. McNeal admitted having the intent or purpose to enter apartment 510 to commit a crime (Tr. 123-211). In closing, the State summarized its case by saying that since apartment 510 was being renovated, Mr. McNeal must have heard the power tools and must have known that Tracy did not live there anymore (Tr. 260). The State argued that Mr. McNeal "went into that apartment, Apartment 510, the apartment he doesn't have permission to be in, there's no tenant, it's being worked on but

it's owned by that apartment complex, and he went inside and he stole things. That's burglary" (Tr. 206).

During their deliberations, jurors submitted the following question:

> Regarding Inst. No 5 [burglary in the second degree] and the second point – can the intent to commit the crime occur after he opens the door for burglary?[5] Must it occur prior to opening/touching door?

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[5] Instruction No. 5, in full read:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about May 8, 2008, in the State of Missouri, the defendant knowingly entered unlawfully in an inhabitable structure located at 4720 S. Broadway and possessed by Riverbend Apartment's, and
>
> Second, that defendant did so for the purpose of committing the crime of stealing therein,
>
> then you will find the defendant guilty under Count I of burglary in the second degree.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(App. L.F. 94, Tr. 272).

The Court responded for the jury to be guided by the instructions (App. L.F. 94). The instructions included a paragraph explaining that "a person 'enters unlawfully or remains unlawfully' in or upon premises when the person is not licensed or privileged to do so . . ." (App. L.F. 66).

The jury returned guilty verdicts on burglary in the second degree and stealing and, on September 9, 2008, the Honorable Ralph Jaynes sentenced Mr. McNeal to consecutive terms of imprisonment of ten years in the Missouri Department of Corrections on count I and 150 days in jail on count II (Tr. 272-273; App. L.F. 18-22; S. Tr. 7-8).

Mr. McNeal appealed to the Missouri Court of Appeals, Eastern District, which issued its *per curiam* order and memorandum in *State v. McNeal*, 292 S.W.3d 609 (Mo. App. E.D. 2009), affirming movant's convictions, and issued its mandate on October 19, 2009. Movant timely filed a *pro se* Rule 29.15 motion on October 26, 2009 (PCR L.F. 4-9). The motion court appointed

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> A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

(App. L.F. 65).

counsel to represent Mr. McNeal on March 24, 2010 (PCR L.F. 11). On May 13, 2010, counsel timely filed an amended motion (PCR L.F. 12-35).

Amended Motion

Mr. McNeal's single Rule 29.15 claim involved the allegation that his attorney was ineffective for failing to request, on count I, burglary in the second degree, a lesser-included instruction on trespass in the first degree (PCR L.F. 12-35). In subsections of his amended motion, entitled "The evidence at trial warranted a lesser-included offense instruction," "If requested by trial counsel, the [trial] court would have been obligated to give the lesser-included instruction for trespass in the first degree," "Trial counsel was unreasonable and ineffective in his failure to request a lesser included instruction," and "Movant was prejudiced by trial counsel's failure to request a lesser-included instruction," Mr. McNeal set out his claim (PCR L.F. 14-18, 18-22, 22-26, 26-29, 29-30) (capitals in title sections omitted).

In his motion, Mr. McNeal asserted that his trial counsel did not employ any strategy in not requesting a lesser-included instruction, but simply did not do so out of neglect, or because he forgot or did not consider doing so (*See* PCR L.F. 26-29). Also, in his motion, he asserted that the trial court would have been required to instruct on the lesser-included instruction of trespass in the first degree, if requested, under the facts of this case (*See* PCR L.F. 22-26). Finally, pointing to the jurors' "hesitation or doubt" as shown by their

question to the court about the timing of the requisite intent for burglary in the second degree, he asserted: "[h]ad the jury receive an instruction on trespass in the first degree, there is a reasonable probability that the jury would have convicted him of that offense . . ." (PCR L.F. 29-30).[6]

Findings of Fact and Conclusions of Law

In its conclusions of law and order, dated April 13, 2011, the court concluded "that [Mr. McNeal] has failed to allege grounds that would entitle him to relief if true and that are not refuted by the record" (PCR L.F. 37). The motion court's conclusions can be fairly characterized as determining that (a) trial counsel decision not to request a lesser-included instruction was trial strategy; and (b) that the trial court would not have submitted, or would not have been required to submit, the lesser-included instruction on trespass in the first degree because, *inter alia*, the defense evidence "if believed, would preclude a finding that he was guilty of trespass in the first degree, that he knowingly entered the apartment unlawfully" (PCR L.F. 36-38, 39).

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[6] In an effort at clarity and to avoid duplication, more details and specific portions of Mr. McNeal's amended motion are set out in the "Argument" section of his brief in juxtaposition with portions of the motion court's "Conclusions of Law." Similarly, the motion court's Conclusions of Law are set out more fully below.

Mr. McNeal timely filed notice of appeal on May 23, 2011 (PCR L.F. 41-43). This appeal follows. Mr. McNeal states the above facts, and will adduce other facts, as necessary, in the argument portion of his brief.

POINT RELIED ON

The motion court clearly erred in denying Mr. McNeal's Rule 29.15 motion without an evidentiary hearing because he pleaded facts, not conclusions, that were not refuted by the record and which entitled him to post-conviction relief on grounds that trial counsel acted unreasonably, and without strategy, by failing to request a lesser-included instruction on trespass in the first degree, which was supported by the evidence. Trial counsel's failure prejudiced Mr. McNeal. But for counsel's failure, there is a reasonable probability that jurors would not have convicted Mr. McNeal of burglary in the second degree, and would have convicted him of trespass in the first degree, particularly since jurors expressed doubt about when – whether before or after he entered the apartment - Mr. McNeal had formed an intent to commit a crime. The motion court's ruling denied Mr. McNeal his right to effective assistance of counsel, right to due process of law, right to present a defense, and right to a fair trial, in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 18(a), 19, and 22(a) of the Missouri Constitution. Mr. McNeal requests this Court reverse the motion court's judgment, and remand his cause for a new trial, or in the alternative, for an evidentiary hearing.

