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At the Edge of Objectivity: The Missouri Court of Appeals' Deference to a Seemingly Subjective Assessment of Prejudice Under Strickland

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NOTE

At the Edge of Objectivity: The Missouri Court of Appeals' Deference to a Seemingly Subjective Assessment of Prejudice Under *Strickland*

Dawson v. State, No. WD 82441, 2020 WL 3966847 (Mo. App. W.D. July 14, 2020), *reh'g and/or transfer denied* (Aug. 27, 2020)

*Bradley J. Isbell**

I. INTRODUCTION

Strickland v. Washington is often heralded as one of the most important criminal procedure cases of the last century.¹ The opinion created a two-prong framework for analyzing a post-conviction relief claim of ineffective assistance of counsel: performance and prejudice.² The focus of this Note is the prejudice prong, specifically when the post-conviction court is the same court that presided over a defendant's trial or sentencing.

Imagine an inmate's post-conviction counsel argues that the defendant received ineffective assistance before the trial court because

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1. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also* Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1967 n.109 (2017).

2. *Strickland*, 466 U.S. at 687. As explained in more detail *infra*, the first prong, performance, regards the actual assistance provided by legal counsel. The prejudice prong evaluates what impact, if any, counsel's deficient performance had on the outcome of the proceeding.

trial counsel failed to present readily available, mitigating evidence.³ Under *Strickland*'s second prong, post-conviction counsel must argue that trial counsel's failure caused prejudice: a reasonable probability exists that the unrepresented evidence would have resulted in a shorter sentence.⁴ How should the post-conviction court assess whether the evidence would have resulted in a shorter sentence? In the event that the post-conviction court is the same as the sentencing court, should the court simply ask a *subjective* question: is there a reasonable probability that *it* would have imposed a shorter sentence? Conversely, should the post-conviction court divorce its inquiry from its role at sentencing and engage in an *objective* inquiry: is there a reasonable probability that the evidence would have resulted in a shorter sentence from an impartial, fair court? Reading *Strickland* in light of its specific facts seemingly foreclosed this decision in favor of objectivity.⁵

However, in *Dawson v. State*, the Missouri Court of Appeals for the Western District, came to the opposite conclusion.⁶ The court entertained an appeal from a motion court's⁷ rejection of a motion for post-conviction relief based on ineffective assistance of counsel, where the motion court also presided over the appellant's sentencing.⁸ In line with its approach for the last decade, the Western District took the subjective approach.⁹ It gave special deference to the lower court's prejudice analysis under *Strickland* precisely because that court would presumably know whether trial counsel's alleged failures would have altered its sentencing decision.¹⁰ In fact, the Court of Appeals stated that a post-conviction court's prejudice analysis in such a circumstance is "virtually unchallengeable."¹¹

Part II of this Note details the facts and holding from *Dawson v. State*, with particular attention to the court's analysis of prejudice under the

3. Mitigating evidence is evidence that is presented by defense counsel during the sentencing phase of a capital trial that suggests that the defendant should be sentenced to life in prison rather than death. See *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982).

4. *Strickland*, 466 U.S. at 694.

5. *Id.* at 700–01.

6. *Dawson v. State*, 611 S.W.3d 761, 768 (Mo. Ct. App. 2020).

7. A motion court is the lower court that originally hears a motion for post-conviction relief.

8. *Id.* at 763.

9. See *id.* at 768.

10. *Id.*

11. *Id.* at 769 (quoting *Cherco v. State*, 309 S.W.3d 819, 825 (Mo. Ct. App. 2010)).

Strickland standard. Part III provides the legal context in which *Dawson* was decided. This includes identifying the source of the *Strickland* standard, as well as its interpretation in both federal and Missouri state courts. Part IV discusses the reasoning behind the prejudice analysis in *Dawson*, including Judge Alok Ahuja's concurrence, which draws attention to potential weaknesses in the majority's reasoning, given the context in which *Strickland* was decided. Part V provides commentary on *Dawson*, noting the difficulty in applying *Strickland's* prejudice prong when the post-conviction court also presided over the underlying criminal case. It also contemplates the appropriateness of such an arrangement. Part VI concludes and provides suggestions for further research.

II. FACTS AND HOLDING

On November 16, 2015, Gabriel Dawson was placed on probation by the juvenile division of the Circuit Court of Buchanan County, Missouri for several acts of juvenile delinquency.¹² On May 17, 2016, Dawson participated in a robbery, during which an accomplice to the robbery died.¹³ After the robbery, the juvenile division of the prosecutor's office filed a motion to prosecute Dawson as an adult, and the juvenile court granted the motion.¹⁴ Dawson was then charged with the class B felony of attempted first-degree robbery.¹⁵ On October 6, 2016, at the age of sixteen, Gabriel Dawson pleaded guilty to attempted first-degree robbery for the crime committed on May 17, 2016, in exchange for the prosecutor agreeing not to seek felony murder charges.¹⁶ Dawson's plea and sentencing hearings were before Judge Patrick K. Robb, of the Circuit Court of Buchanan County, Missouri.

