No. SC95665

IN THE

Supreme Court of Missouri

BRUCE WATSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Margaret M. Neill, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Watson appeals the denial of his Rule 29.15 motion, in which he alleged that trial counsel was ineffective for failing to submit included-offense instructions for robbery in the second degree and stealing (PCR Supp. L.F. 7-8). The motion court denied Mr. Watson's post-conviction motion without an evidentiary hearing (PCR L.F. 76-87).

* * *

A jury found Mr. Watson guilty of robbery in the first degree. *See State v. Watson*, 397 S.W.3d 539 (Mo.App. E.D. 2013). In brief, the facts of Mr. Watson's offense were as follows.

On the morning of July 11, 2009, Mr. Watson took a cab to a Check'n Go check-cashing business (Tr. 207, 239-255). When he got out of the cab, Mr. Watson told the driver to wait for him (Tr. 247).

Yelena Shull was working at the Check'n Go (Tr. 202-203). While Ms. Shull was helping another customer, Mr. Watson entered the business and began to pace impatiently (Tr. 203-204, 262-267). Ms. Shull asked him if she could help him (Tr. 203-204). Mr. Watson said "No", and tossed a blue bag onto the counter; he told Ms. Shull she could fill up the bag (Tr. 204). Ms. Shull picked up the bag and said, "What?" (*see* Tr. 204). Mr. Watson walked around the counter, reached into his jacket, quickly flashed what Ms. Shull thought was a gun, and told her to fill up the bag (Tr. 204-208).

Ms. Shull believed he had a weapon, so she opened a cash drawer and started putting money in (Tr. 207). After putting money in the bag, she held it up for Mr. Watson, but he told her to put the bag down and go to another cash drawer (Tr. 207). There was no money in the other drawer, however, as Ms. Shull was the only one working (Tr. 207-209).

Ms. Shull showed the empty drawer to Mr. Watson, and he told her to open the safe (Tr. 209). Ms. Shull entered the code and told Mr. Watson that, since it was a delay safe, it could not be opened for ten minutes after entering the code (Tr. 209-210). Mr. Watson told Ms. Shull not to enter a fake code, and she assured him that she had put in the only code she had (Tr. 210). She then entered the code again, and the safe "went into count down again" (Tr. 210). Mr. Watson then left with the bag of money and got into the cab, where he sat for almost a minute (Tr. 210-212). Ms. Shull had activated a "holdup alarm," and she wrote down the phone number of the cab company and the cab number (Tr. 211-212). She called 911 (Tr. 212).

Mr. Watson eventually directed the cab driver to take him to the intersection of Jefferson and Gravois, where Mr. Watson paid the fare and got out (Tr. 251). The police subsequently contacted the cab driver, and, later, the driver identified Mr. Watson in a live line-up (Tr. 252-254, 302-305).

Ms. Shull identified Mr. Watson in a photo line-up as the man who pointed a gun at her and took the money (Tr. 216-219, 297-300). She also

identified Mr. Watson in a live line-up and in a surveillance video obtained from the business (Tr. 219-225, 306-307).

At trial, the jury found Mr. Watson guilty of robbery in the first degree but not guilty of armed criminal action (L.F. 41-42, Tr. 367-370). The court sentenced Mr. Watson to fifteen years' imprisonment and ordered the sentence to run concurrently with a federal sentence (Tr. 377, L.F. 48-51). After imposing sentence, the trial court advised Mr. Watson of his rights under Rule 29.15 and, *inter alia*, told him that he would have to file his "Criminal Procedure Form Number 40 within 180 days after [his] delivery to the Missouri Department of Corrections" (Tr. 379).

On direct appeal, this Court affirmed Mr. Watson's conviction and sentence. *State v. Watson*, 397 S.W.3d at 539. The Court issued its mandate on May 15, 2013.

More than sixteen months later, on October 2, 2014, Mr. Watson filed an untimely, *pro se* motion pursuant to Rule 29.15 (PCR L.F. 4). In his *pro se* motion, Mr. Watson alleged that he "was instructed not to file this cause until [he] was delivered to the D.O.C. by the Courts making this cause timely" (PCR L.F. 4; *see* PCR L.F. 11).

On October 14, 2014, the motion court appointed the public defender to represent Mr. Watson in his post-conviction case (PCR L.F. 37). On October 23, 2014, post-conviction counsel entered an appearance (PCR L.F. 38). On

November 6, 2014, the motion court granted Mr. Watson a thirty-day extension time to file an amended motion (PCR L.F. 2).

On January 12, 2015, Mr. Watson timely filed an amended motion (PCR L.F. 2; *see* PCR Supp.L.F. 1). Mr. Watson alleged in his amended motion that trial counsel was ineffective for failing to submit included-offense instructions for the offenses of robbery in the second degree and felony stealing (based on stealing $500 or more or physically taking the property from the person of the victim) (PCR Supp. L.F. 7-8)

On February 5, 2015, the motion court denied Mr. Watson's post-conviction motion (PCR L.F. 76-87). The motion court first concluded that, because the trial court had misinformed Mr. Watson about the time limit for filing his post-conviction motion, it would overlook the untimely filing of the initial, *pro se* motion (*see* PCR L.F. 80-81). The motion court then denied Mr. Watson's claim that counsel was ineffective for failing to request included-offense instructions because "[a]n instruction on second degree robbery was not required at the time of movant's trial where there was evidence he used or threatened the use of a deadly weapon or dangerous instrument in the course of the robbery" (PCR L.F. 84).