State v. Crenshaw, 14 S.W.3d 175 (Mo. App. E.D. 2000);

State v. Haslar, 887 S.W.2d 610 (Mo. App. W.D.1994);

State v. Moore, 729 S.W.2d 239 (Mo. App. E.D. 1987);

Wooldridge v. State, 239 S.W.3d 151 (Mo. App. E.D. 2007);

Mo. Const., Art. I. §§ 10, 18(a), 19, and 22(a);

U.S. Const., Amend. V, VI, and XIV; and,

Rule 29.15.

ARGUMENT

The motion court clearly erred in denying Mr. McNeal's Rule 29.15 motion without an evidentiary hearing because he pleaded facts, not conclusions, that were not refuted by the record and which entitled him to post-conviction relief on grounds that trial counsel acted unreasonably, and without strategy, by failing to request a lesser-included instruction on trespass in the first degree, which was supported by the evidence. Trial counsel's failure prejudiced Mr. McNeal. But for counsel's failure, there is a reasonable probability that jurors would not have convicted Mr. McNeal of burglary in the second degree, and would have convicted him of trespass in the first degree, particularly since jurors expressed doubt about when – whether before or after he entered the apartment - Mr. McNeal had formed an intent to commit a crime. The motion court's ruling denied Mr. McNeal his right to effective assistance of counsel, right to due process of law, right to present a defense, and right to a fair trial, in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 18(a), 19, and 22(a) of the Missouri Constitution. Mr. McNeal requests this Court reverse the motion court's judgment, and remand his cause for a new trial, or in the alternative, for an evidentiary hearing.

Preservation and Standard of Review

The claim made in Mr. McNeal's amended motion is the same claim made here on appeal, and the same one ruled on by the motion court (PCR L.F. 12-35; PCR L.F. 36-39). This claim is preserved for appellate review. *Cf. Clay v. State*, 310 S.W.3d 733, 736 (Mo. App. W.D. 2010) (stating "[t]he allegation raised on appeal is materially different from the allegation raised in [movant's]'s post-conviction motion. We do not review claims which were not raised in the post-conviction motion.); *see also State v. Gray*, 926 S.W.2d 29, 34 (Mo. App. W.D. 1996).

Appellate review of a trial court's ruling on a Rule 29.15 motion is limited to determining whether the trial court's findings and conclusions are clearly erroneous. *Schmedeke v. State*, 136 S.W.3d 532, 532 (Mo. App. E.D. 2004); Rule 29.15(k). The motion court's findings of fact and conclusions of law are clearly erroneous only if the reviewing court, having examined the entire record, is left with the definite and firm impression that a mistake has been made. *Branyon v. State*, 304 S.W.3d 166, 168 (Mo. App. E.D. 2009) (citing *Rousan v. State*, 48 S.W.3d 576, 581 (Mo. banc 2001)). "In reviewing the motion court's dismissal, this Court is required to assume every pled fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom." *Wooldridge v. State*, 239 S.W.3d 151, 154 (Mo. App. E.D. 2007) (citing *Frederick v. State*, 754 S.W.2d 934 (Mo. App.

E.D. 1988)). On review, the motion court's findings and conclusions are presumptively correct. *Id*. (citing *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991)).

"If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held." Rule 29.15(h). A movant is entitled to an evidentiary hearing if the motion meets three requirements: (1) the motion must allege facts not conclusions that warrant relief; (2) the facts alleged must not be refuted by the files and records of the case; and (3) the allegations must have resulted in prejudice. *Schmedeke*, 136 S.W.3d at 532 (citing *Wilkes v. State*, 82 S.W.3d 925, 928 (Mo. banc 2002)). To deny a request for an evidentiary hearing, the record must conclusively show that the movant is not entitled to relief. *Id*. at 533 (citing *Wilkes*, *supra*).

For a claim of ineffective assistance of counsel, a movant must allege facts showing that counsel's performance did not conform to the degree of professional skill and diligence of a reasonably competent attorney and that he or she was thereby prejudiced. *Schmedeke*, 136 S.W.3d at 533 (citing *Wilkes*, *supra*, at 927); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Lawrence v. Armontrout*, 900 F.2d 127, 129 (8th Cir. 1990). To demonstrate prejudice, the movant must allege facts that show a reasonable probability that, but for counsel's deficient performance, the result of the

proceeding would have been different. *Id*. (citing *Wilkes*, *supra*, at 927-28). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Wilkes*, *supra*, at 928).

Argument

To the extent that the motion court denied Mr. McNeal's request for relief and for an evidentiary hearing on the basis that trial counsel's failure to request a lesser-included instruction was "trial strategy," there was an inadequate basis for the motion court to so conclude, and to overcome facts pled in the amended motion that that failure was not strategy, but resulted from oversight or neglect.

To the extent that the motion court denied Mr. McNeal's request for relief and for an evidentiary hearing on the basis that the trial court would not have been obligated to submit the lesser-included instruction on trespass in the first degree under the facts of this case, such a ruling is erroneous and the product of a misapplication of the law to the facts of this case. A review of the record in this case should leave this court with the firm and definite impression that a mistake has been made.