During Dawson's sentencing hearing, the trial court questioned him about his understanding of the plea process.¹⁷ He affirmed that he understood that he was facing a range of punishment of up to fifteen years with no probation.¹⁸ Dawson also affirmed that no one had promised him a particular sentence in exchange for his plea.¹⁹ The sentencing court found that Dawson's plea was made voluntarily and knowingly.²⁰ On

12. *Id.* at 764.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

December 12, 2016, the court sentenced Dawson to fourteen years in the custody of the Missouri Department of Corrections.²¹ After the sentence was announced, Dawson confirmed to the sentencing court that he was satisfied with the legal representation that he had received from plea counsel.²²

Dawson then timely filed a *pro se* motion to vacate, amend, or set aside his sentence under Missouri Rule of Civil Procedure 24.035.²³ The court appointed post-conviction counsel to Dawson, who then filed an amended complaint on his behalf.²⁴ The amended motion claimed that Dawson was denied effective assistance of counsel at sentencing because (1) plea counsel, who also represented Dawson at sentencing, failed to investigate and present mitigating evidence of adolescent development at Dawson's sentencing hearing; and (2) plea counsel failed to investigate and present mitigating evidence from Dawson's family members and weightlifting coach at Dawson's sentencing hearing.²⁵ The amended motion claimed that Dawson was prejudiced by both of plea counsel's alleged failures because there was a reasonable probability that, but for them, he would have received a lesser sentence.²⁶

Dawson's post-conviction proceedings, including an evidentiary hearing, were before Judge Robb, who also presided over Dawson's underlying criminal plea and sentencing proceedings.²⁷ At the evidentiary hearing, a neuropsychologist testified regarding adolescent brain behavior generally, as well as regarding her personal evaluation of Dawson when he was seventeen.²⁸ Dawson's mother, grandmother, great-aunt, and weightlifting coach each testified to Dawson's character.²⁹ Conversely, Dawson's plea counsel testified that Dawson told her he wanted to take responsibility for his actions during sentencing and that she had advised

21. *Id.*

22. *Id.*

23. *Id.*; Mo. Sup. Ct. R. 24.035(b) ("A person seeking relief pursuant to this Rule 24.035 shall file a motion to vacate, set aside or correct the judgment or sentence . . . The motion shall be filed no earlier than the date the sentence is entered if no appeal is taken, including if no appeal is taken after any remand of the judgment or sentence following a prior appeal, or the date the mandate of the appellate court issues affirming the judgment or sentence.").

24. *Dawson*, 611 S.W.3d at 764.

25. *Id.* at 764–65. The amended motion also claimed that Dawson's right to due process was violated because the sentencing court failed to consider him for dual juvenile/criminal jurisdiction under Mo. Rev. Stat. § 211.073. *Id.* at 764.

26. *Id.* at 764–65.

27. *Id.* at 761–63.

28. *Id.* at 765.

29. *Id.*

against hiring an expert to testify to Dawson's mental development.³⁰ Plea counsel also testified that Dawson told her he did not want his mother to testify at his sentencing hearing, and that the weightlifting coach was contacted but was unavailable to testify at the sentencing hearing.³¹

The motion court, the venue where a motion for post-conviction relief ("PCR") is heard,³² denied Dawson's Rule 24.035 motion for PCR, concluding that even if plea counsel had presented at sentencing the mitigating evidence presented at the evidentiary hearing, Dawson would not have received a shorter sentence.³³ The Missouri Court of Appeals, Western District, heard the case on appeal and upheld the judgment of the motion court.³⁴ It found that the motion court's conclusion that *Strickland's* prejudice prong was not met was objectively reasonable and not clearly erroneous.³⁵ The court reasoned that, based on its own precedent, where the motion court had the benefit of also being the sentencing court "the motion court's ruling as to the impact of character witnesses" at sentencing is "virtually unchallengeable," indicating deference to a seemingly subjective analysis of prejudice below.³⁶

III. LEGAL BACKGROUND

This section first discusses the origins of the *Strickland* standard in the United States Supreme Court. Next, it examines the application of *Strickland's* prejudice prong in Missouri state courts. Finally, it presents decisions from United States Courts of Appeals to illustrate *Strickland's* interpretation and application in federal courts.

30. *Id.* at 770.

31. *Id.*

32. *See, e.g., Id.* at 763 ("Specifically, Mr. Gabriel Knight Dawson ("Dawson") appeals from the judgment of the Circuit Court of Buchanan County, Missouri ("motion court"), denying his Rule 24.035 motion for post-conviction relief after an evidentiary hearing."). In Missouri, the motion court is often the same as the trial court, the court where the underlying criminal conviction occurred. *See, e.g., id.* ("[This appeal] also involves a procedural scenario in which the *sentencing* court and the post-conviction relief *motion* court are one and the same.").

33. *Dawson*, 611 S.W.3d at 771.

34. *Id.* at 772.

35. *Id.* at 768, 772.

36. *Id.* at 771.

A. Origins of the Strickland Standard

The framework for analyzing a post-conviction claim of ineffective assistance of counsel was set forth in the Supreme Court of the United States's seminal decision in *Strickland v. Washington*.³⁷ In *Strickland*, the Supreme Court recognized that the Sixth Amendment guarantees to criminal defendants the right to effective assistance of counsel.³⁸ This right is violated both when the Government denies a defendant access to counsel, and when counsel's own deficient performance denies a defendant "adequate legal assistance."³⁹ The Supreme Court established a two-prong test for analyzing a post-conviction claim of ineffective assistance of counsel, colloquially known as the "*Strickland* standard."⁴⁰ First, a movant must show that counsel's performance was objectively deficient.⁴¹ Second, a movant must show that counsel's deficient performance prejudiced the movant.⁴² If a movant fails to show either prong, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."⁴³

The first prong of the *Strickland* standard, the performance prong, governs the performance of defense counsel.⁴⁴ The Supreme Court held that the applicable threshold required to ensure a fair trial is that of "reasonably effective assistance."⁴⁵ This requires a movant to show specific acts or omissions by defense counsel that do not fall within the scope of reasonable professional judgment.⁴⁶ The motion court must then judge the reasonableness of defense counsel's challenged conduct in light of the facts of the case at the time of the alleged acts or omissions.⁴⁷ *Strickland* demands that motion courts begin their evaluation with a strong presumption that defense counsel's assistance was effective and that the challenged actions resulted from "reasonable professional judgment."⁴⁸

37. *Strickland v. Washington*, 466 U.S. 668, 688–700 (1984).