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Watson's Rule 29.15 motion; however, because Mr. Watson's initial, *pro se* motion was untimely filed, the motion court should have dismissed the motion as untimely filed.

Mr. Watson acknowledges in his brief that his initial post-conviction motion was not timely filed, but he asserts that the untimely filing should be excused because the late filing "resulted solely from the active interference of a third party," namely, the trial judge who incorrectly told him at sentencing that he would have to file his post-conviction motion within 180 days of delivery to the department of corrections (App.Sub.Br. 31).

Mr. Watson also asserts that the time limits for filing post-conviction motions under Missouri's post-conviction rules are "unreasonable" because they are too short (*see* App.Sub.Br. 23-24). He asserts that, in light of "Missouri's strict and short time limits for filing a *pro se* post-conviction motion, this Court should adopt a more lenient, good faith exception based on the inaccurate admonishment of a trial or sentencing court" (App.Sub.Br. 33).

Mr. Watson finally asserts that the motion court clearly erred in denying his claim of ineffective assistance of counsel (App.Sub.Br. 19). He asserts that he alleged facts showing that counsel had no reasonable strategy

for failing to request included offense instructions, and that he alleged facts showing that he was prejudiced by counsel's alleged error (App.Sub.Br. 19).

A. The standard of review

"Appellate review of a judgment entered under Rule 29.15 'is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous.' " *Price v. State*, 422 S.W.3d 292, 294 (Mo. 2014) (quoting *Moore v. State*, 328 S.W.3d 700, 702 (Mo. 2010)). " 'Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.' " *Id.* (quoting *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000)).

B. The motion court should have dismissed Mr. Watson's motion as untimely filed

Although Mr. Watson's initial motion was filed more than a year after the mandatory deadline imposed by Rule 29.15, the motion court concluded that "out of an abundance of caution the Court will address the merits of movant's motion" (PCR L.F. 80). The motion court cited cases holding that a trial court's failure to advise the defendant of the time limits of Rule 29.15 did not excuse an untimely filing, but it stated that this case was different because it involved "a misrepresentation to movant about the time limit" (PCR L.F. 80-81). The motion court observed that the trial court had advised Mr. Watson that "he had to file his pro se motion within one hundred and

eighty days of his delivery to the department of corrections" (PCR L.F. 80).

However, notwithstanding the trial court's statement at sentencing, the motion court should have enforced the mandatory time limit of Rule 29.15(b) and dismissed Mr. Watson's motion as untimely filed. It is well settled that the time limits of Rule 29.15 are mandatory. "It is the court's duty to enforce the mandatory time limits and the resulting complete waiver in the post-conviction rules—even if the State does not raise the issue." *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. 2012).

It is also well settled that the time limits of the post-conviction rules are reasonable. *See State v. Ervin*, 835 S.W.2d 905, 929 (Mo. 1992); *Day v. State*, 770 S.W.2d 692, 695 (Mo. 1989). As the Court stated in *Day*: "The time limitations contained in Rules 24.035 and 29.15 are reasonable. They serve the legitimate end of avoiding delay in the processing of prisoners claims and prevent the litigation of stale claims." *Id*.

Mr. Watson cites to an ABA standard, Standard 22-2.4(a), that states that "[a] specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound" (App.Sub.Br. 22). He also points out that some other states have more lenient deadlines (App.Sub.Br. 22-23). But contrary to the ABA standard, the history of post-conviction litigation in Missouri refutes the notion that having a time limit is "unsound."

In *Day*, the Court recounted the history of Missouri's post-conviction

rules and observed that under Rule 27.26—Missouri's first post-conviction rule—a post-conviction motion "could be filed at any time." *Id.* at 693. The Court observed, however, that the number of post-conviction claims "skyrocketed and significant delays developed in processing prisoner's claims," many of which were "filed years after conviction." *Id.* Accordingly, to avoid delays and to prevent the litigation of stale claims, the Court, "upon the recommendation of a special committee, repealed Rule 27.26, and adopted in its stead Rules 24.035 and 29.15." *Id.* The Court should, therefore, decline Mr. Watson's invitation to make an exception to the mandatory time limit of the rule based on the notion that it is "unsound" to have a time limit.

The Court should also refrain from adopting an amorphous "good cause" exception to the time limit for filing the initial motion. The post-conviction rules do not contain any provision for permitting an untimely initial filing for "good cause" or "excusable neglect," and this Court has recognized only one circumstance—"active interference" by a third party—that excuses an untimely filing. *See Price v. State*, 422 S.W.3d at 301; *see also Matchett v. State*, 119 S.W.3d 558, 559 (Mo.App. S.D. 2003) ("[t]he rule makes no allowances for extension of time for good cause shown or excusable neglect."); *Hendrickson v. State*, 400 S.W.3d 857, 859-860 (Mo.App. E.D. 2013) (the movant's mental disability and inability to find someone who would help him write the *pro se* motion did not excuse the untimely filing).

Mr. Watson asserts that his filing was untimely due to active interference of a third party, namely, the sentencing judge who told gave him "inaccurate information . . . regarding the deadline for filing his amended motion" (App.Sub.Br. 31). But advice given to the defendant at sentencing—even if incorrect—does not constitute "active inference" by a third party.

