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NOTE

Not Objecting to Prosecutor's Offering of Fifth Amendment Protections from a Civil Deposition Is Ineffective Assistance of Counsel

Christian v. State, 502 S.W.3d 702 (Mo. Ct. App. 2016)

*Anthony J. Meyer**

I. INTRODUCTION

Supreme Court of Missouri Rules 24 and 29 provide the exclusive mechanism for post-conviction relief in Missouri.¹ Rule 29.15 outlines the procedure for relief following a felony conviction, and the standard it uses is the two-prong test provided by the United States Supreme Court in *Strickland v. Washington*.² A person who has been convicted of a felony must file a motion under Rule 29.15.³ Not all movants have the right to an evidentiary hearing.⁴ Those movants who do proceed to evidentiary hearings have the burden of proving by a preponderance of the evidence that trial counsel failed to exercise the skill

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1. *Barton v. State*, 486 S.W.3d 332, 336 (Mo. 2016) (en banc). Rule 24.035 provides the framework for a post-conviction relief claim following a guilty plea. MO. SUP. CT. R. 24.035.

2. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *DePriest v. State*, 510 S.W.3d 331, 338 (Mo. 2017) (en banc). *Strickland* was a case involving a guilty plea to multiple charges, including three counts of capital murder. *Strickland*, 466 U.S. at 672. Justice O'Connor, writing for the majority, held that the standard for attorney performance is that of reasonably effective assistance, that a defendant must also be prejudiced even assuming the attorney acted unreasonably, and that the attorney in this case did not act unreasonably in his strategy during the sentencing hearing. *Id.* at 687, 699, 700.

3. MO. SUP. CT. R. 29.15(b).

4. MO. SUP. CT. R. 29.15(h) (“If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in [Mo. Sup. Ct. R.] 29.15(j).”).

and diligence that reasonably competent counsel would use in a similar situation and that the movant was prejudiced in that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.⁵

The movant must overcome the strong presumption, however, that trial counsel's conduct fell within the wide range of reasonable trial strategy;⁶ the movant must show otherwise, and as the United States Supreme Court said in *Strickland*, the notion of trial strategy can encompass countless scenarios.⁷

In light of this statement, defense attorneys have the leeway to tailor their trial strategies to unique situations. By contrast, this Note argues that defense attorneys might benefit if Missouri courts choose to chip away at the nebulous catchall of trial strategy and delineate some clear boundaries as to what is and what is not sound trial strategy in the most egregious cases. Doing so would better equip trial counsel with the knowledge of how to try a case effectively and ease the burden of movants in post-conviction relief cases. As a result, the overall quality of justice in Missouri courts would improve.

Accordingly, the Missouri Court of Appeals, Southern District, recently announced an issue of first impression in *Christian v. State*.⁸ Trial counsel failed to object when the prosecutor read a portion of a deposition transcript to the jury from a related civil proceeding in which Vernon George Christian, the defendant in the criminal case, asserted his Fifth Amendment right to avoid self-incrimination.⁹ The Southern District said that, in this instance, failure by trial counsel to object was ineffective assistance of counsel and Christian was prejudiced as a result.¹⁰ This Note argues that this result represents a positive development in *Strickland* jurisprudence in Missouri.

II. FACTS AND HOLDING

In November of 2007, James King realized that he had not received a property tax bill for a piece of property he purchased in 2004 in Taney County that consisted of some land and a cabin.¹¹ When he called the Taney County Collector's Office, he was told that he no longer owned the property.¹² A deed purportedly signed by him had transferred the property to Christian and Mike

5. *Strickland*, 466 U.S. at 668, 687, 694 (1984); Mo. SUP. CT. R. 29.15(i).

6. *Strickland*, 466 U.S. at 689.

7. *Id.* ("There are countless ways to provide effective assistance in any given case.")

8. *Christian v. State*, 502 S.W.3d 702, 709 (Mo. Ct. App. 2016).

9. *Id.*

10. *Id.* at 714.

11. *Id.* at 706.

12. *Id.*

2018] *NOT OBJECTING IS INEFFECTIVE ASSISTANCE OF COUNSEL* 241

Olson on November 22, 2006.¹³ The deed had been notarized by Edmund E. Barker and registered at the Taney County Collector's Office.¹⁴

King filed a civil suit against Christian, and after a bench trial the deed was transferred back to King.¹⁵ In a subsequent criminal case, Christian was tried by a jury on November 22 and 23, 2010, in the Circuit Court of Taney County.¹⁶ The jury returned a guilty verdict on one count of forgery, and Christian was sentenced to six years' imprisonment.¹⁷

At the criminal trial, King testified that he had never seen the deed Christian signed before it was shown to him at the collector's office.¹⁸ King said that he had never met Christian and that no one had paid him money for the property, removed him of his mortgage obligation, or paid property taxes on the property since he acquired it in 2004.¹⁹ Handwriting expert Don Lock testified that King's signature on the deed appeared not to be genuine and that, after comparing a signature Christian wrote in the Taney County Sheriff's Office, the evidence pointed to Christian as the author.²⁰

During the State's case in chief, the prosecutor read a portion of Christian's deposition from the earlier civil suit.²¹ The deposition included references to Christian's invocation of his Fifth Amendment right to refuse to answer questions that would implicate him in the pending criminal case.²² The prosecutor read the following lengthy exchange from the civil deposition into evidence at the criminal trial:

Q. Okay. How much did you pay for [the property]? Are you going to assert your Fifth Amendment right, sir?

A. Yes.

....