Finally, *Strickland* prejudice can result from a trial counsel's unreasonable failure to request a lesser-included instruction, despite that jurors found the defendant guilty of a higher offense.

The Trial Strategy Basis for the Motion Court's Denial of Relief, and Denial of an Evidentiary Hearing

In its findings of fact, the motion court wrote that:

> There is a presumption that counsel made all significant decisions in the exercise of his reasonable professional judgment and that any challenged action was part of counsel's sound trial strategy. Williams v. State, 168 S.W.3d 433, 439 (Mo banc 2005); State v. Tokar, 918 S.W.2d 753, 761 (Mo. banc 1996). The decision whether to request a lesser-included offense instruction is a tactical decision. Neal v. State, 99 S.W. 3d 571, 576 (Mo. App. S.D. 2003).

(PCR L.F. 37).

In his amended motion, Mr. McNeal indicated that the evidence at an evidentiary hearing would show that "no strategy or reason, other than inadvertence, supported [trial counsel's] failure to request that the trial court instruct the jury on trespass in the first degree" (PCR L.F. 28). That allegation of fact should have been enough to overcome the motion court's reliance on a presumption that trial counsel's specific inaction, here, was part of a "sound trial strategy" (*See* PCR L.F. 26, 29; *Cf*. PCR L.F. 37; *see also Wooldridge*, 239 S.W.3d at 154 (Mo. App. E.D. 2007) (stating that an appellate Court "is required to assume every pled fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom").

"When a party presents evidence controverting a presumed fact, the fact must then be determined from the evidence as if no presumption had ever been in effect." *Costello v. Miranda*, 137 S.W.3d 498, 500-501 (Mo. App. E.D. 2004) (citing *Harding v. Harding*, 826 S.W.2d 404, 407 (Mo. App. W.D. 1992)).

It may well be that trial counsel at an evidentiary hearing would state that his failure to request a lesser-included instruction was trial strategy, but nothing on the record, currently, indicates as much. Moreover, at an evidentiary hearing, trial counsel could be questioned about whether or not his failure to request a B misdemeanor lesser-included instruction for trespass in the first degree - in connection with Mr. McNeal's in-trial confession and acknowledgement of guilt to the class A misdemeanor of stealing and the resulting punishment that would inexorably follow – was the product of a *reasonable* trial strategy. *See Wilkes v. State*, 82 S.W.3d 925, 930 (Mo. banc 2002) (stating "[f]or "trial strategy" to be the basis for denying post-conviction relief, the strategy must be reasonable") (citing *State v. Hamilton*, 871 S.W.2d 31, 34 (Mo. App. W.D. 1993)); *see also State v. Townes*, 941 S.W.2d 756, 759 (Mo. App. E.D. 1997). The record indicates, neither that trial counsel's decision was trial strategy, nor that trial counsel exercised reasonable trial strategy. The motion court cites to no fact, document, or transcript testimony to refute Mr. McNeal's allegation that trial counsel's decision was not the product of trial strategy (*See* PCR L.F. 36-39). The

motion court's sole reliance on a presumption of trial strategy, against the backdrop of the facts pled in Mr. McNeal's amended motion, is clear error.

The Motion Court's Conclusion that Mr. McNeal Would Not Have Been Entitled to the Lesser-Included Instruction of Trespass in the First Degree, if Requested

In its findings of fact, the motion court, through its analysis of the facts, concluded that Mr. McNeal would not have been entitled to, or it would not have instructed on, the lesser-included instruction of trespass in the first degree (PCR L.F. 38-39). This conclusion is clearly erroneous, in that it is the product of a narrow or selective reading of the facts, and a misapplication of the law.

Citing *State v. Hinsa*, the motion court noted:

> "[. . . W]here the evidence shows the accused entered a building and committed a crime therein, there is no ambiguity in his purpose for entering, hence there is no basis for submitting trespass in the first degree." State v. Hinsa, 976 S.W.2d 69, 73 (Mo. App. [S.D.] 1998).

(PCR L.F. 38; Appx. A3).

The motion court then concluded that there was no ambiguity about the purpose of Mr. McNeal's entry into apartment 510. The motion court wrote:

He knocked on the door, heard a radio playing, and he opened the door, "but to my surprise it's empty." He then went into the empty apartment and took a drill. He testified that he went to the apartment looking for Tracy, but it was apparent that the apartment was empty as soon as he opened the door. He stated that he did not go over to the apartment to steal anything, that he went looking for Tracy. He took the drill and went down the street and sold it to a mechanic.

(PCR L.F. 38).

The motion court's ultimate conclusion was as follows:

Under the facts of this case, it could not be unreasonable for counsel to forego requesting an instruction on trespass. Once the door was opened it was apparent the apartment was empty and there could have been no purpose at that point for movant to enter the apartment. Movant's defense was that he did not enter the apartment unlawfully because he thought Tracy lived there and he was in shock when he found the apartment vacant. This defense, if believed, would preclude a finding that he was guilty of trespass in first degree, that he knowingly entered the apartment unlawfully. Unlawfully entering an apartment that clearly was no longer occupied by Tracy could reasonably have been only for the purpose of committing a crime therein. Therefore, movant's first claim is without merit.

(PCR L.F. 39).

The motion court's reliance on *Hinsa*, *supra*, and the line of cases discussed therein, is misplaced. In Mr. McNeal's case there was at least ambiguity in Mr. McNeal's purpose in entering apartment 510, if not compelling and convincing evidence to show that he had no purpose to commit a crime when he entered into the apartment. That observation is apparent after a fair consideration of Mr. McNeal's actual testimony and, also in that the jurors had doubts about this very issue, and appeared to be wrestling with this question, as shown by their question to the court - about the timing of the required intent - during their deliberations (*See* App. L.F. 94).