The active-interference exception applies in cases where an inmate does everything he can reasonably do to timely file his motion but is then prevented from timely filing by the "active interference" of a third party. *See State v. Price*, 422 S.W.3d at 302. As this Court stated in *Price*, "where an inmate writes his initial post-conviction motion and takes every step he reasonably can within the limitations of his confinement to see that the motion is filed on time, a motion court may excuse the inmate's tardiness when the active interference of a third party beyond the inmate's control frustrates those efforts and renders the inmate's motion untimely." *Id.* This exception is animated in large part "by the practical limitations on an inmates ability to control all of the circumstances that can affect compliance with Rule 29.15(b)." *Id.* at 301.

Here, Mr. Watson failed to allege facts showing that he did everything he reasonably could do to timely file his motion or that he was prevented from timely filing by the "active interference" of a third party. Mr. Watson did not allege that he drafted his motion within the time limits of the rule, that

he attempted to file his motion within the time limits, or that he took any steps (before the deadline) to ascertain whether he needed to file his motion. To the contrary, he alleged merely that the trial court advised him that he had to file his motion within 180 days of his delivery to the department of corrections. Thus, Mr. Watson was not prevented from filing his motion by the "active interference" of any third party. *See id*. ("Price did not write his initial post-conviction motion and took no steps to meet (or even calculate) the applicable filing deadline for his motion," and retained post-conviction counsel did not "actively interfere" with the timely filing of a motion, even though counsel assured the defendant that counsel would draft and file the motion). *Cf. McFadden v. State*, 256 S.W.3d 103, 109 (Mo. 2008) (the inmate wrote his initial post-conviction motion, signed it, had it notarized, and was prepared to mail it to the sentencing court well before the deadline; a public defender who had represented the inmate at trial contacted him and expressly directed him to mail his initial motion to her and not to the sentencing court; and the public defender then failed to timely file the motion, even though she received it two weeks before the deadline).[1]

[1] In *McFadden*, the Court characterized counsel's conduct as "abandonment," but the Court later clarified in *Price* that the conduct in *McFadden* constituted third party interference. 422 S.W.3d at 307.

Here, as in *Price*, Mr. Watson did not write his motion or take any steps to file it before the deadline. Instead, according to his allegations, a fellow inmate at the St. Louis Justice Center reviewed his case—sometime between March 9, 2013, and August 4, 2014—and told him that he should have filed his *pro se* motion sooner (PCR Supp.L.F. 2-7). Mr. Watson alleged in his motion that he didn't file sooner because he had never been delivered to the Department of Corrections. And inasmuch as Mr. Watson's *pro se* motion was due by August 13, 2013 (ninety days after the direct appeal mandate), it appears from Mr. Watson's allegations that his fellow inmate must have advised him that he was late sometime between August 13, 2013, and August 4, 2014.

It was still later, however, on October 2, 2014, that Mr. Watson finally filed his initial motion—nearly fourteen months after the deadline (PCR L.F. 4). Thus, Mr. Watson did not do everything he reasonably could have done to timely file his motion, and no effort by Mr. Watson to timely file his motion was thwarted by the active interference of a third party. In short, the tardiness of Mr. Watson's *pro se* motion did not result "solely from the active interference of a third party beyond [his] control[.]" *See Price*, 422 S.W.3d at 301-302.

Respondent acknowledges that insofar as the trial court advised Mr. Watson about the deadline for filing under Rule 29.15, the trial court's advice

was incomplete. Under Rule 29.15(b), if no appeal is taken, an initial post-conviction motion must be filed "within 180 days of the date the person is delivered to the custody of the department of corrections." However, in cases where an appeal is taken, the motion must be filed "within 90 days after the date the mandate of the appellate court is issued[.]" Rule 29.15(b). To cover both possible eventualities, it would be good practice for courts that elect to advise the defendant about the deadline to recite both possible deadlines.

Rule 29.07(b)(4), however, does not require a trial court to advise the defendant about the deadlines for filing. Moreover, a trial court's failing to advise the defendant about the deadlines does not excuse the defendant from timely filing. "While Rule 29.07(b)(4) indicates a trial judge should inform a movant of his right to a Rule 24.035 or 29.15 motion, there is no indication in the rules or case law that failure to do so overrides the mandatory time limitations." *Reed v. State*, 781 S.W.2d 573 (Mo.App. E.D. 1989). "In addition, the rule does not require the sentencing court to specifically advise defendant of the ninety day time limit." *Id*.

Mr. Watson argues that the incomplete advice he received was "misleading" (App.Sub.Br. 25-27). But even if the trial court's incomplete advice was misleading, misleading advice alone was not "active interference" that prevented Mr. Watson from timely filing his post-conviction motion. In *Price*, for instance, the movant's attorney misled the movant by telling him

that he would file the movant's amended motion. *See* 422 S.W.3d at 295, 303. But because the movant "did not do all that he could do to effect a timely filing of his Rule 29.15 motion," the active interference exception did not apply. Moreover, although the record suggested "a gross breach of counsel's duties" to the movant, the courts were not obligated to remedy that breach. *Id*. at 303. More specifically, the courts were not responsible to remedy counsel's breach because the movant had no right to effective assistance of counsel and counsel's breach did not implicate the obligations placed on appointed counsel under Rule 29.15(e). *Id*.

Here, similarly, Mr. Watson did not do everything within his power to timely file his *pro se* motion. And, while the record shows that the trial court gave Mr. Watson incomplete advice about the deadline, the trial court was not obligated by Rule 29.07(b)(4) to give specific advice about the filing deadline. Rather, the court was required to advise Mr. Watson that he had the right to proceed under the rule—which it did—and Mr. Watson was required thereafter to meet the mandatory deadline. *See Clark v. State*, 261 S.W.3d 565, 570 (Mo.App. E.D. 2008) (direct appeal counsel's incorrect advice about the post-conviction filing deadline did not excuse the movant's "honest mistake" and it did not constitute "abandonment").

