IN THE
MISSOURI SUPREME COURT

DAVID A. MCNEAL,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC95666
	)	
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 11
THE HONORABLE MICHAEL MULLEN, JUDGE

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 both counts following a jury trial on September 8-9, 2008. On October 28, 2008, the Honorable Ralph Jaynes sentenced him to consecutive terms of imprisonment of ten years in the Missouri Department of Corrections on Count I, and one-hundred-fifty days in jail on Count II.

The Eastern District affirmed Mr. McNeal's convictions and sentences in ED96796; it issued its mandate on October 19, 2009. Mr. McNeal timely filed his *pro se* Rule 29.15 motion on October 26, 2009. Post-conviction counsel was appointed on March 24, 2010. Fifty days later, on May 13, 2010, counsel timely filed an amended motion.

The motion court denied relief without an evidentiary hearing, a judgment which was affirmed by the Eastern District (ED96796), but subsequently reversed for an evidentiary hearing by this Court (SC92615). Following an evidentiary hearing, the motion court again denied relief, which

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

judgment was then reversed by the Eastern District (ED102152). This Court then ordered transfer on May 24, 2016, after the state's application. Mo. Const., Art. V § 9; Rule 83.04.

STATEMENT OF FACTS

This post-conviction appeal is from the denial of Appellant David McNeal's sole Rule 29.15 claim of ineffective assistance of counsel (*See e.g.*, 2PCR L.F. 13-29, 40-41).[2] He claimed that his trial counsel unreasonably failed to request a lesser-included instruction on trespass in the first degree in connection with the state's charge, in Count I, of burglary in the second degree (2PCR L.F. 13-29).

The state charged Mr. McNeal, in Count I, with 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). 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, a repair person, and located in apartment 510 of the

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[2] Mr. McNeal will cite to the record on appeal as follows: "(App. L.F.)" for the direct appeal legal file; "(Tr.)" and "(S. Tr.)" for the trial and sentencing transcripts, respectively; "(1PCR L.F.)" for the first post-conviction legal file from ED96796; "(2PCR L.F.)" for the second, most current, post-conviction legal file from ED102152; "(PCR Tr.)" for the post-conviction evidentiary hearing transcript; and "(Appx.)" for the appendix.

Riverbend Apartments (App. L.F. 128, Tr. 125, 128). Mr. McNeal confessed his guilt to the misdemeanor stealing count at trial, even indicating in a drawn-out exchange with the prosecutor that he had wanted to plead guilty to stealing before trial (*See* Tr. 235, 238, 250). But Mr. McNeal denied that he had a "burglar's intent" when he entered into apartment 510 (*See* Tr. 249-250). At the instruction conference, there was no discussion by Mr. McNeal's counsel, by the court, or by the prosecutor about the class B misdemeanor lesser-included offense of trespass in the first degree (*See* Tr. 212-217). Mr. McNeal was found guilty of both the burglary count and the stealing count to which he had admitted his guilt (Tr. 272; App. L.F. 90-93). He was sentenced to 10 years and to 150 days in jail, respectively, with credit granted for time already served (App. L.F. 19, 92; Tr. 272; S. Tr. 7-8).[3]

On May 8, 2008, Matthew Harrison, a subcontractor, was installing vinyl plank in apartment 510 after a former tenant, Tracy Hemphill, had moved out (Tr. 123-124, 202). Mr. Harrison and a co-worker took a break

[3] Mr. McNeal's arrest occurred on May 8, 2008, and his $20,000 bond was set the following day (*See* App. L.F. 5-6). By the time of his October 28, 2008 sentencing, it appears that Mr. McNeal had been in jail for 172 days, and that he would have been about eight days short of having served six-months (*See* App. L.F. 2, 5-6; Tr. 279).

that afternoon to go outside to smoke a cigarette (Tr. 125-126). They left the door to apartment 510 unlocked and walked to the elevator (Tr. 126, 134). There, they saw Mr. McNeal, who attempted to engage them in conversation; they, however, ignored him and continued outside (Tr. 126-127). A few minutes later, after thinking Mr. McNeal had been "a little too friendly," they cut their break short and returned to apartment 510, where Mr. Harrison noticed that his $298 drill had been stolen (Tr. 128, 142).

Mr. Harrison and the Riverbend Apartments' property manager, Fanita Wilson, called the police about Mr. Harrison's stolen drill (Tr. 129, 137, 189). Two police officers arrived and viewed video surveillance from the fifth floor, which showed Mr. McNeal attempting to engage Mr. Harrison and his co-worker in a conversation by the elevator, Mr. McNeal going down the hall, and then running back toward the elevator with a drill in his hands (Tr. 147, 153, 156-168, 204-205, 209-210, 232-233; State's Exhibit No. 1 and 7). The officers left and, within a few minutes, returned with Mr. McNeal (Tr. 130, 168, 190). Mr. McNeal at that time denied taking Mr. Harrison's drill, but told the officers that, if they would take the handcuffs off of him, he might be able to find the drill (Tr. 132, 172).

At trial, defense counsel questioned both responding officers about whether the initial call they received was for stealing or for burglary (*See* Tr. 157-158, 175). The first officer was unsure, but responded that, in any event,

the burglary charge was decided upon after the officers had viewed the video (*See* Tr. 158-160). The second officer, who wrote the police report, indicated that the initial call had, in fact, been for stealing (Tr. 175). That officer also indicated that Mr. McNeal had been charged with burglary, notwithstanding the initial call, "because of the way [Mr. McNeal] obtained the drill . . . [b]y entering the apartment in order to steal the drill he's charged with burglary" (Tr. 179). Defense counsel then questioned the officer whether, "[w]hen somebody is in a place where they're not supposed to be, that's not necessarily burglary, is it?" (Tr. 181). Defense counsel asked, "[i]t could be a trespass?" (Tr. 181). The officer responded that it could, in fact, be a trespass (Tr. 181).