In his trial testimony, Mr. McNeal testified that he opened up the door looking for Tracy. He said:

> I opened the door up, 'Hey Tracy,' but now I'm in shock. It's empty. I step in there and I look over and see the radio playing, you know, because it's a shock to me. I didn't have any idea that the lady had moved and so I'm standing there.

(Tr. 235).

He testified that once already in the apartment:

> I saw the radio playing and I'm on my way back out now, got to figure out how I'm going to buy [Ms. Sanders] something to drink with these

> $2, and I looked at the radio because it drawed [sic] my attention, there was a drill laying there. I picked the drill up and 'Grrrr, rrrr, rrrr,' that's when the thought came to my mind, 'Hm, I might could sell this here.' Now, that was wrong on me, but that's what happened.

(Tr. 235).

The issue in this case about whether the trial court would have been obligated to instruct on trespass in the first degree, therefore, resolves itself into whether the defense evidence reasonably could show that Mr. McNeal had no purpose to commit a crime when he entered Tracy's apartment looking for her. The motion court's conclusion makes no account for Mr. McNeal's surprise, and the dawning awareness, that Tracy no longer lived there. The motion court makes criminal his entry into the apartment simply because the apartment was empty (*See* PCR L.F. 39, stating "Once the door was opened it was apparent the apartment was empty and there could have been no purpose at that point for movant to enter the apartment"). The motion court's conclusion, however, employs too narrow a reading of the facts, unreasonably would take the decision about his purpose out of the hands of jurors, ignores and misinterprets case law that it would have been obligated to instruct on a lesser-included instruction under the facts of this case, and misreads *Hinsa*, *supra*, and the line of cases discussed therein.

Trespass in the first degree is a lesser-included offense of burglary in the second degree. *State v. Yacub,* 976 S.W.2d 452, 453 (Mo. banc 1998) (citing *State v. Blewett*, 853 S.W.2d 455, 459 (Mo. App. W.D. 1993)). "A person commits the crime of trespass in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure or upon real property." § 569.140, RSMo. Burglary in the second degree requires the additional element of intent to commit a crime within the premises. § 569.170, RSMo.

A trial court must give a lesser-included offense instruction "if the evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense and a conviction of the lesser offense, and if such instruction is requested by one of the parties or the court." *Brooks v. State*, 51 S.W.3d 909, 914 (Mo. App. W.D. 2001) (quoting *State v. Hahn*, 37 S.W.3d 344, 349 (Mo. App. W.D. 2000)); § 556.046.2, RSMo.

A lesser-included instruction, had it been offered in this case, would have read:

Instruction No. 6

If you do not find the defendant guilty of burglary in the second degree as submitted in Instruction No. 5, you must consider whether he is guilty of trespass in the first degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

That on or about May 8, 2008, in the State of Missouri, the defendant knowingly entered unlawfully in an inhabitable structure located at 4720 S. Broadway, Apartment 510, and possessed by Riverbend Apartments,

then you will find the defendant guilty Count I of trespass in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(*See* MAI–CR3d 304.02m 3(b); MAI-CR3d 323.58; § 569.140.1, RSMo).

First, Mr. McNeal's testimony, if believed, would have provided a sufficient basis for the jury to find that he did not commit the crime of burglary (Tr. 224-253). Second, and contrary to the motion court's conclusion[7], the State elicited evidence that Mr. McNeal unlawfully entered

[7] The motion court concluded that, "Movant's defense was that he did not enter the apartment *unlawfully* because he thought Tracy lived there and he was in shock when he found the apartment vacant. This defense, if believed, would preclude a finding that he was guilty of trespass in first degree, that he

apartment 510 which would have substantiated a conviction for trespass in the first degree. State's witness, Fanita Wilson, property manager of Riverbend Apartments, testified that Mr. McNeal did not have permission to be in apartment 510 (Tr. 196). Mr. McNeal also testified about the habit of notifying the former tenant, Tracy, about phone calls, but never indicated that he had been given permission, or for example, a license, or "implied consent" to enter her apartment at will (*See e.g.* Tr. 196, 234). Also, there is nothing in the law that allows a person to lawfully walk into another person's house or apartment because they are owed money. Reasonable jurors could have found that when he opened the door and stepped into what he believed was Tracy's apartment, he unlawfully entered that apartment and committed the class B misdemeanor offense of trespass in the first degree. *See e.g. State v. Woods*, 984 S.W.2d 201, 204 (Mo. App. W.D. 1999) (stating "reasonable jurors could have found that [bounty hunter's] belief that [a statement in a Supreme Court case] allowed him to lawfully break and enter [a certain address] was not reasonable and that he did knowingly enter the residence unlawfully").

"A defendant is entitled to an instruction on any theory of his case that the evidence tends to establish." *State v. Crenshaw*, 14 S.W.3d 175, 177 (Mo. App. E.D. 2000) (citations omitted). Doubt as to whether to instruct on the

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knowingly entered the apartment unlawfully" (PCR L.F. 39) (emphasis added).

included offense is to be resolved in favor of instructing on the included offense. *Yacub*, 976 S.W.2d at 453 (citing *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997)). In reviewing whether a defendant was entitled to a particular instruction, an appellate court will review in a light most favorable to the defendant. *State v. Howard*, 949 S.W.2d 177, 180 (Mo. App. E.D. 1997). "A trial court is required to submit a lesser included offense instruction if the evidence arguably shows a lack of an essential element of the greater offense, while affording a basis for conviction of the lesser." *Hinsa*, 976 S.W.2d at 71; § 556.046.2, and § 556.046.3, RSMo.