In short, Mr. Watson was free to draft his motion and file it *before* the deadline communicated to him by the trial court. Nothing the trial court said

at sentencing actually prevented Mr. Watson from drafting and filing his post-conviction motion within the time limit of Rule 29.15.

Mr. Watson cites *Nicholson v. State*, 151 S.W.3d 369 (Mo. 2004); and *Spells v. State*, 213 S.W.3d 700 (Mo.App. W.D. 2007), in support of his claim that his untimely filing should be excused (App.Sub.Br. 25). But his reliance on those cases is misplaced.

In *Nicholson*, the inmate's *pro se* motion was, in fact, timely filed—it was simply sent to the wrong circuit court by the inmate. Thus, the Court held that the inmate's motion should be treated as timely filed because the circuit clerk was bound by Rule 51.10 to transfer the misdirected filing to the proper court. *Id.* at 371 n. 1. Moreover, as required under the "active interference" exception, the inmate had done everything in his power to timely file his *pro se* motion. Here, by contrast, Mr. Watson did not attempt to timely file his motion, and his motion was not, in fact, timely filed in the wrong circuit court.

In *Spells*, there were unique circumstances beyond the movant's control that caused an otherwise timely filed motion to be returned to the movant. There, even though the inmate mailed his *pro se* motion in time to meet the deadline, the filing was tardy because the inmate relied on an outdated address and the sentencing court's postal forwarding order was not renewed and lapsed the day before his motion arrived. 213 S.W.3d at 701-702. After

the mailing was returned, the movant then filed his motion seven days late. *Id*. Here, by contrast, there were no similar circumstances that caused Mr. Watson's otherwise timely filed motion to be late. Rather, Mr. Watson filed his motion more than a year late; and, even if his allegations are viewed liberally in his favor, he filed his motion at least two months *after* he learned from his fellow inmate that he should have filed his motion sooner.[2]

In sum, Mr. Watson failed to allege facts showing that he took any steps to file his initial *pro se* motion within the mandatory time limits of the rule, and he failed to allege facts showing that he was prevented from timely filing by the "active interference" of a third party. Accordingly, the motion court should have dismissed Mr. Watson's post-conviction motion as untimely filed. This point should be denied.

C. The motion court did not clearly err in denying relief

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[2] In light of their facts, respondent questions whether *Nicholson* and *Spells* actually fit within the third-party interference exception. In *Price*, the Court seemed to question whether *Nicholson* and *Spells* were proper applications of the exception; the Court stated: "The question of whether *Nicholson* or *Spells* are proper applications of an exception for third-party interference is not before the Court. It is sufficient for present purposes only to note that this is the exception the Court *purported* to apply" in those cases (emphasis added).

Even if the Court concludes that the motion court properly excused the untimely filing, Mr. Watson failed to allege facts in his amended motion warranting relief.

To prevail on a claim of ineffective assistance of counsel, a movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In addition, the movant must "affirmatively prove prejudice." *Id*. at 693.

To demonstrate prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. Rather, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id*.

1. Counsel's performance

"To establish ineffective assistance of counsel for failure to request a lesser-included offense instruction, [a movant] must show[ ] three things: (1) the evidence would have required submission of a lesser-included offense

instruction had one been requested, (2) the decision not to request the instruction was not reasonable trial strategy, and (3) he was thereby prejudiced." *Immekus v. State*, 410 S.W.3d 678, 683 (Mo.App. S.D. 2013) (footnote omitted).

Here, to the extent that Mr. Watson alleged that counsel should have requested instructions on the alleged included offense of felony stealing based upon (1) stealing property with a value of $500 or more, or (2) physically taking property from the person of the victim, counsel could not have been ineffective because the offense of felony stealing, as alleged in the amended motion, was not an included offense of robbery in the first degree or robbery in the second degree.

An offense is an included offense when "(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or (2) It is specifically denominated by statute as a lesser degree of the offense charged; or (3) It consists of an attempt to commit the offense charged or to commit an offense other included therein." § 556.046.1(1), RSMo Cum. Supp. 2013. Stealing is not an "attempt" to commit robbery in the first degree or robbery in the second degree, and it is not denominated by statute as a lesser degree of robbery.

In addition, as alleged in the amended motion, felony stealing was not "established by proof of the same or less than all the facts required" to prove

robbery. To the contrary, as alleged in the amended motion, the stealing offenses required proof of elements that were not required to prove robbery, namely, that the stolen property had a value of $500 or more, or that the stealing was accomplished by physically taking the property from the person of the victim.[3] Accordingly, the felony stealing offenses that were alleged in the amended motion were not included offenses, and, consequently, counsel was not ineffective for failing to make those specific requests.