Q. Okay. And how much – did you tell me how much you paid for it?

A. No, I didn't.

Q. Do you remember or know?

13. *Id.*

14. *Id.*

15. *Id.*

16. *State v. Christian*, 364 S.W.3d 797, 798 (Mo. Ct. App. 2012).

17. *Id.* at 800.

18. *Christian*, 502 S.W.3d at 706.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 706–07.

A. I wasn't going to tell you.

Q. Okay. How much did you pay for it?

A. I'm going to stand on the Fifth Amendment. That's my business.

....

Q. Okay. Now, then, when – what were the circumstances that Mr. King would bring you this deed?

A. I'll stand on that.

Q. On your Fifth Amendment rights?

A. Yeah.

Q. So you're refusing to answer any questions about the circumstances of this deed being brought to you based on your Fifth Amendment rights?

A. Yes, sir.

Q. Okay. If I were to ask you any questions concerning the petition that was filed, would you also assert your Fifth Amendment rights and not answer those questions?

A. Probably so.

Q. Well, I mean visit with your attorney.

A. Ask, and I'll tell you yes or no.

Q. If I were to ask you any questions concerning the petition that was filed, the deed, the transaction where you claim Mr. King sold or conveyed this property to you, would you assert your Fifth Amendment rights?

A. Yes.

....

Q. Let me ask this question. When Mr. King brought this deed to you, did any money change hands? You may want to visit with your attorney.

A. I'll stand on the Fifth on that.

....

Q. And when Mr. King brought you Exhibit 1 in 2006, did you pay him any money?

A. I'm going to stand on the Fifth on that.

....

Q. Okay. Okay. I'm about done, sir. I just want to reiterate that if I were to ask you about the allegations of the petition or the transactions that you – whereby you claim ownership of the property or claim Mr. King gave you the deed that's Exhibit 1, you would assert your Fifth Amendment rights and not answer those questions; is that correct?

A. Yes, sir.²³

Christian's trial counsel did not make a contemporaneous objection during this reading.²⁴

The next day, trial counsel motioned for a mistrial on the grounds that the exchange from the civil deposition was read into evidence in violation of Christian's Fifth Amendment privilege against self-incrimination.²⁵ Trial counsel motioned for a mistrial outside the hearing of the jury so as not to reinforce the jury's remembrance and highlight the testimony.²⁶ While arguing the motion for a mistrial, trial counsel said that he did not believe the prosecutor was going to read Christian's Fifth Amendment invocations into evidence.²⁷ Trial counsel said, "I may have been wrong in that, Judge, and frankly I may have been ineffective in that."²⁸ In arguing against the mistrial, the prosecutor said that the Fifth Amendment invocations would not be referenced again.²⁹ The court denied the request for a mistrial, saying that Christian's Fifth Amendment invocations did not have anything to do with Christian's guilt or innocence in the criminal case.³⁰ The trial court did not instruct the jury regarding the invocations.³¹

23. *Id.* at 707 (alteration in original).

24. *Id.*

25. *Id.*

26. *Id.* at 707–08.

27. *Id.* at 707.

28. *Id.* at 708.

29. *Id.*

30. *Id.*

31. *Id.*

Christian testified in his own defense.³² He said that he bought the property at a tax sale in 1987 and that King had lived on the property.³³ When Christian heard King claim that he owned the property, Christian threatened to file suit.³⁴ According to Christian, King then brought Christian the signed and notarized deed, but the recorder of deeds refused to record it because it had been notarized in the wrong place.³⁵ Christian admitted that he had a friend named Edmund E. Barker³⁶ re-notarize the deed, which was then recorded.³⁷ Christian explicitly denied that he had forged King's signature on the deed.³⁸ After Christian was convicted, he made a direct appeal to the Southern District, which affirmed the conviction.³⁹

Christian was granted an evidentiary hearing after making a Rule 29.15 motion, and the same judge presided over it as had presided over the criminal trial.⁴⁰ Christian argued that because prosecutors are prohibited from using a defendant's invocation of the Fifth Amendment as proof of guilt, any reasonably competent trial counsel would have objected at the prosecution's use of Christian's invocations during the civil deposition.⁴¹ In contrast, the state argued that because it is not clear whether in Missouri such evidence is actually inadmissible, the reviewing court cannot merely accept the conclusion that reasonably competent trial counsel would have objected.⁴²

At the evidentiary hearing trial counsel testified that he was aware the State intended to offer Christian's statements from the deposition into evidence

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. The sole issue on the direct appeal was whether the trial court abused its discretion in finding that Barker was unavailable to testify at the trial. *State v. Christian*, 364 S.W.3d 797, 800 (Mo. Ct. App. 2012). Barker was ninety years old at the time of the trial and unable to testify in court because of his infirm condition. *Id.* at 799. His deposition had to be taken at his home. *Id.* Barker testified that he lost his notary license as a result of re-notarizing the deed. *Id.* at 800. The reviewing court held that the trial court did not abuse its discretion in allowing Barker's deposition testimony to be read into evidence after the state moved to preserve the testimony and proved that Barker was indeed unavailable. *Id.* at 801–02.