In *State v. Moore*, the Eastern District held that it was error for the trial court to refuse to submit a requested instruction on trespass in the first degree. 729 S.W.2d 239, 241 (Mo. App. E.D. 1987). The evidence in that case showed that a man knocked on the front door of Mr. Zink's house. *Id*. at 239. About ten minutes later, Mr. Zink heard the back door, which was unlocked, open. *Id*. Within a few seconds, the defendant appeared in the doorway to Mr. Zink's room. *Id*. The defendant turned on the light and Mr. Zink and the defendant stared at each other for several seconds. *Id*. The defendant then ran from the house. *Id*.

The Eastern District wrote, "[t]he question here is whether the evidence, in fact or by inference, would provide a basis for both an acquittal of burglary second degree and a conviction of trespass in the first degree." *Id*.

(citing *State v. Eidson*, 701 S.W.2d 549 (Mo. App. E.D. 1985) (emphasis omitted)).

The Court continued:

> It is possible to infer that he entered to call for help or to advise someone of his delay. It may be granted that other evidence cast substantial doubt on that scenario but it is the duty of the jury to evaluate that evidence and, under proper instructions from the court, determine the proper inference to be placed upon it. The question is one of the defendant's intent and we cannot conclude that the evidence here established that intent as a matter of law. Defendant's flight at the scene and prior to trial is indicative of guilt. But it does not establish defendant's guilty knowledge of which crime. *Id*.

In this case, as in *Moore*, it was possible to infer that Mr. McNeal entered the house, unlawfully, to collect his $10. In this case, more than mere inference, Mr. McNeal's testimony provided a basis in fact for the jury to conclude that he did not possess the requisite intent for burglary in the second degree (*See* Tr. 231-235). The motion court's conclusion that it would not have been obligated to instruct is, therefore, erroneous.

The motion court's conclusion, moreover, is based on a narrow or one-sided interpretation of the facts. For one, as he stood on the threshold of the door, and if the apartment was "empty," how was it only reasonable that he

must have had a purpose to commit a crime in there – to steal something? How is it that Mr. McNeal's testimony that he stepped inside the apartment looking for Tracy not – at least – ambiguous evidence about his purpose in entering the apartment? (*See* Tr. 235). By deciding the issue on such a limited reading of the facts, the court would unfairly take the issue out of the hands of the jurors.

Finally, the facts presented in this case are markedly different than those in *Hinsa*, *supra*, and the line of cases discussed therein, with respect to whether a person shows an "ambiguity of purpose" in entering a building. In *Hinsa*, the defendant was denied a requested lesser-included instruction of trespass in the first degree under dissimilar facts. The facts showed that the defendant at 3 a.m. stopped his car at an unoccupied house – for the purported reason to use the bathroom - and, although the lights worked, he used a flashlight to walk around the house and to look through and take some items from the within the house. 976 S.W.2d 69, 70-74 (Mo. App. S.D. 1998). The Southern District used those facts to support the denial of the requested instruction. *Id*. at 73.

In *State v. Eidson*, 701 S.W.2d 549 (Mo. App. E.D. 1985), the defendant was convicted of burglary in the second degree. On appeal, he complained the trial court erred in rejecting his tendered instruction of trespass in the first degree. *Id*. at 550. The evidence showed the defendant broke into an

unoccupied commercial building at night using a crowbar. *Id*. at 550–52. He was apprehended by police while leaving the building. *Id*. at 551. Inside the building, police found a walkie-talkie, gloves and a small flashlight. *Id*. Police found another man hiding in a nearby van. *Id*. In the van was a walkie-talkie matching the one inside the building. *Id*. The defendant argued the trespass instruction was required because he told police, when arrested, that he was thinking about renting or purchasing the building. *Id*.

The Eastern District concluded that the evidence of an intent or purpose to commit a crime once inside the building was strong. *Id*. at 552. The Court wrote that:

> The so-called purpose espoused by defendant of viewing the unit as potential rental property is inconsistent with his conduct in this case and inconsistent with an acquittal of burglary second degree and a conviction of trespass in the first degree. Defendant kicked in the outside door on unit 207. Inside there was property damage to the door between units 207 and 211. A walkie-talkie and gloves were found concealed in the ceiling. A crowbar and a pen-light flashlight were also found. Defendant entered the building at night while the building was unoccupied. In fact, when apprehended by the police, he admitted that he did not have permission to enter the building.

Id. at 552.

In *State v. Blewett*, 853 S.W.2d 455 (Mo. App. W.D.1993), the defendant entered a house by breaking a lock on a door, disturbed various items of personal property, and fled when police approached. *Id*. at 457. On appeal from the denial of post-conviction relief from a conviction of burglary in the second degree, the defendant claimed his lawyer rendered ineffective assistance in failing to submit a verdict-directing instruction on trespass in the first degree. *Id.* at 456–57. The Western District held the evidence did not support such an instruction, stating in that case, that, "[t]he evidence of burglary was compelling." *Id*. at 459; *see also State v. Portwood*, 694 S.W.2d 831, 832 (Mo. App. E.D. 1985) (stating "There is no evidence here from which the jury could have found defendant had entered the liquor store with no intent to commit a crime.) (citation omitted).