Whether counsel's performance was otherwise deficient for failing to request an included offense instruction is generally a question that might more easily be resolved after an evidentiary hearing. Here, however, the

[3] While the Court indicated in *State v. Williams*, 313 S.W.3d 656, 659 (Mo. 2010), that "[s]tealing from a person is a lesser included offense of robbery in the second degree," the offense of robbery in the second degree does not require proof that the property was physically taken from the person of the victim. *See* § 569.030, RSMo 2000. Thus, under the elements test, it does not appear that "stealing from the person" should be deemed an included offense of robbery. The cases *Williams* relied on—*Patterson v. State*, 110 S.W.3d 896, 901 (Mo.App. W.D. 2003), and *State v. Ide*, 933 S.W.2d 849, 851 (Mo.App. W.D. 1996)—held that misdemeanor (not "stealing from the person") "stealing" was an included offense of robbery.

record refuted Mr. Watson's conclusory allegation that counsel "had no reasonable trial strategy reason for failing" to request included offense instructions (PCR Supp.L.F. 17). It is plainly apparent from the record that counsel employed an all-or-nothing strategy in defending against the robbery.

In closing argument, for example, after outlining evidence that showed that there was no gun and that the victim had not seen Mr. Watson display a gun, counsel argued, "The defendant did not commit an essential element of Robbery in the First degree, and for that reason you need not go any further" (Tr. 352-353). Counsel then referred the jury to the elements in the applicable verdict director and argued as follows:

> The fourth element is the one you cannot find. Fourth, that in the course of taking the property, the defendant displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument. Someone has to see something that appears to be a deadly weapon or a dangerous instrument, and that possibility's refuted by clear and convincing, unmistakable videotape evidence. Human observation is prone to assumption and mistakes. The videotape is not. It is the most reliable piece of evidence you have. And it clearly refutes the State's case. The defendant never displayed what appeared to be a deadly – or threatened the use of what appeared to be. There has to be

something displayed that appears to be a deadly weapon or dangerous instrument.

(Tr. 353). Counsel continued by arguing that "the evidence shows the defendant absolutely did not commit element four and is therefore innocent" (Tr. 354). Counsel also reminded the jury that the State bore the burden of proof, and he urged the jury to "find him not guilty" (Tr. 354).

Counsel further argued that the State "probably did a great job of proving the . . . first two elements, that the defendant was somehow involved" (Tr. 354). Counsel even went so far as to concede that the State "proved those two elements beyond a reasonable doubt" (Tr. 354-355). But, having said that, counsel argued, "But their case must fail because there was no gun; the videotape refutes it. And there's nothing that could even appear to be a deadly weapon or dangerous instrument" (Tr. 355).

Counsel also reminded the jurors that they had agreed in voir dire to follow the instructions (Tr. 355). Counsel said, "And now that is your duty, to follow the Court's instructions . . . to look at that videotape evidence and to follow the Court's instructions" (Tr. 355). Counsel finally concluded by stating, "Their case has been refuted, and it's your job to follow the Court's instructions and find that the defendant is not guilty on both counts" (Tr. 356). In short, it was plainly apparent in light of counsel's arguments that counsel employed an all-or-nothing defense predicated upon the State's

failure to prove an essential element of the charged offense.

There was no allegation in the amended motion that counsel was unaware of lesser included offenses, or that counsel inadvertently failed to request a lesser included offense (PCR Supp.L.F. 16-17). Rather, the motion alleged that counsel would testify that his strategy was to persuade the jury "that the state failed to meet its burden on an essential element of robbery in the first degree because [Mr.] Watson did not have a gun and did not display what appeared to be a dangerous instrument or deadly weapon" (PCR Supp.L.F. 17). This strategy was consistent with an all-or-nothing strategy, and absent any factual allegations showing that counsel did not consciously choose to employ that evident strategy, Mr. Watson failed to allege facts overcoming the presumption that counsel made a strategic decision to employ that strategy. *See Curry v. State*, 438 S.W.3d 523, 525 (Mo.App. E.D. 2014) ("Movant makes no claim that his trial counsel unreasonably refused to request the second-degree robbery instruction or inadvertently failed to consider that course of action."). *Cf. McNeal v. State*, 412 S.W.3d 886, 889-890 (Mo. 2013) (movant alleged that counsel's failure to request an included offense instruction was not justified by any "strategy or reason, other than inadvertence").

Mr. Watson asserts on appeal, as he alleged in his motion, that, in light of the lesser range of punishment on the included offenses, "trial counsel

could only have helped Mr. Watson's position by requesting the submission of a lesser-included offense instruction" (App.Sub.Br. 43; *see* PCR Supp.L.F. 16). But this is incorrect, as the all-or-nothing strategy employed by counsel could have resulted in an outright acquittal on both charges. In other words, submitting an included offense instruction could have harmed Mr. Watson by giving the jury more opportunities to find him guilty. And for that reason, Missouri courts have repeatedly recognized that an all-or-nothing defense is a reasonable trial strategy. *See*, *e.g.*, *McCrady v. State*, 461 S.W.3d 443, 449-450 (Mo.App. E.D. 2015); *Curry v. State*, 438 S.W.3d at 525; *Oplinger v. State*, 350 S.W.3d 474, 477 (Mo.App. S.D. 2011); *Neal v. State*, 99 S.W.3d 571, 575 (Mo. App. S.D. 2003); *see also Jackson v. State*, 205 S.W.3d 282, 286 (Mo.App. E.D. 2006) (quoting *Love v. State*, 670 S.W.2d 499, 502 (Mo. 1984)) (" '[M]ovant's counsel cannot be convicted of being ineffective for seeking to employ the best defense for [her] client by not offering the jury a middle ground for conviction.'"); *State v. Lee*, 654 S.W.2d 876, 879 (Mo. 1983) ("It is also recognized that defense counsel frequently make a conscious decision not to request a lesser offense as a matter of trial strategy. The reasoning is that the jury may convict of the lesser offense, if submitted, rather than render a not guilty verdict on the higher offense if the lesser is not submitted.").