38. *Id.* at 684–86.

39. *Id.* at 686 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

40. *Id.* at 687.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 690.

47. *Id.*

48. *Id.*

Further, *Strickland* sets out that strategic choices made by counsel after an investigation of law and facts are “virtually unchallengeable.”⁴⁹

The second prong of the *Strickland* standard, much like a plain error review, requires a movant to show that he or she was prejudiced by defense counsel’s deficient performance.⁵⁰ The movant must show a reasonable probability that the result of the proceeding would have been different but for counsel’s unprofessional errors.⁵¹ *Strickland* requires that an assessment of prejudice “should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision” of guilt of sentencing.⁵² The Supreme Court explained that this objective approach entails excluding the “idiosyncrasies of the particular decisionmaker,” including the particular judge’s sentencing practices.⁵³

In the underlying criminal case, Washington waived his right to an advisory jury during the sentencing phase.⁵⁴ The trial judge found that the aggravating factors in the case outweighed the mitigating factors and sentenced Washington to death.⁵⁵ After Washington unsuccessfully exhausted his PCR claims in Florida’s state court system, he filed a petition for a writ of habeas corpus in federal district court claiming ineffective assistance of counsel for – among other things – trial counsel’s alleged failure to adequately investigate and present mitigating evidence at sentencing.⁵⁶ The district court held an evidentiary hearing on Washington’s claims.⁵⁷ The trial judge from Washington’s criminal proceeding testified that even if trial counsel had presented additional mitigating evidence, it would not have affected the sentence the trial judge imposed.⁵⁸ Relying in part on this testimony, the district court denied Washington’s petition because it found no reasonable probability that the alleged errors by trial counsel affected the outcome of sentencing.⁵⁹ The United States Court of Appeals for the Eleventh Circuit reversed and

49. *Id.*

50. *Id.* at 691–92.

51. *Id.* at 691–92.

52. *Id.* at 695.

53. *Id.*

54. *Id.* at 672. Under Florida’s capital sentencing scheme in place at the time, a defendant had the right to an advisory jury during the sentencing phase of trial, although the ultimate sentencing decision rested with the judge. *Id.*

55. *Id.* at 678–79.

56. *Id.* at 678.

57. *Id.* at 679.

58. *Id.*

59. *Id.* at 683.

remanded the case, and petitioner, the State of Florida, filed a petition for a writ of certiorari.⁶⁰

To illustrate the objective approach to determining prejudice, the Supreme Court applied this newly minted standard to the facts of Washington's claim.⁶¹ The Court made clear that its conclusion that Washington's claim did not meet either the performance or the prejudice prong did "not depend on the trial judge's testimony at the District Court hearing," and that "that testimony [was] irrelevant to the prejudice inquiry."⁶²

In 2007, and in the wake of *Strickland*, the Supreme Court heard *Schriro v. Landrigan*, another claim of ineffective assistance of counsel.⁶³ In *Landrigan*, the defendant, Landrigan, filed a petition for PCR following a sentence of death for capital murder.⁶⁴ The same judge who sentenced Landrigan to death presided over the post-conviction court that heard his petition.⁶⁵ Landrigan's petition was denied by the post-conviction court without an evidentiary hearing because the record clearly showed that his counsel's performance was not deficient—the first prong of *Strickland*.⁶⁶ On review, the Supreme Court held that the motion court's determination of the facts was reasonable and noted that because the judge presiding over the post-conviction court also presided over the underlying criminal case, she was "ideally situated" to assess the factual record of the underlying case.⁶⁷ Justice Stevens, writing in dissent, agreed that some special deference was owed to the post-conviction court's interpretation of the sentencing transcript.⁶⁸

B. *Strickland Applied in Missouri State Courts*

In Missouri state courts, a claim of ineffective assistance of counsel is properly brought as a motion for PCR pursuant to either Missouri Rule of Civil Procedure 24.035 or 29.15.⁶⁹ Under either rule, the motion court

60. *Id.* at 698–99.

61. *Id.* at 698–99.

62. *Id.* at 700.

63. *Schriro v. Landrigan*, 550 U.S. 465 (2007).

64. *Id.* at 469–71.

65. *Id.* at 471.

66. *Id.*

67. *Id.* at 476.

68. *Id.* at 495 (Steven, J., dissenting).

69. Mo. Sup. Ct. R. 24.035 (providing an avenue for postconviction relief following a guilty plea); Mo. Sup. Ct. R. 29.15 (providing an avenue for postconviction relief following a felony conviction by a judge or jury).

is required to issue findings of fact and conclusions of law, whether or not an evidentiary hearing is held.⁷⁰ Both rules limit appellate review of a motion court's ruling to "a determination of whether the findings and conclusion of the trial court are clearly erroneous."⁷¹ In the context of reviewing the prejudice prong of claims of ineffective assistance of counsel, a line of precedent in the Southern and Western Districts of the Missouri Court of Appeals has emerged that conflicts with *Strickland's* framework of objectivity.