In *State v. Haslar*, 887 S.W.2d 610 (Mo. App. W.D.1994), the defendant was convicted of burglary in the second degree. He kicked in the door of a woman's duplex while she was gone, remained inside a short time, then left carrying a small, square object. *Id*. at 612. When the woman returned, she found a television broken, the telephone ripped from the wall, and her answering machine and food stamps missing. *Id*. at 613. At trial, the woman acknowledged she occasionally did laundry for the defendant and he may have had some clothing in her duplex when he broke into it. *Id*. at 615–16. Seizing upon that testimony, the defendant argued on appeal that the trial

court erred in rejecting his tendered instruction hypothesizing trespass in the first degree. *Id*. at 616. The defendant maintained the jurors could have inferred he entered the duplex to retrieve his clothing. *Id*. at 616. The Western District disagreed, and wrote:

> [The defendant's] alleged 'basis' for submitting a jury instruction on the lesser included offense of trespass in the first degree is no more than 'mere possibility and speculation.' ... [T]here is insufficient evidence to support [the defendant's] contention that he entered the home for any reason other than to commit a crime.

Id. at 616.

Unlike the more compelling evidence of burglary presented in *Hinsa, supra* (use of flashlights in a unoccupied house at 3 am), *Eidson, supra* (the use of a crowbar and other evidence indicative of a burglary), and *Blewett, supra* (involving the breaking of a lock and flight upon the approach of the police), the evidence of criminal intent in this case was not nearly so compelling that the Court should have taken this decision away from the jurors, and refused to instruct on trespass in the first degree.

And also unlike in *Haslar*, *supra*, where the defendant would have asked the jurors to rely on an unsupported inference about his entry into the apartment, Mr. McNeal provided direct testimony about his purpose in entering apartment 510.

Strickland Prejudice from the Failure to Request a Lesser-Included Instruction

The process of making a decision can be affected by the availability of options. Based on the evidence presented at trial, and notwithstanding that jurors found Mr. McNeal guilty beyond a reasonable doubt of burglary in the second degree, there is a reasonable probability that through their deliberations the jurors would have found him guilty of the lesser-included offense of trespass, had it been aware of that option.

On direct appeal, in cases involving the erroneous failure to instruct on a lesser-included instruction, this observation or possibility is well-taken by courts. In *State v. Williams*, for example, this Court discussed the evidence in the context of an option (a lesser-included instruction for stealing) not given to jurors, and noted:

> The jurors could have believed Williams was complicit in the taking of money from Wagner, believed Wagner's testimony that no gun or knife was used, and disbelieved Wagner's testimony about the use of physical force. Therefore, the trial court erred in not submitting the stealing instruction to the jury.

313 S.W.3d 656, 660 (Mo. banc 2010).

What this Court did *not* do, after the jurors found Mr. Williams guilty beyond a reasonable doubt on the charge of robbery in the second degree,

was to ask in what sense could there have be any prejudice[8] since, in any event, the jurors found Mr. Williams guilty of the higher offense.

That, however, is what a string of cases may seem to propose in the post-conviction context. *See e.g., Sanders v. State*, 946 So.2d 953 (Fla. 2006); *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001); *Hendrix v. State*, 369 S.W.3d 93 (Mo. App. W.D. 2012).

The impetus for those cases appears to be a misguided or fastidious application of the following language from the *Strickland* opinion:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the

[8] "Appellate review of preserved error is 'for prejudice, not mere error, and [it] will reverse only if the error is so prejudicial that it deprived the defendant of a fair trial.'" *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002) (quoting *State v. Tokar*, 918 S.W.2d 753, 761 (Mo. banc 1996)).

> idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 694-695.

The application of cases such as *Sanders*, *supra*, *Johnson v. Alabama*, *supra*, and *Hendrix*, *supra*, to Mr. McNeal's case would proceed essentially as follows: the jurors found Mr. McNeal guilty, beyond a reasonable doubt, of burglary in the second degree and "[t]o assume that, given the choice, the jury would now *acquit* the defendant of the same crime of which it convicted him, and instead convict of a lesser offense, is to assume that the jury would disregard its oath and the trial court's instructions" (*Sanders*, 946 So.2d at 958); it cannot logically be contended "that an additional alternative charge would have led a rational jury down a different path" (*Johnson v. Alabama*, 256 F.3d at 1183); and in reviewing the already decided upon verdict "a court should presume . . . that the jury . . . acted according to the law" and "[t]hus, no prejudice can be established" (*Hendrix*, 369 S.W.3d at 100) (citing *Strickland*, *supra*, at 694).

But to conclude that the only way that jurors in Mr. McNeal's case could have found him guilty of a lesser-included trespass instruction (had it been offered) would be if they had disregarded the law or acted out of whim or caprice is a flawed argument, misreads *Strickland* and Missouri law, and disregards human experience and decision making.

Sanders, *supra*, was based on Florida law that "allows the jury to consider a lesser-included offense *only* if it 'decide[s] that the main accusation has not been proved beyond a reasonable doubt." 946 So.2d at 958. (emphasis in original) (citations omitted). In Florida, therefore, a jury convinced by the State's case beyond a reasonable doubt, and returning a guilty verdict on the charged offense, would have no occasion to consider a lesser-included instruction. Under that law, there is a stronger basis to conclude that to "assume that, given the choice, the jury would now acquit the defendant of the same crime of which it convicted him, and instead convict of a lesser offense, is to assume that the jury would disregard its oath and the trial court's instructions" *Id*; *see also Strickland*, 466 U.S. at 695 (stating that prejudice analysis should presume the "jury acted according to law" and "must exclude the possibility of 'nullification' . . .").