Mr. McNeal testified (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 knew "Tracy" through Ms. Arlene Sanders, the mother of his son, who lived next door in apartment 511 (Tr. 231-232). He didn't know her last name and "just knew her as an acquaintance" (Tr. 247). Mr. McNeal testified that he had been in Tracy's apartment a number of times before, but he did not testify that he had been given general permission to enter Tracy's apartment at will (Tr. 224-253, 247-249). 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 and knock on the door 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 with a carton of cigarettes in his hand (Tr. 233). That day, he ran into Tracy in the hallway of the apartment building and agreed to sell her eight packs of cigarettes for $15 (Tr. 233). Tracy only had $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). After the men declined his invitation to exit the elevator so that he could find out from them whether Tracy was at home, or busy, he said, "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, at that moment, 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).

Mr. McNeal denied that, in going to Tracy's apartment, he had the 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 inside 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).

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). The defense expressed an

awareness that Mr. McNeal would be found guilty of stealing, and argued for the jurors to find him not guilty of burglary (*See* Tr. 266).

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? Must it occur prior to opening/touching door?

(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 to 150 days in jail on Count II (Tr. 272-273; S. Tr. 7-8; App. L.F. 18-22).

Mr. McNeal appealed to the 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 his convictions and sentences. The Eastern District issued its mandate on October 19, 2009. Mr. McNeal timely filed a *pro se* Rule 29.15 motion on October 26, 2009 (1PCR L.F. 4-9). The motion court

appointed counsel to represent Mr. McNeal on March 24, 2010 (1PCR L.F. 11). On May 13, 2010, counsel timely filed an amended motion (1PCR 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 (1PCRL.F. 12-35; *see also* 2PCR L.F. 11-34;).

In his motion, Mr. McNeal asserted, *inter alia*, that "[a] reasonably competent attorney, based on the facts of this case, and especially in light of an expressed doubt about the correctness of the offense as charged, would have requested that the court instruct the jury on the lesser-included offense of trespass in the first degree." (1PCR L.F. 27). He alleged that "no strategy or reason, other than inadvertence, supported [counsel's] failure to request that the court instruct the jury on trespass in the first degree" (*See* 1PCR 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* 1PCR 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 received an instruction on

trespass in the first degree, there is a reasonable probability that the jury would have convicted him of that offense . . .” (1PCR L.F. 29-30).

The motion court denied Mr. McNeal’s request for an evidentiary hearing (*See* 1PCR L.F. 36-39). The Eastern District affirmed that decision in an unpublished memorandum in *McNeal v. State*, ED96796. Following transfer in SC92615, this Court remanded the case for an evidentiary hearing, which was held on August 15, 2014. *McNeal v. State*, 412 S.W.3d 886 (Mo. banc 2013); (PCR Tr. 1-34).

Evidentiary Hearing

Trial counsel and Mr. McNeal testified at the evidentiary hearing (*See* PCR. Tr. 3-18, 19-34).

Counsel recalled that Mr. McNeal had been charged with burglary and stealing (*See* PCR Tr. 5-6). He remembered that Mr. McNeal “was admitting” to the stealing charge, and that the defense position was “that he had not committed the crime of burglary” (PCR Tr. 5). About the burglary charge, counsel believed that it had been over-charged or “enhanced,” and he noted, for example, “[e]ven in the police report there was a reference to a larceny as opposed to burglary” (PCR Tr. 7-8). His belief that it was over-charged formed “part of the [defense] theory of the case” (PCR Tr. 8). Counsel added, however, “[b]ut it’s hard to argue stuff like that to the jury” (PCR Tr. 8).

Counsel stated that he thought that he could have requested a trespass instruction, but that he did not know whether the trial court would have submitted it, and he was personally unsure "[w]hether it would have made any difference in the verdict" (PCR Tr. 9). When asked at what point it was decided he would not request the instruction, he responded: "I'm not sure it was that much of a conscious decision as much as just it didn't seem appropriate" (PCR Tr. 11). He did not think that he discussed the issue with Mr. McNeal, and he could not remember whether they had the ability to talk much during the trial (PCR Tr. 10, 11, 17).[4] He said, however, that Mr. McNeal had given him "a lot of notes"[5] before trial, and had made "very pointed statements about 'I took the drill, but I didn't do the burglary'" (PCR Tr. 8). Counsel referenced a "mindset that we were in," and indicated also that Mr. McNeal did not "bring the trespass instruction to [his] attention," adding that,

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[4] He speculated that Mr. McNeal "might have objected to" a trespass instruction, but counsel did not think he ever specifically discussed the issue with Mr. McNeal (PCR Tr. 17). He acknowledged that this assertion was "speculation" on his part, and that he did not know Mr. McNeal's position (PCR Tr. 17).

[5] Counsel said that Mr. McNeal "gave [him] extensive notes and things that he had written. Some of it was typed" (PCR Tr. 10).

in his estimation, Mr. McNeal was a "pretty good jailhouse lawyer" (PCR Tr. 10).