A claim of ineffective assistance of counsel at sentencing following a guilty plea was first brought before the Missouri Court of Appeals in 2009, when the Southern District, heard *Joos v. State*.⁷² In *Joos*, the movant claimed that his trial counsel was ineffective for failing to move to dismiss certain venirepersons for apparent bias.⁷³ The motion court concluded that this failure could not have prejudiced the movant because the venirepersons in question were excused for other reasons and did not ultimately sit on the movant's jury.⁷⁴ In affirming the motion court's decision, the Southern District concluded that the motion court's findings "carry special weight" because the motion court had also been the trial court in the underlying criminal case.⁷⁵ This statement was supported by citations to several past decisions of the Supreme Court of Missouri and Missouri Court of Appeals, which discussed a trial court being in the best position to control *voir dire* because it can see and hear potential jurors respond to questioning.⁷⁶ However, each of the cited cases concerned a direct appeal with a claim of trial court error, not a PCR proceeding.⁷⁷ Therefore, none of the cases that the *Joos* court relied on dealt with an

70. *Id.* at 24.035(j).

71. *Id.* at 24.035(k).

72. *Joos v. State*, 277 S.W.3d 802, 804 (Mo. Ct. App. 2009).

73. *Id.* at 804. A venireperson is a member of an entire panel from which a jury is drawn. *Venire*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

74. *Joos*, 277 S.W.3d at 804.

75. *Id.* at 804–05.

76. *Id.* (citing *State v. Taylor*, 166 S.W.3d 599, 608 (Mo. Ct. App. 2005)) (concluding that the trial court is "in the best position to determine the impact of a juror's statement upon other members of the panel."); *State v. Smulls*, 935 S.W.2d 9, 19 (Mo. 1996) (en banc) (acknowledging broad discretion for a trial court's determination of whether a jury panel should be dismissed); *State v. Evans*, 802 S.W.2d 507, 514 (Mo. 1996) (en banc) (acknowledging broad discretion for a trial court's determination of whether a jury panel should be dismissed).

77. *State v. Taylor*, 166 S.W.3d 599, 602 (Mo. Ct. App. 2005); *Smulls*, 935 S.W.2d at 17; *Evans*, 802 S.W.2d at 510.

application of *Strickland* because they were not claims of ineffective assistance of counsel.⁷⁸

A year later, the Missouri Court of Appeals, Western District heard *Cherco v. State*, which was the first time a Missouri Court of Appeals showed special deference to the prejudice determination of a motion court that was also the sentencing court in the underlying criminal case.⁷⁹ In *Cherco*, the Western District relied on the Supreme Court of Missouri's interpretation of the prejudice analysis defined in *Strickland*.⁸⁰ The court held that in such a circumstance, a movant must show that but for counsel's unprofessional errors, the movant would have received a lesser sentence.⁸¹ The *Cherco* court determined that the motion court's conclusion that there was no reasonable probability that additional mitigation evidence would have resulted in a lesser sentence for the movant was not clearly erroneous.⁸² The court noted that, "[H]ere, the sentencing court and the motion court are one in the same, rendering a motion court's finding that character witnesses would not have ameliorated the sentence virtually unchallengeable under the clearly erroneous standard."⁸³

In *Scroggins v. State*, the Western District again acknowledged a heightened degree of deference to a motion court hearing a PCR claim when that court also presided over the underlying criminal case. In that case, however, deference was given to the motion court's review of the record, and not its determination of prejudice.⁸⁴ In *Scroggins*, the motion court denied Scroggins's motion for PCR.⁸⁵ On review, the Western District noted that the motion court was particularly well situated to review the facts from the underlying record and the motion for PCR because the motion court was also the sentencing court.⁸⁶ While the motion court determined that the facts did not support a possible finding of prejudice,

78. See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

79. *Cherco v. State*, 309 S.W.3d 819, 828, 831 (Mo. Ct. App. 2010).

80. *Id.* at 828 (citing *Middleton v. State*, 103 S.W.3d 726, 733 (Mo. 2003) (en banc) (holding that *Strickland* prejudice requires a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been *different*." (emphasis added))).

81. *Id.* at 830–31.

82. *Id.* at 831.

83. *Id.*

84. *Scroggins v. State*, 596 S.W.3d 163, 168 (Mo. Ct. App. 2020).

85. *Id.* In Missouri, a movant seeking PCR is only entitled to an evidentiary hearing if the motion alleges facts that are not disputed by the record which, if true, would warrant relief. *Patterson v. State*, 576 S.W.3d 240, 243 (Mo. Ct. App. 2019).

86. *Scroggins*, 596 S.W.3d at 168.

which should have implicated the objective analysis detailed in *Strickland*, the language used by the Western District was more akin to the United States Supreme Court's ruling in *Landrigan*.⁸⁷ Like *Landrigan*, here the motion for PCR was denied without an evidentiary hearing.⁸⁸ The appellate court's review, therefore, was limited to determining whether the motion court's determination that the facts alleged in Scroggins's PCR motion would not warrant relief if true was clearly erroneous, as opposed to conducting a full *Strickland* analysis of the merits of the PCR claim following an evidentiary hearing.⁸⁹ Consequently, the heightened deference given here may not conflict with *Strickland* in the way that language in *Joos*, *Cherco*, and *Dawson* does.⁹⁰

Both the Southern and Western Districts of the Missouri Court of Appeals have recognized this special degree of deference to a motion court that also served as the trial court in the underlying criminal case.⁹¹ However, the Supreme Court of Missouri has yet to address this issue.