Missouri does not similarly constrain its juries with respect to the consideration of lesser-included offenses. "Missouri's instructions on lesser-included offenses do not require that the defendant first be acquitted of the greater offense before the jury can consider the lesser offense." *Tisius v. State*, 183 S.W.3d 207, 217 (Mo. banc 2006) (citing *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994) (overruled on other grounds *by Joy v. Morrison*, 254

S.W.3d 885 (Mo. banc 2008)). MAI–CR3d 304.02 Notes on Use 3(b)[9] for lesser-included offenses provides that "juries are allowed to consider the lesser-included offense if they 'do not find the defendant guilty' of the greater offense." *Id*. (citing *id*.).

Because his conviction would require a unanimous verdict[10], if one or more of the jurors or the jury as a whole were not persuaded of Mr. McNeal's guilt or were deadlocked, they would have been permitted to consider a lesser-included offense. The difference between a Missouri lesser- included instruction and one such as that in the Florida case of *Sanders*, *supra*, is significant. A deadlocked jury provided an instruction such as that in Florida could not consider the lesser-included charge because, being deadlocked,

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[9] MAI–CR3d 304.02 Notes on Use 3(b) provides, "For each lesser graded or lesser included verdict directing instruction, the introductory paragraphs will read:

If you do not find the defendant guilty of [name of offense from immediately higher verdict director] as submitted in Instruction No. _____, you must consider whether he is guilty of [name of offense from the lesser verdict director] under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

. . .

[10] (*See* Instruction No. 11, App. L.F. 84).

they have not found the defendant "not guilty" of the greater offense. *See Wise*, 879 S.W.2d at 517. Under Missouri law, however, "a jury deadlocked on the greater offense has not found the defendant guilty on the greater charge, thus can consider the lesser included offense." *Id*.

"Deliberation" describes and envisions discussion between jurors and the evaluation and re-evaluation of the evidence throughout their discussions. Instruction No. 11 in this case, *inter alia*, admonished the jurors to consider all of the evidence, to discuss it fully with the other jurors, and to come to a decision only after the views of all of the jurors had been heard (App. L.F. 71). Holding up the verdict in Mr. McNeal's case may show the final decision that jurors made in the case, but does not demonstrate that the jurors, reasonably, could not have made a different decision. Holding up the final verdict in Mr. McNeal's case as the only verdict the jurors would have reached (regardless of other, unknown options) disregards the process of decision. It is an approach that the jurors' view of the evidence remains static and one that does not recognize that jurors may, in the course of their deliberations, entertain doubt with respect to some or all of the elements of the State's case. Such an approach is unreasonable and, in this case, inconsistent with a reasonable view of the evidence.

Rather than a categorical rule that declines to consider prejudice in all cases where an attorney does not request a lesser-included instruction,

prejudice or the absence of prejudice should be decided by the facts of each particular case. In Mr. McNeal's case, it is reasonable to conclude that jurors may have seriously questioned the second element of count I – that he entered apartment 510 "for the purpose of committing the crime of stealing therein" (*See* App. L.F. 78). The evidence on this issue was contested. Mr. McNeal provided a (arguably) reasonable explanation for his entry into apartment 510 that did not include the intent to commit a crime while inside (*See* Tr. 232-236). The issue of "intent" – and the difference between burglary and trespass - was directly addressed and talked about at trial, including through defense counsel's question to a police officer that: "When somebody is in a place where they're not supposed to be, that's not necessarily burglary, is it?[,]" and the officer's answer, "No" (*See* Tr. 158, 175, 179-182). Actual evidence that the jurors may have struggled with the "intent" element of count I was the jurors note to the court, ". . . can the intent to commit the crime occur after he opens the door for burglary? Must it occur prior to opening/touching door?" (App. L.F. 94).

Unconvinced of Mr. McNeal's guilt under instruction No. 5 of burglary in the second degree, the jurors – had it been submitted – would have flipped to instruction No. 6, or trespass in the first degree. In this case, there was ample evidence of a trespass. The property owner and an officer each testified that Mr. McNeal did not have permission to be in apartment 510 (Tr.

180, 196, 207). In its closing argument, the State came close to arguing merely that Mr. McNeal had committed a trespass, indicting even if a person has permission to go into some parts of the building, "that doesn't mean you can go into your neighbor's apartments without their permission . . ." (Tr. 259).[11]

In *State v. Patterson*, the Western District undertook a detailed and reasoned analysis of this issue, using *Strickland's* prejudice requirement that a post-conviction movant must show a reasonable probability that the outcome would have been different had a lesser-included instruction been properly given. 110 S.W.3d 896, 906-907 (Mo. App. W.D. 2003); *see also Strickland*, 466 U.S. at 694). After reviewing and discussing the evidence, the Court concluded that the evidence "was certainly sufficient" to support the conviction, "[y]et, the record in this case also would have allowed a juror to

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[11] At the same time, Mr. McNeal does not contest that the State did have sufficient, though not overwhelming, evidence that Mr. McNeal did have an intent to commit a crime while in apartment 510. The State pointed out that he should have heard the sounds of the work being done on the apartment (Tr. 124-125, 136, 142-143, 260), that he had run with the drill after leaving apartment 510 (Tr. 193-196; Exhibit No. 1 and 7), and had lied about stealing the drill (Tr. 170, 235-236).

reasonably find" for a lesser-included offense not offered. *Id*. at 905. The Court held that, because the evidence was not overwhelming, "there is a reasonable probability that the results of the proceedings would have been different if trial counsel had submitted a properly drafted lesser-included offense instruction." *Id*. at 906-907.