37. *See Christian*, 502 S.W.3d at 708.

38. *Id.*

39. *Christian*, 364 S.W.3d at 802. Christian argued that the state failed to prove that Barker was unavailable as a witness and did not make a good faith effort to obtain Barker's presence at trial. *Id.* at 801. The state read into evidence a deposition of Barker, who was eighty-nine years old at the time, taken at Barker's home. *Id.* at 801–02. The Southern District affirmed the conviction, finding that the trial court's ruling on this evidentiary issue was not against the logic of the circumstances as to be "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration" on the part of the trial court. *Id.* at 802.

40. *Christian*, 502 S.W.3d at 708 & n.10.

41. *Id.* at 709.

42. *See id.* at 710.

but that he had not anticipated the prosecutor would read Christian's Fifth Amendment invocations.⁴³ When asked why he did not make a contemporaneous objection, trial counsel said,

There are certain things that you simply believe that a prosecuting attorney acting in good faith would understand are so far out of bounds as to not use, and you get shocked and surprised at trial when they're brought up. And so I should have objected, but was quite surprised that they were being used.⁴⁴

Trial counsel said he did not know why he did not immediately motion for a mistrial but that when he "regained a little bit of composure," he requested one the next day.⁴⁵ Trial counsel did not expressly argue at the evidentiary hearing that this was a strategic choice.⁴⁶

The motion court denied Christian's motion and found that Christian did not meet his burden for showing ineffective assistance of counsel.⁴⁷ The motion court found that trial counsel made a clear record of his objection to the reference to Christian's prior bad acts in his motion for the mistrial.⁴⁸ Christian then filed an appeal in the Southern District.⁴⁹

The Southern District noted that no prior Missouri court case had squarely addressed the issue of whether an invocation of a criminal defendant's asserting his Fifth Amendment privilege during a civil proceeding would be admissible as evidence.⁵⁰ The court found that, in spite of the lack of precedent, the prosecutor's reading into evidence of Christian's civil deposition testimony was "clearly objectionable."⁵¹ The Southern District then held that trial counsel failed to exercise the skill and diligence of a reasonably competent attorney

43. *Id.* at 708–09.

44. *Id.* at 709.

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 712.

51. *Id.* (citing *Griffin v. California*, 380 U.S. 609, 614 (1965) (standing for the proposition that "the Fifth Amendment outlaws remnants of an inquisitorial system such as a comment on the refusal to testify" (internal quotation marks omitted)); *State v. Hutchinson*, 458 S.W.2d 553, 555 (Mo. 1970) (en banc) (standing for the proposition that "the defendant should not be punished in a criminal case for exercising the Fifth Amendment"); *State v. Graves*, 27 S.W.3d 806, 812 (Mo. Ct. App. 2000) (standing for the proposition that "the effect on the Fifth Amendment by affirmative proof of guilt via post-arrest, pre-*Miranda* silence is too severe to be permitted" (internal quotation marks omitted))).

in failing to object when the prosecutor offered evidence of Christian's invocation of his Fifth Amendment privilege and that Christian was prejudiced as a result.⁵²

III. LEGAL BACKGROUND

A. *Strickland Standard*

To make a showing of ineffective assistance of trial counsel, a movant must demonstrate: (1) that trial counsel failed to exercise the skill and diligence that a reasonably competent counsel would have in a similar situation and (2) that he was prejudiced by that failure.⁵³ Prejudice occurs when there is a reasonable probability that, but for the unprofessional errors, the result would have been different.⁵⁴ Prejudice is not, however, an outcome-determinative standard; it instead turns on the fairness of the underlying proceeding.⁵⁵

The findings of the motion court are presumed correct, and a reviewing court will only reverse if they are clearly erroneous, leaving the reviewing court with a definite and firm impression that a mistake has been made.⁵⁶ To justify relief on a post-conviction motion, the movant must show that the "failure to object must have been of such character as to deprive the defendant substantially of his right to a fair trial."⁵⁷ The movant must prove that a failure to object was not strategic; trial counsel will not be deemed ineffective for failing to make a non-meritorious objection.⁵⁸ The movant must overcome a strong presumption that a failure to object was sound trial strategy.⁵⁹ Experienced trial counsel do not object in many instances to arguably improper questions for strategic purposes; they fear that frequent objections irritate the jury and highlight the statements complained of, exacerbating the effect of the improper questions.⁶⁰ According to *Strickland*, "There are countless ways to provide effective assistance in any given case."⁶¹ Not objecting to a clear implication of a defendant's constitutional right, however, might be considered one instance in which there is no reasonable trial strategy.⁶²

52. *Id.* at 710, 714.

53. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Deck v. State*, 68 S.W.3d 418, 425 (Mo. 2002) (en banc).

54. *Strickland*, 466 U.S. at 694; *Deck*, 68 S.W.3d at 429.

55. *Deck*, 68 S.W.3d at 427.

56. *Worthington v. State*, 166 S.W.3d 566, 572 (Mo. 2005) (en banc).

57. *Ervin v. State*, 80 S.W.3d 817, 822 (Mo. 2002) (en banc) (internal quotation marks omitted) (quoting *State v. Bearden*, 926 S.W.2d 483, 486 (Mo. Ct. App. 1996)).