C. Interpretations of Strickland in Federal Circuit Courts

Several federal circuit courts have confronted the *Strickland* issue, each concluding that *Strickland* requires an objective, not subjective, analysis of prejudice.⁹² In *Sealey v. Warden, Georgia Diagnostic Prison*, a movant's post-conviction counsel presented an affidavit at the movant's PCR hearing from a juror in the defendant's underlying criminal case.⁹³ The juror stated that if additional mitigating evidence about the defendant's family had been presented during sentencing, it would have made a difference in the juror's decision.⁹⁴ The United States Court of Appeals for the Eleventh Circuit still held that it was reasonable for the

87. *Id.*

88. *Id.* at 163.

89. *Id.* at 165; *see also Patterson*, 576 S.W.3d at 243.

90. *See Dawson v. State*, 611 S.W.3d 761 (Mo. Ct. App. 2020); *Cherco v. State*, 309 S.W.3d 819, 828 (Mo. Ct. App. 2010); *Joos v. State*, 277 S.W.3d 802 (Mo. Ct. App. 2009).

91. *See Scroggins*, 596 S.W.3d at 168; *Goodwater v. State*, 560 S.W.3d 44, 55 (Mo. Ct. App. 2018); *McKee v. State*, 540 S.W.3d 451, 458–59 (Mo. Ct. App. 2018); *Noland v. State*, 413 S.W.3d 684, 687 (Mo. Ct. App. 2013).

92. *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1358 (11th Cir. 2020); *Garner v. Lee*, 908 F.3d 845, 862 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1608 (2019); *Williams v. Allen*, 542 F.3d 1326, 1344 (11th Cir. 2008); *White v. Ryan*, 895 F.3d 641, 670 (9th Cir. 2018).

93. *Sealey*, 954 F.3d at 1358.

94. *Id.*

state court to conclude that the defendant did not prove prejudice because the prejudice “inquiry under *Strickland* is an objective one.”⁹⁵

The Eleventh Circuit faced the same issue in *Williams v. Allen*, where the same judge who sentenced the defendant to death in the underlying criminal proceedings also presided over the defendant’s PCR proceedings.⁹⁶ In his PCR motion, the defendant raised a claim of ineffective assistance of counsel at sentencing for a failure to present mitigation evidence.⁹⁷ The judge found no reasonable probability that the additional mitigation evidence would have changed the sentence he imposed.⁹⁸ On review, the Eleventh Circuit held that “a trial judge’s post-hoc statements concerning how additional evidence might have affected its ruling are not determinative for purposes of assessing prejudice.”⁹⁹ The court concluded that the defendant in fact did prove prejudice, reversing the district court’s ruling.¹⁰⁰

In *Garner v. Lee*, the United States Court of Appeals for the Second Circuit reviewed the United State District Court for the Eastern District of New York’s grant of habeas corpus for a defendant’s post-conviction claim of ineffective assistance of counsel.¹⁰¹ In its ruling, the lower court concluded that the prejudicial impact of potentially inadmissible evidence was apparent from post-trial statements made by jurors to the media.¹⁰² The Second Circuit noted that “to the extent the district court relied on a juror’s post-trial statements to evaluate *Strickland* prejudice, . . . the district court committed error.”¹⁰³ The court further expounded that the proper focus of a prejudice inquiry is “the reliability of the result, from an objective viewpoint,” so evidence about the actual decision-making process should not be considered.¹⁰⁴ After reviewing the record *de novo*, the Second Circuit concluded that the state court did not err in finding no prejudice and therefore vacated the district court’s grant of habeas corpus.¹⁰⁵

95. *Id.*

96. *Williams*, 542 F.3d at 1344.

97. *Id.* at 1331–32.

98. *Id.* at 1344–45.

99. *Id.* at 1345.

100. *Id.*

101. *Garner v. Lee*, 908 F.3d 845, 862 (2d Cir. 2018).

102. *Garner v. Lee*, No. 2:11-CV-00007 (PKC), 2016 WL 7223335 (E.D.N.Y. Dec. 13, 2016), *vacated and remanded*, 908 F.3d 845 (2d Cir. 2018).

103. *Garner*, 908 F.3d at 862.

104. *Id.*

105. *Id.* at 871.

In *White v. Ryan*, the United States Court of Appeals for the Ninth Circuit faced a similar issue of a post-conviction court applying a subjective prejudice standard.¹⁰⁶ The court presiding over the defendant's post-conviction proceedings was not the same as the sentencing court.¹⁰⁷ However, the post-conviction court assessed *Strickland's* prejudice prong by answering whether *it* would have imposed a different sentence, given the additional mitigation evidence presented in the post-conviction hearing.¹⁰⁸ On review, the Ninth Circuit found that the post-conviction court's prejudice determination was improper.¹⁰⁹ It held that *Strickland* requires the post-conviction court to consider "the likelihood of a different result not just by the trial court but by an appellate court that 'independently reweighs the evidence.'"¹¹⁰

This line of holdings in federal circuit courts illustrates how the Western and Southern Districts of the Missouri Court of Appeals have misapplied *Strickland's* prejudice prong by considering input from the decisionmaker from the underlying criminal case.¹¹¹

IV. INSTANT DECISION

In *Dawson*, the Missouri Court of Appeals, Western District, found that the motion court's conclusion that Dawson failed to satisfy *Strickland's* prejudice prong was objectively reasonable.¹¹² The court stated that, even if plea counsel had presented the additional mitigating evidence at Dawson's sentencing hearing, Dawson would not have received a lower sentence.¹¹³ The mitigating evidence that Dawson complained was omitted had already largely been presented to the sentencing court either through the sentencing assessment report or because it was common knowledge for a judge familiar with juvenile cases.¹¹⁴

106. *White v. Ryan*, 895 F.3d 641, 670 (9th Cir. 2018).