In sum, the record plainly shows that counsel sought to convince the jury that it had to acquit due to the State's failing to prove an essential

element of the offense. It is evident that counsel employed an all-or-nothing defense, and Mr. Watson failed to allege any facts showing that counsel's evident decision was due to inadvertence or a misunderstanding of the law. In short, Mr. Watson failed to allege facts overcoming the presumption that counsel's evident choice was a reasonable, strategic choice.

2. Prejudice

Mr. Watson also failed to allege facts showing that he was prejudiced. As evidenced by the jury's verdict in this case, it is apparent that the jury concluded beyond a reasonable doubt that Mr. Watson took currency from the business, that he did so for the purpose of withholding it from the owner permanently, that he threated the immediate use of force against Ms. Shull for the purpose of forcing her to deliver up the property, and that "in the course of taking the property, [he] displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument" (L.F. 35). Counsel's alleged error in this case—failing to submit an included offense instruction—would not have altered the evidence presented to the jury, and, accordingly, there is no reasonable probability that the jury would have made different factual findings if an included offense instruction had been submitted to it.

a. *Strickland*'s presumption that the factfinder will act according to the law precludes a finding of prejudice

In *Strickland*, the Court stated that "[i]n making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law." 466 U.S. 694. "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." *Id.* at 695. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.*

In light of this presumption, courts in various jurisdictions have held that it is not possible to show *Strickland* prejudice if counsel's alleged error lies in failing to give the jury a different option to convict the defendant of a lesser offense. In *State v. Grier*, 246 P.3d 1260, 1268, 1272-73 (Wash. 2011), the Supreme Court of Washington reaffirmed its "adherence to *Strickland*" and rejected the notion that prejudice could be predicated on the jury failing to follow the law. The Washington court pointed out that "[i]n *Strickland*, the Court indicated that, '[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law.' " *Id.* Thus, the court held that the defendant could not demonstrate prejudice from counsel's alleged error: "Assuming as this court must, that the jury would not have convicted [the defendant] of second degree murder unless the State had met its burden of

proof, the availability of a compromise verdict would not have changed the outcome of [the defendant's] trial." *Id.* at 1274.

Similarly, in *Sanders v. State*, 946 So.2d 953, 956 (Fla. 2006), the Florida Supreme Court held that the defendant could not demonstrate prejudice from counsel's alleged error in failing to submit a lesser included offense because "under *Strickland*, a defendant cannot, as a matter of law, demonstrate prejudice by relying on the possibility of a jury pardon, which by definition assumes that the jury would have disregarded the law, the trial court's instructions, and the evidence presented." The Court explained:

> [T]he jury must anchor its verdict in, and only in, the applicable law and the evidence presented. Nothing else may influence its decision. When a jury convicts a defendant of a criminal offense, it has decided that the evidence demonstrated beyond a reasonable doubt that the defendant committed the crime charged. 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. at 958.

In *Autrey v. State*, 700 N.E.2d 1140, 1142 (Ind. 1998), the Indiana Supreme Court similarly stated that a defendant could not demonstrate

Strickland prejudice from counsel's failing to request a lesser-included offense instruction:

> The jury found defendant guilty of murder beyond a reasonable doubt. Had the jury been instructed on lesser included offenses to murder, they would have been presented with the same evidence and heard the same testimony. Therefore, there is no reason to believe that the inclusion of lesser included offenses would have raised a reasonable doubt as to defendant's culpability for murder.

In *Fair v. Warden*, 559 A.2d 1094, 1099-1100 (Conn. 1989), the Connecticut Supreme Court likewise cited *Strickland*'s presumption and concluded that "any possibility that the jury would have convicted the petitioner only of the lesser included larceny charge does not amount to 'a probability sufficient to undermine confidence in the outcome.' " *See also Sigman v. State*, 695 S.E.2d 232, 234 (Ga. 2010) ("Since the jury found him guilty of the felony murder counts, rejecting the lesser included offense of involuntary manslaughter based on reckless conduct or simple battery, there is no reasonable probability that the outcome of the trial would have been different if counsel had also requested charges on reckless conduct and simple battery as lesser included offenses of the underlying felonies of cruelty to children, aggravated battery and aggravated assault."); *Commonwealth v.*

Breakiron, 729 A.2d 1088, 1095 (Pa. 1999) ("The jury rejected this argument and convicted [the defendant] of robbery. … Had a theft instruction been given, it is not likely that the jury would have returned a verdict only on the theft charge."); *State v. Leon*, 638 So.2d 220, 221-222 (La. 1994) (citing *Strickland*'s presumption and holding, in light of the various other options presented to the jury that "speculation that jurors might have returned the second responsive verdict provided by law if it had been listed correctly on the verdict form does not amount to a showing that the mistake rendered the proceedings fundamentally unfair or the result unreliable"); *see generally Sims v. State*, 472 S.W.3d 107, 115 (Ark. 2015) (the jury was instructed on first and second-degree murder, and "[b]ecause the jury returned a guilty verdict on the greater offense of first-degree murder, [defendant] cannot establish that prejudice resulted from counsel's failure to request an instruction on yet another lesser-included offense").