58. *State v. Clay*, 975 S.W.2d 121, 135 (Mo. 1998) (en banc).

59. *Hays v. State*, 484 S.W.3d 121, 128 (Mo. Ct. App. 2015).

60. *Id.* at 128–29 (quoting *Helmig v. State*, 42 S.W.3d 658, 679 (Mo. Ct. App. 2001)).

61. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

62. *See Christian v. State*, 502 S.W.3d 702, 710, 713–14 (Mo. Ct. App. 2016); *supra* Part V.C.

B. Underlying Evidentiary Issue

As an evidentiary matter, the privilege against self-incrimination is “the essential mainstay of our adversary system.”⁶³ The prosecution must not penalize a defendant for exercising his right to remain silent.⁶⁴ In Missouri, statutes⁶⁵ and Supreme Court rules⁶⁶ protect a criminal defendant’s constitutional guarantee of the rights to silence⁶⁷ and due process.⁶⁸ These rights apply any time the answer would tend to incriminate the defendant and could be used as evidence or to furnish a link in the chain of evidence.⁶⁹ The privilege against self-incrimination applies whether or not a criminal charge is pending⁷⁰ and is available to a witness in a civil deposition.⁷¹ When a criminal defendant makes a contemporaneous objection to a prosecutor’s direct reference to a defendant’s invocation of his right to silence, use of the direct reference “will almost invariably require reversal of the conviction.”⁷² A reviewing court may order a reversal even if an indirect reference to a criminal defendant’s invocation of his privilege against self-incrimination is made “if there is a calculated intent to magnify that decision so as to call it to the jury’s attention.”⁷³ However, a corrective instruction to the jury can often cure prejudice resulting from a direct reference to the defendant’s failure to testify.⁷⁴

Ordinarily, “[t]he mere failure to make objections does not constitute ineffective assistance of counsel.”⁷⁵ Missouri courts are cognizant that not making an objection is often sound trial strategy: “In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good.”⁷⁶ The failure to object must be significant enough “as to deprive the defendant substantially of his right to a fair trial.”⁷⁷

63. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

64. *State v. Hutchinson*, 458 S.W.2d 553, 555 (Mo. 1970) (en banc).

65. MO. REV. STAT. § 546.270 (2016).

66. MO. SUP. CT. R. 27.05.

67. U.S. CONST. amend. V; MO. CONST. art. I, § 19.

68. U.S. CONST. amend. XIV; MO. CONST. art. I, § 10.

69. *See State ex rel. Long v. Askren*, 874 S.W.2d 466, 471–72 (Mo. Ct. App. 1994).

70. *State ex rel. Lieberman v. Goldman*, 781 S.W.2d 802, 805 (Mo. Ct. App. 1989).

71. *State ex rel. Pulliam v. Swink*, 514 S.W.2d 559, 560 (Mo. 1974) (en banc) (per curiam).

72. *State v. Neff*, 978 S.W.2d 341, 344 (Mo. 1998) (en banc).

73. *Id.*

74. *State v. Garrison*, 292 S.W.3d 555, 560 (Mo. Ct. App. 2009).

75. *Ervin v. State*, 80 S.W.3d 817, 822 (Mo. 2002) (en banc).

76. *Barton v. State*, 432 S.W.3d 741, 754 (Mo. 2014) (quoting *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. 1996) (en banc)).

77. *Ervin*, 80 S.W.3d at 822.

C. Comparative Analysis

In other jurisdictions, failure to object to testimony that references a criminal defendant's privilege against self-incrimination has been found to fall below the standards of reasonably competent trial counsel. Gregory G. Sarno, author of the American Law Report chapter "Adequacy of defense counsel's representation of criminal client regarding confessions and related matters," has analyzed the issue.⁷⁸ He writes that generally "[w]hether defense counsel's failure at trial to pose an objection, to introduction of his client's statement, whose merits would or arguably would have been upheld amounts to incompetent representation has depended . . . on the adequacy of the explanation for counsel's inaction."⁷⁹ Sarno elucidates this principle by example, contrasting the decision in *Commonwealth v. Roberts*, a pre-*Strickland*, 1978 Pennsylvania case, from that in *Boyer v. Patton*, a Sixth Circuit case from the same year.⁸⁰ Sarno's parsing of these two decisions helps illustrate the fine line the *Christian* court negotiated in its decision.

In *Roberts*, trial counsel failed to object to the arresting officer's testimony concerning the defendant's silence after the defendant's arrest and receipt of *Miranda*⁸¹ warnings.⁸² The court said that an objection to the introduction of this evidence "clearly" would not have been frivolous and that such evidence improperly infringed on the defendant's Fifth Amendment privilege.⁸³ However, the court held that trial counsel was not ineffective because there was at least a reasonable basis for not making an objection, which was designed to effectuate the defendant's innocence.⁸⁴ The basis for not making an objection could have been that a curative instruction would have corrected the problem or that the reference to the Fifth Amendment privilege was isolated and not intended to invite an improper inference.⁸⁵

Sarno writes that, in *Boyer*, there was an inadequate explanation for trial counsel's failure to object.⁸⁶ In this case, a prison guard testified to the defendant's silence when the prison guard asked the defendant how he initially got outside the prison when the defendant was being carried back into the prison with a broken leg.⁸⁷ At the post-conviction hearing, trial counsel said that he could not recall any specific reason for not objecting and that "it didn't seem

78. Gregory G. Sarno, Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Confessions and Related Matters*, 7 A.L.R.4th 180 (1981).