107. *Id.*

108. *Id.*

109. *Id.*

110. *White v. Ryan*, 895 F.3d 641, 671 (9th Cir. 2018) (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)).

111. *See, e.g., White*, 895 F.3d 641 (9th Cir. 2018); *see also Garner v. Lee*, 908 F.3d 845 (2d Cir. 2018).

112. *Dawson v. State*, 611 S.W.3d 761, 772 (Mo. Ct. App. 2020). Because the prejudice prong was not met, the performance prong was not addressed. *See id.*

113. *Id.* at 771.

114. *Id.*

However, the *Dawson* court did not stop at crediting the motion court's objective analysis of *Strickland's* prejudice prong.¹¹⁵ The court then identified the procedural circumstances of the case: that the motion court also served as the sentencing court in the underlying criminal case.¹¹⁶ Citing *Cherco*, the court described the "benefit" of such a circumstance, where a subjective analysis of the prejudicial impact of additional mitigating evidence is possible.¹¹⁷ Specifically, the court stated that where circumstances allow for such subjective review, the motion court's ruling is "virtually unchallengeable."¹¹⁸ Accordingly, the court held that the motion court's finding that *Strickland's* prejudice prong had not been met was not clearly erroneous and affirmed the motion court's judgment.¹¹⁹

Writing in concurrence, Judge Ahuja agreed with the majority's conclusion that *Dawson* failed to satisfy *Strickland's* prejudice prong.¹²⁰ Judge Ahuja then highlighted the majority's dictum, in which it noted that special deference was given to this motion court's prejudice determination because the motion court was also the sentencing court.¹²¹ His concurrence then proceeded to cite every decision in which a Missouri court of appeals had relied on this construction of *Strickland*.¹²² Judge Ahuja then explained how *Strickland's* prejudice prong required an objective inquiry, not a subjective analysis of how additional mitigation evidence would have affected the decision of a particular judge or jury, noting that *Strickland* itself made this point "crystal clear" when it disregarded testimony by the sentencing judge as irrelevant.¹²³ Next, Judge Ahuja provided support for his interpretation of *Strickland's* prejudice prong with United States Courts of Appeals opinions holding that a subjective analysis of prejudice was an erroneous application of *Strickland*.¹²⁴

Finally, Judge Ahuja conceded that the majority's seemingly erroneous application of *Strickland* may have little practical effect when reviewing a motion court's denial of PCR based on a claim of ineffective assistance of counsel.¹²⁵ Missouri's indeterminate sentencing regime

115. *Id.*

116. *Id.*

117. *Id.* (citing *Cherco v. State*, 309 S.W.3d 819, 831 (Mo. Ct. App. 2010)).

118. *Id.*

119. *Id.* at 772.

120. *Id.* (Ahuja, J., concurring).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 773–74.

125. *Id.* at 774.

allows broad discretion to sentencing courts and grants them great deference on appellate review.¹²⁶ Also, Missouri Supreme Court Rules 24.035 and 29.15 allow overturning a motion court's denial of PCR only if the motion court's findings of fact and conclusions of law are clearly erroneous.¹²⁷ Like the majority opinion, Judge Ahuja concluded that it is unlikely a motion court's decision that there was no reasonable probability that additional mitigation evidence would have affected sentencing will be reversed, even under a correct application of *Strickland*.¹²⁸ However, the high bar for proving prejudice established by *Strickland* is hardly reason for a reviewing court to raise the bar higher in cases where *Strickland* was arguably not applied correctly below.

V. COMMENT

The standard being followed in the Western District is in stark contrast to the objective prejudice analysis mandated by *Strickland* and adhered to in federal courts.¹²⁹ The plain language used in *Dawson* shows that the Missouri Court of Appeals, Western District, is affording special deference to a motion court's subjective opinion that additional mitigating evidence would not have changed a movant's sentence.¹³⁰ Moreover, in doing so, the *Dawson* court relied on its own precedent which recognized the importance of such a subjective analysis.¹³¹ This application of *Strickland*'s prejudice prong highlights an apparent split among the Districts of the Missouri Court of Appeals, the difficulty of applying *Strickland* in a discretionary sentencing scheme, and the potential difficulties of requiring a trial court to objectively review its own prior decision.¹³²

A. Split Among Missouri Courts of Appeals Districts

The key to a prejudice analysis under *Strickland* is objectivity.¹³³ The Court in *Strickland* provided a perfect illustration of this by disregarding

126. *Id.*

127. *Id.*; Mo. Sup. Ct. R. 24.035(k), 29.15(k).

128. *Dawson*, 611 S.W.3d at 744 (Ahuja, J., concurring).

129. *Id.* at 772; *Garner v. Lee*, 908 F.3d 845, 862 (2d Cir. 2018); *Williams v. Allen*, 542 F.3d 1326, 1344–45 (11th Cir. 2008); *Cherco v. State*, 309 S.W.3d 819, 830–831 (Mo. Ct. App. 2010).

130. *Dawson*, 611 S.W.3d at 772 (Ahuja, J., concurring).

131. *Id.*

132. *Strickland v. Washington*, 466 U.S. 668, 694–95 (1984).

133. *Id.* at 695.

testimony by the sentencing judge about prejudicial effect as irrelevant.¹³⁴ Judge Ahuja's concurrence in *Dawson* highlighted the Western District's history of apparent misapplication of *Strickland's* prejudice prong by giving special deference to a motion court's apparent subjective determinations.¹³⁵

It is not clear that the misapplication here is a product of a motion court's reliance on its own subjective judgment. The opinion in *Dawson* provides no insight into Judge Robb's basis for concluding that Dawson failed to demonstrate prejudice.¹³⁶ What is clear though, is that an appellate review of the motion court's determination of prejudice should give no heightened deference simply because the motion court was also the sentencing court. Such consideration of "a particular judge's sentencing practices" or "idiosyncrasies" is forbidden under *Strickland*.¹³⁷ This line of precedent in the Western District is in apparent conflict with established ineffective assistance of counsel review jurisprudence and is ripe for correction by the Supreme Court of Missouri.

Furthermore, notably missing from Judge Ahuja's concurrence is any case from the Eastern District relying on this erroneous application of *Strickland*.¹³⁸ In fact, the Eastern District has not subscribed to this line of cases, as it has not explicitly given special deference to a motion court because it was also the sentencing court in the underlying criminal case. This apparent split of authority between the Eastern District and the Southern and Western District of Missouri's Court of Appeals provides further reason for the Supreme Court of Missouri to address this issue.

B. Difficulty in applying Strickland in a Discretionary Sentencing Scheme

In true *Strickland* fashion, Judge Ahuja's concurrence in *Dawson* questions whether or not the majority's misapplication of *Strickland's* prejudice prong actually impacts – or prejudices – a review of a motion court's decision.¹³⁹ In fact, United States Supreme Court Justice O'Connor herself expressed doubt that the precise formulation of a prejudice standard would impact a reviewing court's ultimate decision.¹⁴⁰ But the difficulty of establishing prejudice under *Strickland* is a poor

134. *Id.* at 700.

135. *Dawson*, 611 S.W.3d at 772 (Ahuja, J., concurring).

136. *Id.* at 772.

137. *Strickland*, 466 U.S. at 695.

138. *Dawson*, 611 S.W.3d at 772 (Ahuja, J., concurring).

139. *Id.* at 774.

140. *Strickland*, 466 U.S. at 696–97.

reason to make it a near impossibility by deferring entirely to the motion court in cases where *Strickland* was arguably not applied correctly below. Both Justice O'Connor and Judge Ahuja recognized that the rare case would occur in which a stricter standard will deny PCR to a movant who was in fact denied effective assistance of counsel.¹⁴¹ These borderline cases, though few in number, justify adherence to *Strickland's* objective approach, and the principle of leniency dictates that any variance from this standard skew in favor of the movant.

There are two factors that present impediments to an objective analysis of the prejudicial effect of missing mitigating evidence in Missouri post-conviction proceedings. First is the discretionary sentencing scheme that Missouri trial courts employ.¹⁴² The second is that courts that presided over the underlying criminal proceeding also hear motions for PCR in the same matter.¹⁴³

Strickland, though since expanded to apply to non-capital sentencing proceedings, reviewed alleged ineffective assistance of counsel at sentencing during a capital proceeding.¹⁴⁴ Justice O'Connor pointed to the structured adversarial nature and standards of decision in capital sentencing as important components that enabled an objective review of counsel's effectiveness and any resulting prejudice.¹⁴⁵ She also cautioned that a more informal sentencing proceeding with standardless sentencing discretion might "require a different approach to the definition of constitutionally effective assistance."¹⁴⁶

Applying *Strickland's* prejudice prong to non-capital sentencing poses two problems.¹⁴⁷ First, the relatively unguided sentencing discretion which judges and juries are afforded makes appellate review of sentencing decisions particularly difficult when there is no indication in the record of what factors influenced sentencing.¹⁴⁸ Second is the non-discrete choices

141. *Id.* at 697 ("The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case."); *Dawson*, 611 S.W.3d at 774 (Ahuja, J., concurring).

142. Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 97 (2006).

143. *See, e.g.*, *Rowland v. State*, 605 S.W.3d 125, 127–28 (Mo. Ct. App. 2020) ("The same judge who presided over the two trials involving the underlying charges against Movant also served as the PCR motion court.").

144. *Strickland*, 466 U.S. at 686–87.

145. *Id.*

146. *Id.* at 686.

147. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1087 (2009).

148. *Id.* at 1087–88.

available in non-capital sentencing.¹⁴⁹ While a capital sentencing proceeding poses a binary choice for a sentencing court, a non-capital sentence could be any of a number of years of incarceration, probation, fines, or a combination of any of those options.¹⁵⁰ These two concerns have led to much criticism of *Strickland* as applied to non-capital sentencing.¹⁵¹

However, these criticisms are not without pushback. Capital sentencing also allows for discretion in sentencing, and judges and juries in capital trials are not always required to provide reasoning for their decisions.¹⁵² This makes the distinction between capital and non-capital cases less meaningful in the context of applying *Strickland*.¹⁵³ Further, the Supreme Court has made it clear that when it comes to prejudice, any amount of actual jail time is significant.¹⁵⁴ Therefore, on collateral review, the seemingly non-discrete nature of non-capital sentencing comes down to a binary question: did deficient performance add any time to the movant's sentence? This leaves a much simpler question for an objective inquiry to answer, much like that answered in a capital case. With both obstacles overcome, any justification for deviating from *Strickland's* objective approach is much less convincing.

C. Applying *Strickland* When the Sentencer is the Reviewer

Even if the general concerns of applying *Strickland's* prejudice prong to non-capital sentencing were alleviated, it does not resolve the issue presented in *Dawson*.¹⁵⁵ The question faced is whether it is appropriate to give heightened deference to a motion court's prejudice determination when it is engaged in a collateral review of its own prior sentencing decision under a standard that demands objectivity.

Common sense seems to suggest that the sentencing court would be in the best position to determine the prejudicial effect that missing mitigating evidence had on a movant's sentencing proceeding.¹⁵⁶ The Supreme Court itself acknowledged as much in *Landrigan* when it noted

149. *Id.* at 1089.

150. *Id.*

151. *Id.* at 1079.

152. *Id.* at 1087–88.

153. *See Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

154. *Glover v. United States*, 531 U.S. 198, 203 (2001).

155. *Strickland*, 466 U.S. at 686–87; *Dawson v. State*, 611 S.W.3d 761, 772 (Mo. Ct. App. 2020) (Ahuja, J., concurring).

156. *See Ty Alper, 'So What?': Using Reverse Investigation to Articulate Prejudice and Win Post-Conviction Claims*, *Champion*, December 2011, at 46.

that the post-conviction court was “ideally situated” to assess the record from the underlying criminal case because the same judge presided over both sentencing and post-conviction proceedings.¹⁵⁷ This impulse is likely driven by the aforementioned concerns about applying *Strickland* to a non-capital sentencing proceeding in the first place.¹⁵⁸ The judge who presided over sentencing should know exactly what factors affected the movant’s sentence, how those factors would interact with additional mitigating evidence, and whether or not the additional evidence would have shortened the sentence handed down.¹⁵⁹

Strickland forecloses the use of such subjectivity in a prejudice analysis.¹⁶⁰ How then can a motion court, inherently bestowed with such insight into sentencing, be asked to ignore it and review its own prior decision objectively? The thought experiment is taxing. A motion court with the “benefit” of also being the sentencing court must hear the new mitigating evidence raised in a post-conviction motion, ignore all of its own “idiosyncrasies” and disregard as irrelevant any thought or memory about its own “actual process of decision” or “sentencing practices.”¹⁶¹ Granted, *Strickland* tells us to assume that a judge acted according to the law;¹⁶² however, even taking that as given, the question still exists in a discretionary sentencing scheme what sentencing practices a motion court should rely on, if not its own.¹⁶³

Strickland would seem to require such a court to consider the prejudicial effect through the lens of a hypothetical reasonable, conscientious, and impartial decisionmaker.¹⁶⁴ However, *Strickland* just told us that both the motion court and the sentencing court should be assumed to be such.¹⁶⁵ So, a motion court is left with the task of becoming

157. *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007). But that comment was specifically directed toward the post-conviction court’s determination of facts in deciding to deny an evidentiary hearing. *Id.*

158. *See supra* Section V.B.

159. Hessick, *supra* note 147, at 1089.

160. *Strickland*, 466 U.S. at 695.

161. *Dawson v. State*, 611 S.W.3d 761, 771 (Mo. Ct. App. 2020); *Strickland*, 466 U.S. at 695.

162. *Strickland*, 466 U.S. at 694.

163. *Id.* at 694. This leaves unaddressed an equal (or perhaps greater) concern that a sentencing court, that felt it had shown leniency at sentencing, might be frustrated by the appearance of a particular defendant’s motion for PCR on its already crowded docket. *Id.* Such a circumstance strains the reasonableness of the assumption that the motion court will attempt in good faith an objective review of prejudice in its own prior proceeding.

164. *Id.* at 695.

165. *Id.*

some hypothetical, reasonable, conscientious, and impartial decisionmaker – other than itself – to determine what this hypothetical decisionmaker would do if it were in the position that the motion court is *actually in*. Reliance on such a system seems to question the very necessity of appellate courts in our judicial system.

VI. CONCLUSION

An analysis of prejudice under *Strickland* requires objective review. The precedent of the Western District of the Missouri Court of Appeals is seemingly in conflict with this mandate by giving heightened deference when a motion court is able to engage in a subjective review. This precedent is also seemingly in conflict with the approach of the Eastern and Southern Districts of the Missouri Court of Appeals. Therefore, *Dawson* presents an opportunity for the Supreme Court of Missouri to rule on an issue that is ripe for review.

Further, this tension in *Dawson* highlights the difficulty that the *Strickland* standard of prejudice presents when a motion court is reviewing a case that it presided over as a sentencing court. The plain language of *Strickland* requires the motion court to assume that it followed the law when it made its earlier decision at sentencing.¹⁶⁶ *Strickland* then requires the motion court to forget its own sentencing practices and any process of decision that it might remember from the underlying case. The motion court must instead reweigh all of the aggravating and mitigating evidence now available and rule as if it were some other hypothetical, impartial decisionmaker.

This mental exercise stretches the limits of the assumption that a motion court will be able to follow the *Strickland* standard in making its decision. It also begs the question of whether a motion court should be able to hear a PCR claim when it also presided over the underlying criminal case. Such a question presents an avenue for future research to determine which jurisdictions allow such a practice. Also of interest would be the deference given to the motion court's analysis of prejudice by the appellate courts of those jurisdictions.

166. *Id.*