About the trespass instruction, counsel said that "[i]t seemed inconsistent to me at the time to be requesting that kind of an instruction because we were arguing that his entry in there was if not legitimate at least not within the intent. And so it just didn't – it didn't seem to me that it fit with the facts that we were trying to argue" (PCR Tr. 8).

Under questioning from the state about whether he would agree "that it could be a legitimate trial strategy for a defense counsel not to seek a lesser included charge and instead just go for a straight acquittal," counsel responded that, "[i]t can be" (PCR Tr. 12).[6] Counsel then pointed to an example where an attorney would not ask for a lesser-included instruction: when a client/defendant is on parole and it's an "issue of just not getting a conviction at all because of a parole violation or something . . . that's a clear area where you wouldn't ask for the lesser included" (PCR Tr. 12).

Counsel indicated that, from the outset, he believed that defeating the burglary charge would be difficult (PCR Tr. 13). He said, "[i]t's tough, you

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[6] Counsel also stated that some tactical decisions are "not entirely [his] choice" (PCR Tr. 12). About a decision to request a lesser-included instruction or not, however, counsel appeared to believe that would be entirely his choice (*See* PCR Tr. 12-13, 17).

know, this kind of case where it's really not very much recommended to go in admitting half of the elements of the crime" (PCR Tr. 13). Still, it was his defense to try to get Mr. McNeal found not guilty of the burglary "based on his not having the intent to steal and his entering the room, if not perfectly lawfully, at least not unlawfully [sic]" (PCR Tr. 13). Since there "wasn't any breaking and entering here," counsel thought that they "had a shot at" him being found not guilty of burglary (PCR Tr. 14).

From the evidence and closing statements, counsel recalled that Mr. McNeal "did know [the woman who lived in apartment 510, and he] made a knock on the door, there was no answer so he just went on in" (PCR Tr. 14). He indicated, "I mean, that's just – that just doesn't sound like trespass to me. I don't know, I kind of doubt the judge would have given the instruction if we asked for it, but that's speculation at this point" (PCR Tr. 14). In follow up to that answer, the State questioned him, "[a]nd so as a matter of trial strategy you decided to seek an acquittal on the burglary and not to submit a lesser included of the trespassing?[;]" counsel responded, "correct" (PCR Tr. 14-15).

Counsel was asked "why not give the jurors the option" of trespass (PCR Tr. 15). He responded,

> Well, you know, in highlight maybe there is some ground to consider that. But in light of the facts of the case and what we were arguing to the jury, it doesn't seem like the judge would have allowed that

> instruction, 'cause here we are asking for an instruction where they find him entering unlawfully and we're arguing that he is not entering unlawfully.

(PCR Tr. 15).

When asked what "harm" would result from requesting a trespass instruction, counsel indicated, "I'm not sure there would have been any harm, but . . . I'm not sure it would have done any good either. But it didn't fit the theory of the case, and I'm not sure the Judge would have allowed it" (PCR Tr. 16-17).

Mr. McNeal testified that he met with counsel for two short visits before his trial (PCR Tr. 19-20). He was offered a plea deal of seven years on the burglary charge, but he turned that down because he said he "wasn't guilty of the burglary" (PCR Tr. 20). He said he told counsel he would take "time served on the trespass, because that's all it [was]" (PCR Tr. 20). He never discussed "strategy" with counsel (PCR Tr. 21). Mr. McNeal said that he did not know that he had any "input" on the instructions; he thought the judge and the prosecutor were the ones that gave the jurors the instructions (PCR Tr. 21-22). Had he known he could have requested a trespass instruction, he would have done so, or would have had his counsel request it (PCR Tr. 22).

Findings of Fact and Conclusions of Law

In its judgment, dated September 2, 2014, the motion court denied Mr. McNeal's claim (2PCR L.F. 37-41; Appx. A1-A4). The court initially summarized the evidence, and referred to its previous findings (prior to remand by this Court): that Mr. McNeal'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 first degree, that he knowingly entered the apartment unlawfully" (2PCR L.F. 39; Appx. A3; *see also* 1PCR L.F. 38-39).

The motion court then summarized counsel's evidentiary hearing testimony, including his testimony "that since trespass was inconsistent with the defense theory, he did not know if the Court would have given a trespass instruction," "if the entry was lawful it could not be burglary," and "an instruction on trespass 'just didn't seem appropriate'" (PCR L.F. 39-40; Appx. A3-A4).

Then court then wrote or concluded as follows:

> "Reasonable choices of trial strategy, no matter how ill fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." Cole v. State, 152 S.W.3d 267, 270 (Mo. banc 2004). The decision whether to request a lesser-included offense instruction is a

> tactical decision. Oplinger v. State, 350 S.W.3d 474, 477 (Mo. App. S.D. 2011); *Neal v. State*, 99 S.W.3d 571, 576 (Mo. App. S.D. 2003). Where counsel makes an objectively reasonable decision not to request a lesser included offense instruction, there is no ineffectiveness of counsel. Hendrix v. State, 369 S.W.3d 93, 100 (Mo. App. W.D. 2012). Such is the case here.
>
> The testimony of counsel at the evidentiary hearing indicated that counsel's decision was reasonable, and the facts of the case including movant's testimony support counsel's theory. The Court finds that this claim is without merit.

(2PCR L.F. 40-41; Appx. A4-A5).

After an appeal, the Eastern District reversed the motion court's judgment, and held that "under the circumstances of this case, counsel lacked an objectively reasonable strategic reason for failing to request a trespass instruction." *McNeal v. State*, ED 102152, 2016 WL 616297, at *6 (Mo. App. E.D. 2016). The Court noted, *inter alia*, "[m]ovant was a prior and persistent offender, confined at the time of trial. He had much to fear from a felony burglary conviction, but precious little to fear from a misdemeanor trespass conviction." *Id*. Following the state's application, this Court accepted transfer. David 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 claim - in violation 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, as provided for under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 18(a) and 22(a) of the Missouri Constitution – because his counsel was ineffective for failing to request a lesser-included instruction for trespass in the first degree, in that counsel offered no objectively reasonable strategic reason for failing to request the instruction; counsel doubted his chances of success in obtaining an acquittal on the charged offense; the lesser-included instruction would have neither "undermined" the defense case, nor have provided a "middle ground" for jurors; the instruction would not have been inconsistent with the defense theory and argument; and because counsel never consulted with Mr. McNeal on this issue. Mr. McNeal was prejudiced in that the evidence for the charged offense of burglary was not overwhelming, and the jury sent a question to the court related to the timing for the required intent necessary for burglary; and had jurors been given the option to find trespass in the first degree there is a reasonable probability, sufficient to undermine confidence in the outcome, that they would have so found.

Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015);

McNeal v. State, 412 S.W.3d 886 (Mo. banc 2013);

Roe v. Flores-Ortega, 528 U.S. 470 (2000);

Strickland v. Washington, 466 U.S. 668 (1984);

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

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

ARGUMENT

The motion court clearly erred in denying Mr. McNeal's Rule 29.15 claim - in violation 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, as provided for under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 18(a) and 22(a) of the Missouri Constitution – because his counsel was ineffective for failing to request a lesser-included instruction for trespass in the first degree, in that counsel offered no objectively reasonable strategic reason for failing to request the instruction; counsel doubted his chances of success in obtaining an acquittal on the charged offense; the lesser-included instruction would have neither "undermined" the defense case, nor have provided a "middle ground" for jurors; the instruction would not have been inconsistent with the defense theory and argument; and because counsel never consulted with Mr. McNeal on this issue. Mr. McNeal was prejudiced in that the evidence for the charged offense of burglary was not overwhelming, and the jury sent a question to the court related to the timing for the required intent necessary for burglary; and had jurors been given the option to find trespass in the first degree there is a reasonable probability, sufficient to undermine confidence in the outcome, that they would have so found.

Preservation

The allegation of ineffective assistance of counsel raised in this point relied on was raised in Mr. McNeal's amended motion, evidence related to it was adduced at an evidentiary hearing, and it was ruled on by the motion court (2PCR L.F. 13-29, 37-41; PCR Tr. 3-34: Appx. A1-A5). This issue is preserved for appellate review.

Standard of Review

The motion court's findings are presumed correct. *Vaca v. State*, 314 S.W.3d 331, 334 (Mo. banc 2010) (citing *Zink v. State,* 278 S.W.3d 170, 175 (Mo. banc 2009)). A motion court's judgment will be overturned only when its findings of fact or its conclusions of law are clearly erroneous. *Id*. (citing Rule 29.15(k); *Worthington v. State,* 166 S.W.3d 566, 572 (Mo. banc 2005)). Findings or conclusions are clearly erroneous if this Court is "left with a 'definite and firm impression that a mistake has been made.'" *Id.*

To prevail on a claim of ineffective assistance of counsel, a post-conviction movant must show that his counsel (1) failed to exercise the level of skill and diligence that a reasonably competent attorney would in a similar situation and (2) that he was prejudiced by that failure. *Patterson v. State*, 110 S.W.3d 896, 900 (Mo. App. W.D. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish the (1) performance prong, a post-conviction movant "must overcome the presumptions that any challenged

action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *Id*. (citing *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997)). To establish (2) prejudice, he 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*. (citing *id*). In the context of this case, "'prejudice' means a reasonable probability that the outcome of the trial would have been different if the trespass instruction had been given." *McNeal v. State*, 412 S.W.3d 886, 889 (Mo. banc 2013) (citing *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006)). A reasonable probability exists when there is "'a probability sufficient to undermine confidence in the outcome.'" *Id*. at 33–34 (quoting *Strickland*, 466 U.S. at 694).

Argument

Mr. McNeal was charged as, and proven to be, a prior and persistent offender (App. L.F. 39, 128-129; Tr. 6-9). If convicted on the offense of burglary, he faced a fifteen-year sentence. *See* § 558.016.6(3), RSMo. If, however, he was convicted on the class B misdemeanor offense of trespass, he faced only a 180 day sentence. § 569.140, RSMo; § 558.011.1(6), RSMo.

At the time of his trial, Mr. McNeal had already served 123 days in jail (App. L.F. 2, 5-6; Tr. 279). Trial counsel believed that the burglary offense had been over-charged or "enhanced," which belief formed "a part of the theory of

the case" (PCR L.F. 7-8). Trial counsel understood, going into trial, that winning an outright acquittal on the burglary offense in this particular case (with Mr. McNeal admitting to stealing) would be difficult (PCR Tr. 13). But counsel never discussed the option of submitting a trespass instruction with Mr. McNeal; instead, counsel "guess[ed]" that this decision rested entirely and solely with him (PCR Tr. 10-11, 17).

Although counsel indicated that a trespass instruction just "didn't seem appropriate" to him, or didn't seem to "fit with the facts" (*see* PCR Tr. 8, 11), counsel also indicated that he didn't think there would have been "any harm" in submitting the instruction (PCR Tr. 16-17). Counsel also candidly admitted at the evidentiary hearing that not requesting a trespass instruction was not even a "conscious decision" that he made (PCR Tr. 11). Under the facts and circumstances of this case, trial counsel acted unreasonably by failing to request a lesser-included trespass instruction. The motion court's ruling is clearly erroneous; the record in this case should leave this Court with definite and firm impression that a mistake has been made.

Missouri courts have never directly considered whether the defendant or his counsel holds the ultimate authority in the decision about whether to request an instruction for a lesser-included offense. Other states have directly considered this issue. *See e.g.*, *Simeon v. State*, 90 P.3d 181, 182 (Alaska App. 2004) (stating, "[t]his case raises the question of whether the

lawyer or the defendant has the authority to decide whether to request a jury instruction on a lesser included offense[;]" and holding that, "it is the lawyer's decision"); *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008) (holding that "as captain of the ship" the "final authority to make such decisions is reserved to defense counsel") (citation omitted). In Missouri, the Southern District may have come closest to considering this issue in *State v. Hise*, 980 S.W.2d 334 (Mo. App. S.D. 1998). There, the Court rejected the defendant's contention that the decision about whether to request a lesser-included instruction rested entirely with the defendant's counsel. *Id*., at 337.[7]

After noting that this type of decision did not implicate one of the areas within the exclusive decision-making authority of the defendant (*i.e.,* whether

[7] In *Hise*, the defendant personally did not want a lesser-included instruction to be submitted. 980 S.W.2d at 336. His counsel informed the court that he (counsel) believed that "it would be appropriate [for] ... the jury [to] be given an instruction of a lesser included offense . . ." *Id*. On appeal, Hise essentially argued that the trial court and his counsel should not have listened to him, and should have submitted the instruction, in any event, since that decision rested entirely with his counsel. *Id*., at 337-338.

to plead guilty, to waive a jury trial, to testify[8], or to appeal), the Southern District nevertheless indicated, "[t]hat does not mean an accused has no right to make decisions on other important issues during his trial." *Id*., at 337 (citations omitted). The Court indicated that it "disagree[d] with Appellant's premise that the decision on whether to request an instruction on a lesser-included offense is always a trial strategy decision to be made by an accused's lawyer." *Id*. As a basis for upholding the trial court not giving a lesser-included instruction in that case[9], the Southern District noted that *both* the defendant and his counsel had each participated in this important decision in that case, and that the defendant's counsel had fully advised the defendant about this issue. *Id*. at 337.

Mr. McNeal acknowledges that while Missouri courts may not have explicitly considered this issue, the clear import from the case law shows that Missouri considers this to be a strategy-type decision on the part of counsel. *See e.g*., *Patterson v. State*, 110 S.W.3d 896, 903 (Mo. App. W.D. 2003) (indicating, "[w]hen the failure to request a lesser-included instruction is a matter of strategy, the court should not second guess the defendant's

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[8] *See also* Rule 4-1.2, which states, "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

[9] This issue specifically involved a claim of plain error on direct appeal.

counsel") (citing *State v. Dexter*, 954 S.W.2d 332, 344 (Mo. banc 1997); *see also e.g.*, *Tabor v. State*, 344 S.W.3d 853, 860 (Mo. App. S.D. 2011) (stating "counsel is permitted to adopt an 'all-or-nothing' strategy, foregoing an instruction on a lesser-included offense).

But also implicit in Missouri law – and what Mr. McNeal respectfully suggests should be made *explicit* by this Court - is the understanding or expectation that, as in *Hise*, a reasonable defense counsel will consult and collaborate with his client about this important decision. *See e.g.*, *Buskuehl v. State*, 719 S.W.2d 504, 505-07 (Mo. App. E.D. 1986) (not requesting lesser-included instruction was a "conscious and reasoned decision of trial counsel with the consent of his client"); *Neal v. State*, 99 S.W.3d 571, 575-76 (Mo. App. S.D. 2003) (as shown at instruction conference, defendant had influence in the decision to request certain lesser-included instructions); *Immekus v. State*, 410 S.W.3d 678, 685 (Mo. App. S.D. 2013) (before implementing certain strategy related to lesser-included instructions, "trial counsel discussed it . . . with Movant"); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (stating that, "[r]epresentation of a criminal defendant entails certain basic duties" including "the more particular duties to consult with the defendant on important decisions . . .").

In this case there was no collaboration between trial counsel and Mr. McNeal on the "decision" not to request a lesser-included instruction for

trespass (*See* PCR Tr. 11, 13, 17). On this basis, which informs and casts its shadow over those reasons set out below (*i.e.*, that counsel exercised no strategy himself or that, even if it can be called a "strategy," it was unreasonable), this Court should reverse the motion court's judgment, and should also make explicit what may only now be implicit in Missouri law.

Missouri law holds that "[t]o establish a claim of ineffective assistance of counsel for failure to request a lesser included instruction, a movant must show that the evidence supported submission of the instruction had one been requested,[10] the decision not to request the instruction was not reasonable trial strategy, and the movant was thereby prejudiced." *Thompson v. State*, 437 S.W.3d 253, 260 (Mo. App. W.D. 2014) (citing *McNeal v. State*, 412 S.W.3d 886, 889 (Mo. banc 2013) (other citation omitted).

In this case, despite that the motion court cited to general post-conviction case law referring to "[r]easonable choices of trial strategy" and concluded that trial counsel's "decision was reasonable," there is initially a question about whether trial counsel not requesting a lesser-included

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[10] In Mr. McNeal's previous appeal, this Court recognized that the evidence supported a lesser-included trespass instruction in this case. *See McNeal v. State*, 412 S.W.3d 886, 890-891 (Mo. banc 2013) (stating, "[a] trespass instruction would have been consistent with the evidence and with counsel's argument").

trespass instruction in this case should even properly be categorized as a "decision," a "choice," or a "strategy." (*See* PCR L.F. 41) (citations omitted). A fair reading of trial counsel's evidentiary hearing testimony shows there was nothing particularly deliberate or strategic about it.

Counsel and Mr. McNeal never discussed this issue (PCR Tr. 10-11, 17). Counsel spoke about being in a certain "mindset" and about having received some typewritten notes from Mr. McNeal (obviously prepared in advance of trial) which stated that Mr. McNeal "didn't do the burglary," but that said nothing one way or the other about trespass (PCR Tr. 8). Not requesting an instruction for trespass, according to counsel, was not even a "conscious decision" that counsel made (PCR. Tr. 9-11). When asked at what point he decided not to request the instruction, trial counsel responded that it was not "that much of a conscious decision as much as just it didn't seem appropriate" (PCR Tr. 11); *Cf*., *e.g*., *State v. Lee*, 654 S.W.2d 876, 879 (Mo. banc 1983) (stating, "It is also recognized that defense counsel frequently make a conscious decision not to request a lesser offense as a matter of trial strategy").

Elsewhere during the hearing, counsel returned several times to the idea that he did not believe that the trial court would have granted the request; he doubted whether the trial court would give the instruction, and so it appears that he never asked for one (*See* PCR Tr. 9, 14, 17). This is not

"strategy" in any purposeful or deliberative sense of the word. Being in a "mindset" and not making a "conscious decision" are, in fact, the antithesis of "strategy."[11] *Cf. Barton v. State*, 432 S.W.3d 741, 751 (Mo. banc 2014) (counsel reviewed the old trial transcripts, and made "conscious decision about which witnesses to call" based on witnesses' prior testimony); *State v. Kenley*, 952 S.W.2d 250, 268 (Mo. banc 1997) (counsel testified that she and her co-counsel "consciously decided, after discussion," not to have client re-evaluated); *Buskuehl*, 719 S.W.2d at 505 (in lesser-included instruction context, trial counsel testified that he discussed with defendant the "merits and hazards of tendering the instructions" and "[a]fter thinking about it for quite some time we agreed on the strategy" to request certain instructions).

But even if this Court were to conclude that counsel exercised some sort of "strategy" in not requesting a lesser-included instruction, such a strategy was unreasonable under the facts and circumstances of this case. *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").

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[11] "Strategy" is defined, *inter alia*, as "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result." *See* http://www.dictionary.com/browse/strategy?s=t (last visited June 12, 2016).

In this case counsel was aware that obtaining an acquittal on the burglary charge would be difficult (PCR Tr. 13). Counsel's testimony demonstrated that he was concerned about his ability to defeat the burglary charge; he testified that it was "not very much recommended" to go into trial "admitting half of the elements of the crime" (PCR Tr. 13; *see also* App. L.F. 65). Counsel, moreover, also knew that Mr. McNeal would be convicted on the separate count of stealing and that Mr. McNeal would not, therefore, walk out of trial without at least a conviction for that class A misdemeanor offense (Tr. 266; PCR Tr. 6). A reasonably competent counsel with a charge-specific concern about his success in obtaining an acquittal on a felony offense, and also with knowledge that his client would receive a misdemeanor conviction, would not have unilaterally concluded that it was in the best interest of his client to deny the jurors an opportunity to find for an even lower class misdemeanor, instead of the felony. *Cf.*, *e.g.*, *Love v. State*, 670 S.W.2d 499, 502 (Mo. banc 1984) (after noting particular circumstances of that case, this Court stated that "[p]laced in the same situation, a reasonably competent attorney could have concluded that it was in the best interest of his client to deny the jury the opportunity to compromise on some middle ground between second degree murder and acquittal); *see also See Crace v. Herzog*, 798 F.3d 840, 852-853 (9th Cir. 2015) (concluding that "[a]n all-or-nothing strategy was also clearly inappropriate in this case, given that a conviction

only for [the lesser offense] would have spared Crace a third strike and thus decades of prison time").[12]

In this case a class B misdemeanor conviction for trespass in the first degree under § 569.140, RSMo, which carried a maximum sentence of six months in jail, would not have truly represented a "middle ground" sentence between two extremes in Mr. McNeal's case. Rather than "middle ground," a trespass conviction more accurately would have represented something that might conceptually be thought of (in contrast to "middle ground") as "level

[12] In *Crace*, the Ninth Circuit also rejected, as an objectively unreasonable application of *Strickland*, the same prejudice argument advanced by the state in Mr. McNeal's first appeal, and again in the state's application for transfer – that a defendant cannot demonstrate *Strickland* prejudice where the jury convicted the defendant of the higher offense. *See* 798 F.3d 840, 852-853 (9th Cir. 2015) (stating, "[t]o 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"). This Court previously rejected the same argument in Mr. McNeal's first appeal. *See McNeal v. State*, 412 S.W.3d 886, 892 (Mo. 2013) (stating, "[t]he assumption underlying the state's argument . . . that it is illogical to conclude that the jury's deliberative process would be impacted in any way if a lesser-included offense instruction were provided . . . is incorrect").

ground" or "immediate foreground" - representing a maximum sentencing range only a comparatively short distance (*i.e.*, eight days) beyond the 172 days Mr. McNeal served in jail by the time of his sentencing (*See* App. L.F. 2, 5-6; Tr. 279). While it is true that a trespass sentence could be made to run consecutive to the stealing conviction, a lesser-included option of a class B misdemeanor in this case (down from the class B felony range) did not represent compromise "middle ground" in the same way, for example, that manslaughter might be "middle ground" toward a conviction for second degree murder.

Illustrative of the use of a "strategy" under analogous circumstances is *Immekus v. State*, 410 S.W.3d 678 (Mo. App. S.D. 2013). In *Immekus*, the defendant was charged with the class A felony of assault in the first degree for causing "serious physical injury" to his ex-girlfriend/victim. *Id*., at 681. Counsel requested a lesser-included instruction for the class B felony of assault in the first degree, postulating "physical injury" as opposed to "serious physical injury." *Id*. In addition, counsel also requested an instruction for the class A misdemeanor offense of assault in the third degree, but not one for the class C felony of assault in the second degree. *Id*.

At an evidentiary hearing, in explaining his strategy, counsel's testimony demonstrated that he had "reviewed the elements of the lesser-included offenses of assault in the second degree (class C felony) and assault

in the third degree (class A misdemeanor)" and he concluded that "from a psychological point of view" the elements of both offenses were very similar. *Id*., at 682, 684. Counsel then reasoned "that if the jury was going to compromise on the [class C felony], it would just as likely do so on the [class A misdemeanor.]" *Id*. Under the circumstances of the case, counsel did not want a compromise verdict on the class C felony; counsel noted that "[a] conviction on the [class A misdemeanor] would have been almost equivalent to an outright acquittal for Movant because he had already spent about a year in jail awaiting trial . . . [but that] . . . "a conviction on the class C felony would have exposed Movant to a maximum term of twenty years' imprisonment as a result of his status as a prior and persistent offender. *Id*., at 682, 684-685. In upholding the objective reasonableness of counsel's strategy in that case, the Southern District noted that, "[b]ased upon [the above considerations], trial counsel devised an all-or-misdemeanor strategy of requesting an assault-in-the-third-degree instruction as a lesser-included offense, while foregoing any request for an assault-in-the-second-degree instruction." *Id*., at 685. Additionally, the Court also noted that "[b]efore implementing this strategy, however, trial counsel discussed it, as well as the elements of each offense, with Movant." *Id*., 685.

In this case a trespass instruction would also not have "undermined" the defense theory in light of defense counsel effectively conceding trespass

during trial. *Cf. Love v. State*, 670 S.W.2d 499 (Mo. banc 1984) (where defendant argued he was totally innocent of charges, and did not concede any elements of offense, lesser-included would have been inconsistent with defense); *McKee v. State*, 336 S.W.3d 151, 154 (Mo. App. E.D. 2011) (indicating that counsel "has no duty" to request instruction "that would undermine the entire theory of the case").[13] At trial, before, and independent of, Mr. McNeal's ambiguous testimony regarding the moments surrounding when he opened the door (*see* Tr. 234-235), defense counsel openly expressed doubt concerning the "intent element" of the burglary offense, questioning an officer about whether Mr. McNeal's actions could constitute a trespass (*See* Tr. 181). Independent of that as well, the Riverbend Apartments property manager testified that Mr. McNeal did not have permission to be in apartment 510 (Tr. 186, 196). The property manager, moreover, testified (without objection) that she spoke with Ms. Sanders, who told her that she (Ms. Sanders) did not even want Mr. McNeal at her apartment, even before that day (Tr. 180, 209). Irrespective of Mr. McNeal's testimony, there existed strong and objective evidence that Mr. McNeal was

[13] Also, the overall idea that a theory can be "undermined" through the submission of an instruction is dubious. An instruction is nothing more than an option for the jurors to find. It is not, for example, a concession on the part of the party submitting the instruction.

plainly guilty of at least trespass in this case. "Where 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." *McNeal v. State*, 412 S.W.3d 886, 891 (Mo. banc 2013) (citing *Breakiron v. Horn*, 642 F.3d 126, 138 (3rd Cir. 2011) (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

In this case a lesser-included trespass instruction would have been very much consistent with trial counsel's evidentiary hearing testimony that he believed the case had been over-charged or "enhanced," which belief formed "part of the [defense] theory of the case" (PRC Tr. 7-8). Counsel believed the case had been overcharged, but felt that "it's hard to argue stuff like that to the jury" (PCR Tr. 8). While that may be true, it would be impossible for the jurors to conclude as much when they were not given the option.

In this case, while counsel at the evidentiary hearing may have alluded to a seeming inconsistency between the defense theory/argument and a request for a trespass instruction,[14] this allusion appeared related not to a

[14] This Court reviewing the evidence from this case, and the argument of counsel concluded that, "[a] trespass instruction would have been consistent with the evidence and with counsel's argument." *See McNeal v. State*, 412 S.W.3d 886, 890-891 (Mo. banc 2013).

worry that the jurors would find it inconsistent (nor to any issues in that respect), but to a concern that the judge would find it inconsistent and not submit the instruction, which was why counsel testified he "wasn't inclined to ask for it" (*See* PCR Tr. 9; *see also* PCR Tr. 8, 14, 17). But, importantly, counsel acknowledged at the evidentiary hearing that he was "not sure there would have been any harm" in requesting a trespass instruction (PCR Tr. 17). In all, counsel in this case lacked an objectively reasonable strategic reason for failing to request a trespass instruction.

Moreover, casting its shadow over all of the foregoing is the recognition that trial counsel never discussed the issue of submitting a lesser-included instruction for trespass with Mr. McNeal, and never sought his input (PCR Tr. 10-11, 17). The decision not to request a lesser-included instruction is often based on the reasoning or belief "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." *See Lee*, *supra*, 654 S.W.2d at 879 (citation omitted). But what if the objective circumstances, and the defendant's own personal objectives would show that – quite plainly – it didn't matter much whether the defendant was convicted on the lesser offense; or, that a rational defendant would have wanted to submit the lesser offense? In *Roe v. Flores-Ortega*, in considering whether defense counsel had a duty to consult with the defendant about filing an appeal, the United States

Supreme Court rejected a *per se* rule that a failure to consult with the defendant would always be ineffective or unreasonable. 528 U.S. 470, 477-480 (2000). At the same time, the Court indicated that counsel would have a federal "constitutionally imposed duty to consult with the defendant about an appeal" when, *inter alia*, "there is reason to think that a rational defendant would want to appeal." *Id*., at 480 (also indicating that concurring opinion "would have us impose an 'almost' bright-line rule and hold that counsel 'almost always' has a duty to consult with a defendant about an appeal").[15]

The concept of "strategy" and the adjudication of the reasonableness of a "strategy" is incomplete without an identified goal - whether, for example, to win at all costs and no matter the risks, or to minimize risk. *See e.g*., *Strickland*, 466 U.S. at 691 (stating, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"). Even as *Strickland* rejects mechanistic, bright-line, *per se* rules, it notes that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment . . . of counsel's other litigation decisions." *Strickland*, 466 U.S. at 691. Counsel's failure to consult with Mr. McNeal on this issue at least contributes to the unreasonableness of counsel's failure to request a lesser-included trespass instruction in this case.

[15] Also noting that "States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented." 528 U.S. at 479.

Missouri courts have never explicitly considered whether defense counsel need even consult with his client about the decision to request or to forgo a lesser-included instruction. Whether or not this Court would conclude that counsel retains the ultimate decision-making authority for this decision, an attorney who does not at least discuss this issue with his client – under facts and circumstances similar to those in this case - acts unreasonably.[16] Whether grounded in case law alone, or in combination with the Missouri Rules of Professional Conduct,[17] this Court should explicitly announce an expectation that an attorney will consult with his client on this decision. *See e.g.*, *State v. Grier*, 246 P.3d 1260, 1268 (Wash. 2011) (stating rules of professional responsibility and ABA standards "indicate that the

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[16] Mr. McNeal does not necessarily advocate for placing the final decision-making authority in the hands of the defendant. He does, however, advocate for counsel ascertaining the objectives of the client/defendant before executing a strategy.

[17] *See* Rule 4-1.4 (b), which states "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation[,]" and Comment [2], which states "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."

decision to exclude or include lesser-included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel"). Discussion about a lesser-included instruction should not be dependent on how good of a "jailhouse lawyer" the defendant is and/or on whether the defendant brings this issue to the attention of defense counsel (*See* PCR. Tr. 10). Instead, it should be an expectation in virtually every case, and especially in a case where the relative ranges of punishment are so disparate.[18]

Finally, Mr. McNeal was prejudiced by counsel's failure to request a lesser-included instruction for trespass in the first degree. The evidence in this case was far from overwhelming, but as between a burglary or merely a trespass, it was ambiguous. The jury picked up on that ambiguity and asked, during their deliberations, a question about the timing of the intent necessary to sustain a burglary verdict – whether the intent could "occur after he opens

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[18] The need for such an explicit pronouncement may be even more apparent after *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014), which reaffirmed the Court's previous holdings making lesser-included instructions "nearly universal" in certain cases. Under *Jackson*, the parties will know in advance of trial that a lesser-included instruction will be an option, and can discuss well in advance of trial the means by which the defendant's objectives will be pursued. *See id*., at 403.

the door" or "Must it occur prior to opening/touching door?" (App. L.F. 94, Tr. 272). Their question directly concerned the difference between burglary or what might only be a trespass. As in *Patterson*, 110 S.W.3d at 905, though the evidence was sufficient to support a conviction for burglary, "[y]et, the record in this case also would have allowed a juror to reasonably find" for the lesser-included offense of trespass not offered. *See also McNeal v. State*, 412 S.W.3d 886, 893 (Mo. banc 2013) ("Similarly [to *Patterson*], McNeal has alleged facts, not clearly refuted by the record, showing he was prejudiced by counsel's failure to submit a lesser-included offense instruction).[19]

Under the facts of this case, the motion court clearly erred in denying relief. 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, as provided for under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 18(a) 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.

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[19] The motion court never concluded that Mr. McNeal was not prejudiced by the failure to request an instruction, only that trial counsel's "decision" "was reasonable" (2PCR L.F. 40-41).

CONCLUSION

WHEREFORE, based on his argument, Appellant, David McNeal, requests this Court to reverse the judgment of the motion court, and remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Shaun Mackelprang of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 at shaun.mackelprang@ago.mo.gov on June 15, 2016. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Cambria 13-point font. The word-processing software identified that this brief contains 9031 words.

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