Similarly, in *Johnson v. Alabama*, *supra*, the Eleventh Circuit considered the facts of the case in reaching its decision, and did not establish a categorical rule against *Strickland* prejudice in the context of a lesser-included instruction. The court in *Johnson v. Alabama* very much analyzed the specific facts in that case, the instructions that were given to jurors and those that were not, on its way to the conclusion that there would be "no logical basis to conclude that an additional alternative charge would have led a rational jury down a different path." 256 F.3d 1156, 1181-1183 (11th Cir. 2001).[12]

In the process of deciding whether or not an element has been established, there may come a point where jurors harbor doubt about, or do not believe the defendant guilty of, the charged offense. At that point,

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[12] The court in *Johnson*, in fact, cited to another case where under different facts, it found ineffective assistance counsel for the failure to request a jury instruction. 256 F.3d at 1183, FN 16 (referring to *Young v. Zant*, 677 F.2d 792, 798-99 (11th Cir. 1982)).

consideration of a lesser-included instruction may result in those jurors finding the defendant guilty of that lesser offense, or of logically being led down a different path. *See Bostwick v. Coursey*, 252 Or. App. 332, 337-338 (Or. App. 2012) (stating "a jury that has a complete statement of the law might decide a case differently from one that lacks that complete statement") (citing *State v. Leckenby*, 200 Or. App. 684, 690-691 (Or. App. 2005).[13] At that point, the jurors would ring the bell indicating that they had reached a verdict on the lesser offense, and the outcome of a defendant's trial would have been different than if the lesser offense had not been provided to jurors. The fact that jurors, without the benefit of a lesser-included option, continue to deliberate and find the defendant guilty of the higher offense, does not

[13] Similar to Mr. McNeal's contention that his attorney acted unreasonably in not requesting the lesser included instruction for the class B misdemeanor of first degree trespass, where Mr. McNeal conceded his guilt to the class A misdemeanor of stealing, *Bostwick* also provides a discussion concerning trial counsel's unreasonable performance in counsel's failure to request the judge consider a lesser-included offense, in light of the defendant's trial admission that he had committed a felony of "equal seriousness" to that of the un-requested lesser offense. *Bostwick*, 252 Or. App. at 336-338.

demonstrate no reasonable probability that a jury would not have found a defendant guilty of the lesser offense, had it been allowed to consider it.

The Western District's recent case, *Hendrix v. State*, in contrast to *Patterson*, *supra*, is conclusory on this issue and provides little to no analytical guidance. 369 S.W.3d 93, 100 (Mo. App. W.D. 2012). After acknowledging and crediting defense counsel's testimony that the strategy at trial was self-defense, the Western District concluded, "[i]f the jury would have found Hendrix's actions were in self-defense, then Hendrix would not have been convicted of ***any*** offense." *Id*. (emphasis in original). The Court in that case found that trial counsel's performance, his decision to pursue an "all-or-nothing defense," was reasonable. *Id*. at 100. The Western District's discussion about no prejudice from the failure to request a lesser-included instruction on assault in the first and second degrees, therefore, appears to be *dicta*, or at a minimum provides no real analysis. *Id*. It is not clear how, had the jurors determined the defendant guilty of a lesser-included offense, they would have acted contrary to the law, unreasonably or unconscientiously. *See id*.

Missouri expressly recognizes the *Strickland* standards that guide an analysis into post-conviction cases, including the requirement that a defendant show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002) (citing *Strickland*, 466 U.S. at 694). S*trickland* has cautioned against "mechanical rules" to apply in post-conviction cases, and mandated a consideration of the "totality of the evidence before the judge or jury" 466 U.S. at 695-696. The *Strickland* guidelines continue to provide a workable test for the issue presented in this case. *See e.g., Oplinger v. State*, 350 S.W.3d 474 (Mo. App. S.D. 2011) (holding to "establish ineffective assistance of counsel for failure to request a lesser-included offense instruction, [a movant] must show that the evidence would have required submission of a lesser-included offense instruction had one been requested, that the decision not to request the instruction was not reasonable trial strategy, and that he was thereby prejudiced").

Despite cases that may appear to hold otherwise, *Strickland's* overarching requirement that the defendant show that there is a reasonable probability - sufficient to undermine confidence in the outcome - that but for counsel's unprofessional errors, the result of the proceeding would have been different should not be scrapped for a niche' of categorical non-prejudice in the area of lesser-included instructions. 446 U.S. at 694.

Because based on the specific facts of his case, Mr. McNeal can show there is a reasonable probability that the jurors would have returned a guilty

verdict on the lesser-included offense of trespass in the first degree, he should be found to have met *Strickland's* prejudice requirement.

Under the facts of this case, the motion court clearly erred in denying relief and an evidentiary hearing by determining that trial counsel employed trial strategy in not requesting a lesser-included instruction for trespass in the first degree, and that in any event, the trial court would not have been obligated to so instruct if requested. The motion court's ruling denied Mr. McNeal of his right to effective assistance of counsel, right to due process of law, right to present a defense, and right to a fair trial in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 18(a), 19, and 22(a) of the Missouri Constitution. Mr. McNeal requests that this Court reverse the motion court's judgment, and remand his cause for a new trial, or in the alternative, for an evidentiary hearing.

CONCLUSION

WHEREFORE, based on his argument, Appellant, David McNeal, requests this Court to reverse the motion court's judgment, and remand Mr. McNeal's cause for a new trial, or in the alternative, for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on October 30, 2012 a true and correct copy of the foregoing brief was sent via the Efiling System to Shaun J. Mackelprang, Office of the Attorney General, using the email registered with the System. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word limitations of Rule 84.06. This brief was prepared with Microsoft Word for Windows, uses Cambria 13 point font, and contains 9,818 words, excluding the cover page, signature block, and certificates of service and of compliance.

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