79. *Id.* § 15.

80. *Id.*

81. *Miranda v. Arizona*, 384 U.S. 436 (1966).

82. Sarno, *supra* note 78, § 15 (citing *Commonwealth v. Roberts*, 397 A.2d 1187 (Pa. Super. Ct. 1978)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (citing *Boyer v. Patton*, 579 F.2d 284 (3d Cir. 1978)).

87. *Id.*

important enough.”⁸⁸ The reviewing court found that testimony to the defendant’s silence at the time of arrest violated the Fifth Amendment privilege against self-incrimination and that trial counsel should have realized this.⁸⁹ Therefore, even with conduct at trial that was closely analogous to that in the *Roberts* case, the reviewing court found that trial counsel committed an unprofessional error and was prejudiced as a result.⁹⁰

IV. INSTANT DECISION

The Southern District said that Christian’s claim was a matter of first impression in Missouri.⁹¹ Christian, the State, and the Southern District all agreed that no Missouri case had yet addressed whether an invocation of the Fifth Amendment made in a civil proceeding can be admitted into evidence in a subsequent criminal trial.⁹²

A. Majority Opinion

Writing for the majority, Judge Burrell held that, as a matter of first impression, trial counsel was ineffective for failing to object at the prosecutor’s offering of the evidence of Christian’s invocation of his Fifth Amendment privilege and that Christian was consequently prejudiced.⁹³ The court found that

[a]ctual evidence⁹⁴ presented by the prosecutor that Movant had refused to answer questions based upon the Fifth Amendment about the very document he is alleged to have forged is a much greater direction of the jury’s attention to the fact that Movant had exercised his right not to testify than what would have flowed from a prohibited reference made during *voir dire*.⁹⁵

The court found that trial counsel’s failure to make a contemporaneous objection to the prosecutor’s use of Christian’s Fifth Amendment invocations was clearly objectionable even though no Missouri opinion has expressly held that

88. *Id.*

89. *Id.*

90. *Id.*

91. *Christian v. State*, 502 S.W.3d 702, 709 (Mo. Ct. App. 2016).

92. *Id.* at 709–10.

93. *Id.* at 710, 714.

94. The court here emphasizes actual evidence, in contrast to Judge Rahmeyer’s dissent, which argues that Missouri case law is clear that the evidence could have been admissible for impeachment purposes. *Id.* at 715 (Rahmeyer, J., dissenting) (“Prearrest silence and even post-arrest, but pre-*Miranda* or other similar, affirmative governmental assurance, silence is admissible to impeach a criminal defendant’s trial testimony.” (citing *Fletcher v. Weir*, 455 U.S. 603, 605–07 (1982); *State v. Chambers*, 330 S.W.3d 539, 542–44 (Mo. Ct. App. 2010))).

95. *Id.* at 713 (majority opinion).

the state is barred from using Fifth Amendment invocations from civil depositions in criminal prosecutions.⁹⁶ Based on the longstanding principles that Fifth Amendment privileges against self-incrimination are essential to the adversarial system, the court found that trial counsel's failure to object could not be said to be reasonable trial strategy.⁹⁷ Thus, the court found that the motion court clearly erred in finding that defense counsel acted with the skill and diligence of a reasonably competent attorney and in finding that Christian was not prejudiced.⁹⁸

Next, the court found that Christian was prejudiced as a result of the unprofessional error.⁹⁹ The court first noted that the standard for prejudice is not outcome-determinative.¹⁰⁰ However, the "benchmark for judging whether counsel is ineffective . . . is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."¹⁰¹ The court also stated that the fact that Christian ultimately testified at the criminal trial did not cure the effect of trial counsel's failure to object.¹⁰² Because the invocations of Christian's Fifth Amendment privilege were presented in the state's case in chief as affirmative evidence of Christian's guilt and no curative instruction was given to the jury at the time of the admission of the evidence or afterward, the court found that the evidence offered had a bearing on the jury's verdict.¹⁰³ Citing *Wigmore on Evidence*, the court found that the layman's natural inclination in hearing that a criminal defendant has asserted a privilege is to believe in a "clear confession of crime."¹⁰⁴ The court vacated Christian's conviction and sentence, reversed the motion court's denial of post-conviction relief, and remanded the case for a new trial.¹⁰⁵

B. Dissenting Opinion

Judge Rahmeyer dissented.¹⁰⁶ She argued that trial counsel did not necessarily make an unprofessional error, writing, "The majority opinion evidently holds trial counsel to a much higher level of diligence than a reasonably com-

96. *Id.* at 712.

97. *Id.* at 713.

98. *Id.*

99. *Id.* at 714.

100. *Id.* at 713 (citing *Deck v. State*, 68 S.W.3d 418, 426–28 (Mo. 2002) (en banc)).

101. *Id.* (internal quotation marks omitted) (citing *Dorsey v. State*, 156 S.W.3d 825, 835 (Mo. Ct. App. 2005)).

102. *Id.*

103. *Id.* at 713–14.

104. *Id.* at 714 (citing 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2272 (McNaughton rev. 1961)).

105. *Id.*

106. *Id.* at 715 (Rahmeyer, J., dissenting).

petent counsel. Apparently, trial counsel should have anticipated [the prosecutor's] decision."¹⁰⁷ Judge Rahmeyer argued that the majority opinion faulted trial counsel for requesting a mistrial rather than making a contemporaneous objection.¹⁰⁸

Further, Judge Rahmeyer pointed out that the outcome of the underlying evidentiary issue is not certain in Missouri.¹⁰⁹ She argued that the use of Christian's civil deposition testimony may have been admissible in a case, such as the instant case, in which the defendant chose to testify at the criminal trial; thus, the evidence could have been used for proper impeachment purposes.¹¹⁰ At his criminal trial, Christian did indeed testify and did not invoke his right to remain silent.¹¹¹

Finally, Judge Rahmeyer asserted that Christian could not have been prejudiced.¹¹² Arguing that Christian faced "overwhelming" evidence at the criminal trial that Christian altered a writing two times, Judge Rahmeyer said that she was not left with "a definite and firm impression that a mistake [had] been made."¹¹³

V. COMMENT

The instant case presents several issues. First, did the Southern District correctly rule as a matter of first impression on the underlying evidentiary issue? Second, how well does the Southern District's holding follow *Strickland*? An answer to that question can be found by a comparative analysis of ineffective assistance of counsel cases in other jurisdictions. Finally, what are the implications of the *Christian* holding? This Part argues that knowing that trial strategy is not always presumptively effective assistance of counsel is a desired outcome for everyone – criminal defendants, defense attorneys who uncomfortably find themselves as the main witness at evidentiary hearings, and the state generally. Chipping away at the broad category of strategy and defining specific actions by a lawyer that are ineffective, such as when a prosecutor introduces into evidence a defendant's previously-invoked Fifth Amendment privilege, are desired outcomes, bringing clarity to the criminal process and benefiting both lawyers and defendants.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 715–16.

113. *Id.* at 716–17.

A. Underlying Evidentiary Issue

As a matter of first impression, the *Christian* court held that direct evidence presented by the prosecutor of Christian's invocation of his Fifth Amendment privilege against self-incrimination found in the transcript of a civil deposition was not admissible.¹¹⁴ The court held that even though there was not precedent in Missouri barring such testimony from admissibility in evidence that did "not mean that the prosecutor's doing so here was not clearly objectionable."¹¹⁵ The court reached this ruling both by relying on Fifth Amendment jurisprudence and by the fact that the prosecutor had been prohibited earlier from referencing this material during voir dire.¹¹⁶

In her dissent, Judge Rahmeyer argued that the evidence could have been admissible for impeachment purposes.¹¹⁷ She rejected the notion that it was clear from Missouri case law that this evidence would have been prohibited.¹¹⁸ She bolstered her argument with the contention that Christian did actually testify at the criminal trial.¹¹⁹ Thus, there could have been a proper impeachment purpose for the use of the testimony that the majority ultimately found inadmissible.¹²⁰

While both opinions claim some authority from Fifth Amendment jurisprudence, the dissent's argument ignores that the evidence could not have been admitted in the prosecutor's case in chief if it were offered for impeachment purposes. If the evidence were offered in the prosecutor's rebuttal, the evidence could have been properly admitted for impeachment. It is well settled in Missouri that a criminal defendant who elects to take the stand in his own defense and is subject to cross-examination may be subject to impeachment.¹²¹ A prosecutor cannot, however, introduce evidence of silence for impeachment purposes *before* the criminal defendant takes the stand in his own defense.¹²² Regardless, the entire issue of timing is moot because the majority held that,

114. *Id.* at 712 (majority opinion).

115. *Id.* (citing *Griffin v. California*, 380 U.S. 609, 614 (1965) (standing for the proposition that "the Fifth Amendment outlaws remnants of an inquisitorial system such as a comment on the refusal to testify" (internal quotation marks omitted)); *State v. Hutchinson*, 458 S.W.2d 553, 555 (Mo. 1970) (en banc) (standing for the proposition that "the defendant should not be punished in a criminal case for exercising the Fifth Amendment"); *State v. Graves*, 27 S.W.3d 806, 812 (Mo. Ct. App. 2000) (standing for the proposition that "the effect on the Fifth Amendment by affirmative proof of guilt via post-arrest, pre-*Miranda* silence is too severe to be permitted" (internal quotation marks omitted))).

116. *Id.* at 712–13.

117. *Id.* at 715 (Rahmeyer, J., dissenting).

118. *Id.*

119. *Id.*

120. *See id.*

121. *See, e.g., State v. Amos*, 490 S.W.2d 328, 330 (Mo. Ct. App. 1972).

122. *See State v. Duncan*, 397 S.W.3d 541, 543 (Mo. Ct. App. 2013).

categorically, the evidence that referenced Christian's Fifth Amendment invocations was inadmissible.¹²³ Whether the evidentiary issue will be litigated again remains to be seen.

B. Comparative Analysis

Setting aside the underlying evidentiary issue, this Note next considers the failure to object to evidence that reveals that a defendant invoked the Fifth Amendment privilege against self-incrimination.