The United States Court of Appeals has also relied on *Strickland*'s presumption to conclude that the defendant could not demonstrate prejudice in light of the instructions submitted to the jury and the jury's verdict. *See Johnson v. Alabama*, 256 F.3d 1156, 1183 (11th Cir. 2001). In that case, the court stated:

> Like the district court, we can find no logical basis to conclude that an additional alternative charge would have led a

> rational jury down a different path. The jury already was presented with non-capital alternatives (intentional murder and robbery) and still found Johnson guilty of capital murder. A felony murder instruction would not have changed the standard for a conviction on capital murder, and so for an objective and rational jury—and we must presume this was such a jury—an instruction on that offense should not have changed the outcome.

Id.; *see also Perry v. McCaughtry*, 308 F.3d 682, 690 (7th Cir. 2002) (observing that the jury is presumed to follow the instructions and concluding that an error in a lesser-offense instruction did not result in prejudice because "even assuming that the party to a crime instruction should have referenced the felony murder instruction, once the jury concluded that Perry was guilty of first degree intentional homicide, as a party to the crime, the jury never needed to reach the felony murder instruction."). *But see Breakiron v. Horn*, 642 F.3d 126, 138-139 (3rd Cir. 2011) (holding that a defendant can show prejudice from counsel's failing to submit a lesser-offense instruction).

Respondent acknowledges that in *McNeal v. State*, 412 S.W.3d at 893, this Court ordered a remand under similar circumstances to determine whether there was prejudice from counsel's alleged failure to offer an instruction on an included offense, despite the State's argument that

Strickland's presumption precluded a finding of prejudice. However, to the extent that the Court rejected the State's argument in *McNeal*, respondent respectfully suggests that the Court should reconsider its holding.[4]

b. The luck of a "lawless decisionmaker" or the risk that the jury will not follow the law is not sufficient to show a reasonable probability of a different result

In *McNeal*, the Court stated, "Without a trespass instruction [the included offense at issue in that case], the jury was left with only two choices: conviction of burglary or acquittal." *McNeal*, 412 S.W.3d at 892. The Court then observed that "[w]hen 'one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.' " *Id*. (citing *Breakiron v.*

[4] It does appear that the Court rejected the State's broad claim that *Strickland*'s presumption precluded a finding of prejudice. *See McNeal*, 412 S.W.3d at 891-892 (declining to follow *Hendrix v. State*, 369 S.W.3d 93, 100 (Mo.App. E.D. 2012), which had held "that the movant could not establish prejudice because ' "[i]n making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on the grounds of evidentiary insufficiency, that the ... jury acted according to law." ' ").

Horn, 642 F.3d 126, 138-139 (3rd Cir. 2011) (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

The Court then further observed, "Even though juries are obligated 'as a theoretical matter' to acquit a defendant if they do not find every element of the offense beyond a reasonable doubt, there is a 'substantial risk that the jury's practice will diverge from theory' when it is not presented with the option of convicting of a lesser offense instead of acquittal." *Id.* (citing *Breakiron* (quoting *Keeble v. United States*, 412 U.S. 205, 212-13 (1973)). In other words, the Court suggested that it was possible that the jury's verdict on the greater offense was the product of a lawless decisionmaker that was not actually convinced of the defendant's guilt but was unwilling to acquit him because he was "plainly guilty of some offense."

However, while that speculative possibility surely exists—juries are capable of ignoring the law—in assessing *Strickland* prejudice, the jury's strict adherence to the law is not "a theoretical matter." Rather, under *Strickland*, it is a presumption that must be employed. 466 U.S. at 694-695. As the Court stated in *Strickland*, "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." *Id.* at 695. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Id.* In short, any risk or possibility that the jury's

practice will "diverge from theory" must be excluded from a prejudice analysis under *Strickland*.

Accordingly, here, there was no prejudice from counsel's failing to request an instruction on a lesser included offense. Mr. Watson's jury found beyond a reasonable doubt that Mr. Watson was guilty of robbery in the first degree—*i.e.*, "that in the course of taking the property, [he] displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument" (*see* L.F. 35). Merely adding an instruction on an included offense (*e.g.*, robbery in the second degree), would not have altered the evidentiary picture that was presented to the jury. Thus, absent the possibility of nullification, whimsy, caprice, or compromise on the part of the jury, there is no reasonable probability that the jury would have made different factual findings and rendered a different verdict.

Stated another way, because the reliability of the jury's factual findings was not diminished by counsel's alleged error, *i.e.*, because those findings were unaffected, there was no prejudice. And that is the question: "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696.

Respondent acknowledges that in *Crace v. Herzog*, 798 F.3d 840, 847-848 (9th Cir. 2015), the court rejected the argument that *Strickland*'s presumption forecloses a finding of prejudice. In that case, in concluding that *Grier*, *supra*, was wrongly decided, the court stated:

> To think that a jury, if presented with the option, might have convicted on a lesser included offense is not to suggest that the jury would have ignored its instructions. On the contrary, it would be perfectly consistent with those instructions for the jury to conclude that the evidence presented was a better fit for the lesser included offense. The Washington Supreme Court [in *Grier*] thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury necessarily would have reached the same verdict even if instructed on an additional lesser included offense.

Id. The court then observed that, "in a related context," the United States Supreme Court had recognized that "a jury presented with only two options—convicting on a single charged offense or acquitting the defendant altogether—'is likely to resolve its doubts in favor of conviction' even if it has reservations about one of the elements of the charged offense, on the thinking that 'the defendant is plainly guilty of some offense.' " *Id*. at 848 (citing *Keeble*, 412 U.S. at 205). The court then stated that "[i]t is therefore perfectly

plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense—doubts that, with 'the availability of a third option,' could have led it to convict on a lesser included offense." *Id.*

There are, however, significant problems with employing this analysis in the post-conviction context. First, *Keeble v. United States* and *Beck v. Alabama* (which was cited in *Breakiron v. Horn*, as discussed above) were both direct appeal cases, and they were both decided before *Strickland*. Thus, they should not be relied on to support a finding of *Strickland* prejudice.