According to Sarno's reasoning that the court may consider the adequacy of counsel's explanation for not making an objection,¹²⁴ Christian's trial counsel might have sealed the fate of the case on a post-conviction appeal when he admitted he "may have been ineffective."¹²⁵ Such a statement might have ensured that counsel's conduct would be interpreted later as ineffective and undermined any claim for a reasonable basis of trial strategy.¹²⁶

The fact that the trial counsel did not seek a curative instruction at all may have similarly sealed his fate in a post-conviction claim, which Sarno's analysis of *Roberts* implies.¹²⁷ Sarno also notes that whether a curative instruction would alleviate the damage done by counsel's unprofessional error also enters the calculus of whether counsel was ineffective.¹²⁸ It is interesting to speculate if the Southern District still would have found ineffective assistance of counsel had trial counsel also sought a curative instruction while arguing for a mistrial. But, those are not the facts of *Christian*.

In their treatise *Ineffective Assistance of Counsel*, John M. Burkoff and Nancy M. Burkoff have catalogued many courts that have rejected arguments that defense counsel was ineffective on the grounds that counsel failed to object to the introduction of particular evidence or that such evidence was not prejudicial.¹²⁹ Further, the authors assert, "Not all inaction on the part of defense

123. See *Christian*, 502 S.W.3d at 712.

124. See discussion *supra* notes 78–90.

125. *Christian*, 502 S.W.3d at 708.

126. This conclusion seems logical enough from a practical standpoint, but as a thought experiment, it is worth contemplating whether a criminal defense lawyer who admits at trial to providing ineffective assistance has established a sufficient condition for a successful ineffective assistance of counsel claim. This Note takes up the implications of this question shortly below.

127. Sarno, *supra* note 78, § 15 (citing *Commonwealth v. Roberts*, 397 A.2d 1187 (Pa. Super. Ct. 1978)).

128. *Id.*

129. JOHN M. BURKOFF & NANCY M. BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL*, § 7:15 (2017 ed.) (reporting cases in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits and from state courts in Arkansas, California, Georgia, Indiana, Iowa, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Wisconsin, Washington, and Wyoming).

counsel in the face of questionable prosecutorial actions results in ineffective assistance.”¹³⁰

However, as the holding of *Christian* makes clear, the matter of Fifth Amendment privilege is an altogether different animal. Fifth Amendment privilege deserves heightened protection, and trial counsel must be on alert against prosecutorial infringement of this right. Further, failure to object to the offering of evidence or argument of this type should not be considered sound trial strategy, ever.

Often, the referencing of a criminal defendant’s Fifth Amendment silence occurs at closing argument.¹³¹ As an example, Burkoff and Burkoff cite *Combs v. Coyle*,¹³² a Sixth Circuit case reviewing a conviction for aggravated murder, which held that trial counsel was ineffective when, during argument, the prosecutor referenced that the defendant invoked his Fifth Amendment privilege against self-incrimination in a post-arrest statement.¹³³ The authors write, “Counsel should have known that the use of his client’s pre-arrest silence was at least constitutionally suspect, and should have objected. Since he failed to do so, his conduct fell below an objective standard of reasonableness.”¹³⁴ While the instant case concerns the introduction of evidence and not improper argument, it, like *Combs*, gives proper consideration to the gravity of a defendant’s Fifth Amendment privilege.¹³⁵ Thus, *Christian* follows in the spirit of *Strickland*, giving criminal defendants full constitutional protection while putting defense attorneys on notice that any use of a defendant’s asserted Fifth Amendment rights is suspect.

Lastly, it is important to keep in mind that a defendant appealing under *Strickland* must also meet his burden to prove that he was prejudiced by trial counsel’s conduct.¹³⁶ This is largely a fact-dependent inquiry: prejudice occurs when there is a reasonable probability that, but for trial counsel’s unprofessional error, the result would have been different.¹³⁷ As Judge Rahmeyer correctly implied in her dissent, showing prejudice is a difficult – but, as evidenced by the majority opinion, not insurmountable – burden to meet when a defendant faces near overwhelming evidence.¹³⁸

130. *Id.* § 7:44.

131. *See id.* § 7:43.

132. *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000).

133. BURKOFF & BURKOFF, *supra* note 129, § 7:43; *Combs*, 205 F.3d at 279, 287.

134. BURKOFF & BURKOFF, *supra* note 129, § 7:43.

135. *See Christian v. State*, 502 S.W.3d 702, 711 (Mo. Ct. App. 2016).

136. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Deck v. State*, 68 S.W.3d 418, 425 (Mo. 2002) (en banc).

137. *Strickland*, 466 U.S. at 694; *Deck*, 68 S.W.3d at 429.

138. *Christian*, 502 S.W.3d at 716–17 (Rahmeyer, J., dissenting).

C. Implications

What follows from *Christian v. State*, and how should trial lawyers conduct themselves following this decision?

The most serious implication of *Christian v. State* is that the case might be seen as an initial volley meant to chip away at the concept of reasonable trial strategy.¹³⁹ Any attempts to move *Strickland* analysis from standards-based analysis to rules-based analysis at the margins are welcome, for it is obvious from the perspective of the convicted criminal on a post-conviction appeal that far too much of a lawyer's conduct might fall into the description of reasonable trial strategy.¹⁴⁰ However, criminal defense attorneys might benefit as well from having some concrete examples of what they may and may not do in a trial. Such predictability would be helpful in Missouri law and would consequently improve the overall quality of justice in the state. Moreover, there are clear pedagogical implications for *Christian v. State*. Trial practice classes at Missouri law schools should amend any discussions of when to and not to object with a discussion of *Christian*; namely, there are times in egregious circumstances, as here, when a criminal defense attorney must object.

If Missouri courts choose to expand on the holding of *Christian*, one could predict that courts in the future will hold that failure of trial counsel to object to a prosecutor's infringement on a criminal defendant's constitutional rights in other contexts might also be considered deficient performance.¹⁴¹ In practice, criminal defense attorneys should guard themselves against exposure to these concerns – and exposure to potential disciplinary action – in the near future regardless of whether Missouri courts continue to hand down decisions such as *Christian*.

Second, trial lawyers must be on the lookout for any attempt by a prosecutor to introduce a defendant's Fifth Amendment privilege into evidence. Following the holding on the underlying evidentiary issue in *Christian*, an objection to the offering of this type of evidence will likely be meritorious. Because a prosecutor's referencing a criminal defendant's Fifth Amendment privilege

139. See *Strickland*, 466 U.S. at 689 (“There are countless ways to provide effective assistance in any given case.”).

140. In dissent, Justice Marshall was the first to levy this criticism upon the *Strickland* majority. *Id.* at 707–08 (Marshall, J., dissenting) (“My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will . . . have no grip at all To tell lawyers . . . that counsel for a criminal defendant must behave ‘reasonably’ . . . is to tell them almost nothing.”). Justice Marshall argued that “more specific standards” – rules, even – for performance might be appropriate in areas that are “amenable to judicial oversight,” including defense counsel’s “making timely objections to significant, arguably erroneous rulings of the trial judge.” *Id.* at 708–09. A rule requiring defense counsel to object to constitutional violations is unquestionably “amenable to judicial oversight.”

141. But again, note the difference between deficient performance and prejudice, the two prongs of *Strickland*.

invoked during a civil proceeding will no longer be allowed in as direct evidence in Missouri, criminal defendants will benefit from *Christian*'s holding. Prosecutors, in turn, must be ready to alter their presentation of evidence at trial to avoid the necessity of introducing such evidence.

It is probably not a stretch to say that this implication of *Christian* is not a serious departure from practice in Missouri already. The case could be seen as an outlier in an otherwise relatively fair system of criminal prosecutions; indeed, it involves a particularly troubling set of facts on the part of trial counsel. Regardless of whether this type of conduct is an outlier or not, all criminal defense attorneys practicing in Missouri need to be aware of *Christian*'s implications.

VI. CONCLUSION

Criminal defense lawyers should be aware of the outcome of *Christian v. State*, for the case takes a significant, affirmative step in regulating the conduct of lawyers. Although Judge Rahmeyer's insight that the underlying evidentiary issue – whether the prosecutor's reading of *Christian*'s invocations of the Fifth Amendment privilege would have been ruled inadmissible if challenged¹⁴² – could have been decided either way in Missouri is sound, the holding of *Christian v. State* will stand for now. Additionally, attorneys who work on post-conviction relief cases may now be more inclined to pursue arguments that trial counsel did not object.¹⁴³ Ordinarily the concept of reasonable trial strategy enervates the post-conviction argument that trial counsel failed to object either during the presentation of evidence or during argument.¹⁴⁴ However, the instant case signals that that category is evidently overbroad, even if it grants defense attorneys broad license to tailor their trial strategies to unique cases. This Note welcomes Missouri courts to continue to chip away at the category of “trial strategy” in the most egregious cases.

No doubt the underlying evidentiary issue will be litigated again. The uncertainty regarding the evidentiary issue does not serve trial lawyers well; however, this Note takes the position that the prosecutor's use of the defendant's Fifth Amendment invocations was in contravention to *Christian*'s rights. Regardless, the instant case will serve as precedent that a prosecutor's use of a criminal defendant's invocation of the Fifth Amendment privilege against self-incrimination during a previous civil deposition is probably not admissible, even when the defendant later takes the stand in the criminal trial.

142. *Christian*, 502 S.W.3d at 715 (Rahmeyer, J., dissenting).

143. Ordinarily, trial counsel will not be deemed ineffective for failing to make a nonmeritorious objection. *State v. Clay*, 975 S.W.2d 121, 135 (Mo. 1998) (en banc). However, there are instances in cases, as here, in which trial counsel cannot be said to have exercised a reasonable trial strategy and therefore must object.

144. *See Clay*, 975 S.W.2d at 135; *see also Strickland*, 466 U.S. at 689 (“[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .”).

For now, *Christian v. State* stands for the proposition that a trial lawyer who fails to object to the prosecutor's introduction of a criminal defendant's Fifth Amendment privilege against self-incrimination falls below the standards of reasonably competent trial counsel.¹⁴⁵ If the criminal defendant has also been prejudiced, a remedy is available.¹⁴⁶ As far as *Christian v. State* erodes the overbroad category of reasonable trial strategy, Missouri courts are moving in the right direction under the *Strickland* standard.

145. *Christian*, 502 S.W.3d at 710, 713.

146. *See id.* at 714 (ordering the conviction and sentence to be vacated and remanding for a new trial).