Second, the application of *Strickland*'s presumption in cases like *Grier* is not the equivalent of holding that "because there was sufficient evidence to support the original verdict, the jury necessarily would have reached the same verdict even if instructed on an additional lesser included offense." Rather, *Strickland*'s presumption requires a reviewing court to assume that the jury conscientiously considered all of the evidence and made its findings of guilt because it was *convinced beyond a reasonable doubt* that the State proved every element of the offense.

In other words, under *Strickland*, a prejudice analysis begins with the proposition that the jury was firmly convinced of guilt after resolving all questionable aspects of the evidence. The reviewing court then evaluates whether it is reasonably probable that counsel's deficient performance would

have affected the jury's findings. Thus, contrary to *Crace*, under *Strickland*, in assessing prejudice, it is not "perfectly plausible" to conclude that the jury convicted the defendant despite having doubts about the defendant's guilt. To entertain the notion that the jury had such doubts and nevertheless found the defendant guilty is to conclude that the jury ignored the law, which is not permitted under *Strickland*.

In attempting to reconcile its holding with *Strickland*'s presumption, the court in *Crace* suggested that "*Keeble*'s logic does not rest on the proposition that juries deliberately and improperly choose to convict in the absence of reasonable doubt." 798 F.3d 840. The court continued: "What *Keeble* teaches us is that a lesser-included-offense instruction can affect a jury's *perception* of reasonable doubt: the same scrupulous and conscientious jury that convicts on a greater offense when that offense is the only one available could decide to convict on a lesser included offense if given more choices." *Id*.

In *Keeble*, however, which was a direct appeal case, the Court said nothing about the jury's ability to perceive reasonable doubt. Rather, as discussed above, the analysis in that case was based entirely on the notion that the jury's practice might "diverge from theory," *i.e.*, that the jury might not acquit as required by the instructions if the jury had doubts about the defendant's guilt. 412 U.S. at 212-213. Respondent acknowledges that, in

Keeble, the court also discussed how a rational juror could have found the defendant guilty of the lesser offense under the facts of that case. But the fact that a rational jury *could* have found the defendant guilty of the lesser offense was not the equivalent of holding that there was a reasonable probability that the jury *would* have found the defendant guilty of the lesser offense. Whether a jury "could" find the defendant guilty of the included offense is the standard for determining on direct appeal whether a trial court erred in refusing to give a requested instruction. That standard should not be applied in place of *Strickland*'s standard in a post-conviction case where counsel's effectiveness is the issue.

It is true that an included offense instruction could serve to frame a closing argument or serve to guide the jury's deliberations. However, there is no reason to believe that, in evaluating the evidence in a given case, the jury is incapable of perceiving reasonable doubt with regard to the greater offense if an included offense instruction is not given.

In asserting that he was prejudiced, Mr. Watson asserts—as he alleged in his amended motion—that the jurors in his case sent out a note asking "how it was they could convict Mr. Watson of robbery in the first degree if there was no gun" (App.Sub.Br. 46; *see* PCR Supp.L.F. 19). He asserts that this note showed that "the jury would likely have" found him guilty of a lesser offense if one had been submitted to it (App.Sub.Br. 46).

But if such a note was sent out, it merely showed that the jury was carefully considering the language of the instructions and trying to ensure that the instructions were correct. Further consideration of the instruction would have revealed to the jury that Mr. Watson could be guilty of robbery in the first degree if he displayed what *appeared* to be a gun—a nuance that apparently was not immediately clear. The jury did not need an instruction on an included offense to comprehend that aspect of the case, and there is no reasonable probability that an instruction on robbery in the first degree or stealing would have caused the jury to conclude that Mr. Watson did *not* display what appeared to be a gun.

Mr. Watson points out that "[r]easonable jurors could have concluded that Mr. Watson did not actually display or threaten to use a gun, or that the object that [he] displayed (or threatened to use) did not reasonably appear to Ms. Shull or Ms. Anderson to be a gun" (App.Sub.Br. 40). But, while rational jurors *could* have found Mr. Watson guilty of robbery in the second degree or stealing, that does not mean there was a reasonable probability that the jury *would* have found him guilty of one of those offenses. The jury considered all of the evidence, including its strengths and weaknesses, and the jury concluded that Mr. Watson displayed what appeared to be a gun. If the jury had not believed that he displayed what appeared to be a gun, the jury would have acquitted. As such, there is no reasonable probability that counsel's

alleged error affected the outcome of the trial. *See generally Strickland*, 466 U.S. at 695-696 ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.").

In sum, Mr. Watson failed to allege facts showing that there was a reasonable probability that the jury's deliberations would have resulted in a conviction of robbery in the second degree or stealing if one (or both) of those offenses had been submitted to it. The motion court did not clearly err in denying Mr. Watson's claim that counsel was ineffective for failing to submit an included offense instruction.

CONCLUSION

The Court should affirm the denial of Mr. Watson's Rule 29.15 motion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 9,269 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 26th day of August, 2016, to:

MATTHEW HUCKEBY
1010 Market Street, Suite 1100
St. Louis, MO 63101
Tel.: (314) 340-7662
Fax: (314) 340-7685
Matt.huckeby@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent