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Prove All Things and Holf Fast That Which Is Good: The Missouri Supreme Court Redraws the Line between Plain Error and Ineffective Assistance of Counsel - Deck v. State

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Notes

Prove All Things and Hold Fast That Which Is Good: The Missouri Supreme Court Redraws the Line Between "Plain Error" and "Ineffective Assistance of Counsel"

Deck v. State[1]

"Prove all things and hold fast that which is good."
1 *Thessalonians* 5:21

I. INTRODUCTION

Few challenges to a judicial determination are as disruptive as a criminal defendant's allegation of ineffective assistance of counsel. Discovering the truth behind such an allegation is extremely difficult, owing both to the distorting effect of hindsight and the near impossibility of discovering the full extent of any damage caused by defense counsel's alleged errors.[2] This Note examines the genesis of the confusion concerning the current standard for granting post-conviction relief due to ineffective assistance of counsel and the Missouri Supreme Court's most recent effort to clarify that standard in *Deck v. State*.[3]

II. FACTS AND HOLDING

In 1996, Carman Deck and his sister, Tonia Cummings, murdered James and Zelma Long during a robbery of the Longs' home in rural Jefferson County, Missouri.[4] After nightfall, Deck and Cummings pulled their car into the Longs' driveway, knocked on the door, and asked Zelma Long for directions to Laguana Palma.[5] The Longs invited Deck and Cummings into the Longs' house, whereupon Deck pulled a pistol from his waistband and commanded the Longs to lie face down on their bed while Deck and Cummings robbed their home.[6]

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1. 68 S.W.3d 418 (Mo. 2002).
2. *See infra* notes 48-50 and 144 and accompanying text.
3. 68 S.W.3d 418 (Mo. 2002).
4. State v. Deck, 994 S.W.2d 527, 531 (Mo. 1999), *denial of post-conviction relief aff'd in part, rev'd in part*, 68 S.W.3d 418 (Mo. 2002).
5. *Id.*
6. *Id.*

The Longs fully complied with Deck and Cummings's demands, even to the point of opening their safe and offering to write a check to the robbers.[7] Nevertheless, after taking the Longs' cash and jewelry, Deck again ordered the Longs to lie on their stomachs on their bed, with their faces turned to the side.[8] For approximately ten minutes, Deck paced about the Longs' bedroom while the Longs pleaded for Deck to spare their lives.[9] Then, Cummings ran back into the Longs' bedroom and told Deck that time was running out.[10] Deck put his gun to James Long's head and fired twice.[11] He then put the gun to Zelma Long's head and fired twice more.[12] Later that same day, police officers apprehended Deck based on a tip from an informant.[13] Deck later confessed to killing the Longs and was convicted of first-degree murder for their deaths.[14]

During the penalty phase of his trial, Deck presented mitigation evidence.[15] After Deck and the state had finished presenting evidence regarding aggravation and mitigation, the court held an instruction conference.[16] At this conference, defense counsel offered two instructions regarding non-statutory circumstances in mitigation of punishment based on Missouri Approved Instruction—Criminal (Third Edition) 313.44A ("MAI-CR3d"), but the court refused both.[17] As defense counsel had not prepared alternate instructions, the court allowed new instructions based on MAI-CR3d 313.44A to be downloaded and printed from the court's computer.[18] Defense counsel, however, did not notice that the last two paragraphs of MAI-CR3d 313.44A failed to print and that, therefore, the newly-printed jury instructions were incomplete.[19] As a result, defense counsel offered an incomplete version of the downloaded instructions.[20] Proposed Instruction 8 provided:

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7. *Id.* at 532.

8. *Id.*

9. Deck v. State, 68 S.W.3d 418, 422 (Mo. 2002).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 422-23. Specifically, Deck called four witnesses who testified concerning Deck's role as provider and surrogate parent to his younger siblings, the deprivation and abuse Deck endured at the hands of his mother, and the affection and love Deck's former foster-care parents still had for him. *Id.*

16. *Id.* at 423.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

> As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.[21]

Proposed Instruction 13 was identical to this instruction excepting its numbering and its reference to Count III rather than Count I.[22] The two paragraphs missing from MAI-CR3d 313.44A that failed to print from the court's computer and that should have been included at the end of Instructions 8 and 13 provided:

> You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment. It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.[23]

Defense counsel, unaware that the printout from the court's computer was incomplete, offered no objections to the omission of these two paragraphs from Instructions 8 and 13 and, as a result, the trial court charged the jury with the incomplete versions of Instructions 8 and 13.[24]

During the jury's deliberation, it became clear that the jury did not understand the meaning of "mitigating circumstances," as the term was used in the jury instructions.[25] First, the jury sent a note asking for a legal definition of "mitigating circumstances."[26] When the judge replied that the term should be given its ordinary meaning, the jury sent a second note requesting a dictionary.[27] The judge denied this request.[28] During this time, defense counsel neither requested that "mitigation" be defined nor objected to the trial court's responses

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 424.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

to the jury's requests.[29] The jury subsequently returned a verdict fixing punishment at death on both counts.[30]

Defense counsel eventually discovered the omission of the final two paragraphs of MAI-CR3d 313.44A when one of the defense experts brought it to counsel's attention during preparation for the sentencing hearing, almost a month after the trial's conclusion.[31] Defense counsel brought the omission of the final two paragraphs to the judge's attention in the judge's chambers immediately before sentencing.[32] Defense counsel accepted responsibility for the mistake and urged that the only recourse was to conduct a new penalty phase trial.[33] The trial court rejected defense counsel's motion for a new penalty phase trial by stating that it was the obligation of defense counsel to submit jury instructions in proper form and that defense counsel had failed to show that the omission of the final two paragraphs resulted in prejudice against Deck.[34]

On direct appeal, the Missouri Supreme Court rejected Deck's claim that the omission of the last two paragraphs of MAI-CR3d 313.44A concerning mitigation constituted plain error.[35] Deck subsequently filed a Rule 29.15 motion for post-conviction relief in which he alleged ineffective assistance of counsel.[36] This motion was denied by the motion court.[37] Again, on appeal before the Supreme Court of Missouri, the state argued that Deck's motion had properly been rejected because a finding of no plain error also established a finding of no prejudice under the test for ineffectiveness of counsel[38] as stated by the United States Supreme Court in *Strickland v. Washington*.[39] Deck disputed the state's interpretation by arguing that it impermissibly resulted in an outcome-determinative standard for determining prejudice that had been expressly rejected by the Court in *Strickland*.[40] The Missouri Supreme Court agreed with Deck and held that a finding of no manifest injustice on direct plain error review does not necessarily establish a finding of no prejudice under the *Strickland* standard for granting post-conviction relief based on ineffective

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* The prosecuting attorney conceded that an error had been made but argued that the error should be allowed to stand because the defense counsel, and not the court, had committed the error. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 425.
37. *Id.*
38. *Id.*
39. 466 U.S. 668 (1984).
40. *Deck*, 68 S.W.3d at 426.

assistance of counsel.[41] Given this, the court found that even though it had previously determined that the submission of the incomplete jury instructions did not constitute plain error, the omission did constitute ineffective assistance of counsel that resulted in prejudice against Deck.[42] Given this holding, the court remanded the case for a new penalty phase trial.[43]

III. LEGAL BACKGROUND

Fixing the standard by which effectiveness of defense counsel can be measured has been a very difficult task for the courts.[44] In the years before the *Strickland v. Washington* decision, both the Eighth Circuit and Missouri courts employed inconsistent and often-changing tests for effectiveness of counsel.[45]

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41. *Id.* at 427 (abrogating Hamilton v. State, 31 S.W.3d 124 (Mo. Ct. App. 2000); State v. Kelley, 953 S.W.2d 73 (Mo. Ct. App. 1997); State v. Williams, 945 S.W.2d 575 (Mo. Ct. App. 1997); State v. Suter, 931 S.W.2d 856 (Mo. Ct. App. 1996); State v. Clark, 913 S.W.2d 399 (Mo. Ct. App. 1996); State v. Chapman, 936 S.W.2d 135 (Mo. Ct. App. 1996); State v. Davis, 936 S.W.2d 838 (Mo. Ct. App. 1996); State v. Leady, 879 S.W.2d 644 (Mo. Ct. App. 1994); State v. Anderson, 862 S.W.2d 425 (Mo. Ct. App. 1993); State v. McKee, 856 S.W.2d 685 (Mo. Ct. App. 1993); Hanes v. State, 825 S.W.2d 633 (Mo. Ct. App. 1992)).

42. *Id.* at 431-32.

43. *Id.*

44. *See, e.g.*, Gregory G. Sarno, Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R.4th 27 (1980).

45. *See* Thomas v. Wyrick, 535 F.2d 407 (8th Cir. 1976) (Henley, J., dissenting). Judge Henley noted that the standard for ineffectiveness of counsel in the Eighth Circuit had undergone numerous changes and had become a source of confusion. *Id.* at 419 (Henley, J., dissenting). While most older cases, such as *Cardarella v. United States*, 375 F.2d 222 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967), and *Scalf v. Bennett*, 408 F.2d 325 (8th Cir.), *cert. denied*, 396 U.S. 887 (1969), employed the "farce and mockery of justice" standard, this standard was briefly replaced by a "reasonable competency" standard on the strength of *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). *Id.* (Henley, J., dissenting). *McQueen*'s "reasonable competency" standard, however, did not fully replace the earlier "farce" standard, which resulted in a great deal of confusion within the Eighth Circuit. *Id.* (Henley, J., dissenting). *See* Garton v. Swenson, 417 F. Supp. 697, 707-30 (W.D. Mo. 1976) (Judge Oliver, in an appendix, provides a detailed discussion of the causes for the Eighth Circuit's confusion.).

Missouri courts at this time also had considerable difficulty fixing a standard for measuring ineffectiveness of counsel. In *State v. Schaffer*, 454 S.W.2d 60, 65 (Mo. 1970), the Missouri Supreme Court employed a "farce or a mockery of justice" test. One year later, however, the Missouri Supreme Court abandoned the "farce" test in favor of a standard of ineffectiveness requiring that a defendant seeking relief "demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client." Smith v. State, 473 S.W.2d 719, 722 (Mo. 1971). Still later, the standard of

The United States Supreme Court's decision in *Strickland* was intended to resolve these inconsistencies.[46]

A. *The* Strickland *Standard for Post-Conviction Relief Based on Ineffective Assistance of Counsel*

In *Strickland*, the United States Supreme Court resolved inconsistencies among the federal courts by setting a single standard for granting post-conviction relief based on allegations of ineffective assistance of counsel.[47] The *Strickland* standard has two components.[48] First, a defendant must show that the performance of the defendant's counsel was deficient.[49] Second, the defendant must show that this deficient performance prejudiced the defense.[50]

Under the first prong of the *Strickland* test, counsel's performance is considered deficient only if such representation falls below an "objective standard of reasonableness."[51] The reasonableness of counsel's conduct must be

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ineffectiveness employed by the Missouri Supreme Court was whether or not the defendant "was denied a fair trial." Sims v. State, 496 S.W.2d 815, 817 (Mo. 1973). Recognizing that Missouri courts and federal courts within the Eighth Circuit were applying inconsistent standards when adjudicating questions of effectiveness of counsel in post-conviction relief proceedings, the Missouri Supreme Court later adopted the Eighth Circuit's two-part standard for ineffectiveness of counsel as enunciated in *Reynolds v. Mabry*, 574 F.2d 978 (8th Cir. 1978), and *Witham v. Mabry*, 596 F.2d 293 (8th Cir. 1979). *See* Seales v. State, 580 S.W.2d 733, 736 (Mo. 1979). Under this standard, an accused was entitled to relief for ineffectiveness of counsel if (1) the attorney's conduct did not conform to the level of care and skill of a reasonably competent lawyer rendering similar services under existing circumstances and (2) the accused was prejudiced thereby. *Id.*

46. Strickland v. Washington, 466 U.S. 668, 686 (1984).

47. *Id.* The Court noted that:

> In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having provided a just result.

Id.

48. *Id.* at 687. If a defendant cannot satisfy both prongs of the *Strickland* standard, then "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

49. *Id.* Fundamentally, this component requires "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

50. *Id.*

51. *Id.* at 688. The *Strickland* Court was hesitant to provide an exhaustive list of guidelines for determining what is meant by an "objective standard of reasonableness."

judged in the light of the particular facts of a defendant's case, viewed as of the time of the counsel's allegedly deficient conduct.[52] Because the *Strickland* Court noted that this is a difficult evaluation to make, it required that judicial scrutiny of a defense counsel's performance "be highly deferential."[53] As a result, there is a strong presumption that counsel's allegedly deficient conduct "falls within the wide range of reasonable professional assistance" or "might be considered sound trial strategy."[54] Additionally, for a defendant to successfully claim ineffective assistance of counsel, the defendant must do more than make a general allegation of counsel incompetence.[55] He must identify specific acts or omissions that he claims are objectively unreasonable.[56] Furthermore, while counsel has a duty to investigate the law and facts relevant to a defendant's case, any decision not to investigate a matter of law or fact is directly assessed for reasonableness in view of all the circumstances, "applying a heavy measure of deference to counsel's judgments."[57]

Under the second prong of the *Strickland* test, even if a defendant can show that specific errors of defense counsel were unreasonable, the defendant must also then show that these errors actually had an adverse effect on the defense.[58] Under the second prong of *Strickland*, therefore, a defendant is required to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[59] The Court defines "reasonable probability" as "a probability sufficient to undermine

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Id. The Court noted that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* The Court did, however, note that a criminal defense attorney owes certain basic duties to his or her client. *Id.* Without intending to exhaustively define the obligations of defense counsel, the Court noted that defense counsel's basic duties included a duty of loyalty, a duty to avoid conflicts of interest, a duty to consult with the defendant on important decisions, a duty to keep the defendant informed of important developments in the defendant's case, and a duty to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.*

52. *Id.* at 690. The Court noted that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

53. *Id.* The Court noted that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.*

54. *Id.*

55. *Id.* at 690.

56. *Id.*

57. *Id.* at 691.

58. *Id.* at 693.

59. *Id.* at 694.

confidence in the outcome."[60] Thus, while it is not enough for the defendant to show that the alleged errors "had some conceivable effect on the outcome of the proceeding," the defendant is not required to show that the errors "more likely than not altered the outcome of the case."[61]

When a defendant challenges a conviction based on allegations of ineffective assistance of counsel, prejudice is found where there is a reasonable probability that the fact finder would have had a reasonable doubt as to the defendant's guilt absent counsel's errors.[62] Moreover, when a defendant is challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[63]

B. Missouri Courts' Application of Strickland

By the time the United States Supreme Court announced the two-part test for ineffective assistance of counsel in *Strickland*, the Missouri Supreme Court had already employed a substantially similar test for several years.[64] As a result, Missouri courts swiftly and uniformly recognized the two-pronged *Strickland* test as the standard for determining ineffectiveness of counsel and the existence

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60. *Id.* This "reasonable probability" test has its roots "in the test for materiality of exculpatory information not disclosed to the defense by the prosecution" and "in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." *Id.*

61. *Id.* at 693. The *Strickland* Court noted that both of these possible standards were inappropriate. *Id.* "Virtually every act or omission of counsel" would meet the test of having "some conceivable effect on the outcome of the proceeding." *Id.* Similarly, the Court noted that an outcome-determinative test, requiring that "counsel's deficient conduct more likely than not altered the outcome of the case," was also inappropriate. *Id.* In so deciding, the Court reasoned that "[t]he results of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

62. *Id.* at 695.

63. *Id.*

64. *See* State v. Chandler, 698 S.W.2d 844, 848 n.10 (Mo. 1985); Porter v. State, 682 S.W.2d 16, 19 (Mo. Ct. App. 1984). The test the Missouri Supreme Court was employing at this time was adopted in *Seales v. State*, 580 S.W.2d 733, 735 (Mo. 1979). The test for ineffective assistance of counsel under *Seales* required a showing that (1) counsel's performance did not conform "to the care and skill of a reasonably competent lawyer rendering similar services under the existing circumstances" and (2) the defendant's case was prejudiced by counsel's inadequate performance. *Id.* In *Chandler*, the Missouri Supreme Court stated that it was unable to detect "any significant difference" between the test for ineffective assistance of counsel in *Seales* and the test in *Strickland*. *Chandler*, 698 S.W.2d at 848 n.10.

of resulting prejudice.[65] Nevertheless, while *Strickland* unambiguously stated that an error need not be outcome-determinative to constitute prejudice against the defendant and warrant post-conviction relief, confusion concerning this standard soon surfaced in Missouri courts.[66] The origin of this confusion can be found in the misreading of the Missouri Supreme Court's decision in *Sidebottom v. State*.[67]

In *Sidebottom*, the defendant was convicted of first-degree murder and, following the jury's finding of aggravating circumstances, sentenced to death.[68] Upon direct appeal, the defendant contended that his trial counsel's failure to object to an exhibit, a "prisoner data" sheet that referred to a rape and burglary for which the defendant was not charged, constituted plain error.[69] When the defendant's case reached the Missouri Supreme Court for the first time, the court held that this failure to object did not constitute plain error.[70] After this ruling, the defendant reached the Missouri Supreme Court a second time by arguing that trial counsel's failure to object to the introduction of this "prisoner data" sheet constituted a denial of effective assistance of counsel under *Strickland*.[71] After reciting the *Strickland* standard for finding prejudice, the *Sidebottom* court made two declarations that Missouri courts would subsequently misread to mean that a finding of no plain error mandated a finding of no prejudice under *Strickland*.[72] First, the *Sidebottom* court, citing *O'Neal v. State*,[73] stated that "[i]ssues decided in the direct appeal cannot be relitigated on a theory of ineffective assistance of counsel in a post-conviction proceeding."[74] Second, the *Sidebottom* court declared that "*the bases* for the Court's finding of no manifest injustice on direct appeal serve now to establish a finding of no prejudice under the *Strickland* test."[75]

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65. *See* Deck v. State, 68 S.W.3d 418, 426 (Mo. 2002).

66. *Id.*

67. 781 S.W.2d 791 (Mo. 1989). Missouri decisions before the *Sidebottom* decision clearly recognized the United States Supreme Court's admonition in *Strickland* that the standard for prejudice was not outcome-determinative. *See, e.g.*, Trimble v. State, 693 S.W.2d 267, 274 (Mo. Ct. App. 1985) ("In defining the test for prejudice, the *Strickland* court . . . rejected, as a valid test for prejudice, that the error 'more likely than not altered the outcome of the case.'") (quoting *Strickland*, 466 U.S. at 693) (citations omitted).

68. *Sidebottom*, 781 S.W.2d at 794.

69. *Id.* at 796.

70. *Id.* The Missouri Supreme Court affirmed the finding of no plain error in *State v. Sidebottom*, 753 S.W.2d 915 (Mo. 1988).

71. *Sidebottom*, 781 S.W.2d at 796.

72. Deck v. State, 68 S.W.3d 418, 427 (Mo. 2002).

73. 766 S.W.2d 91, 92 (Mo. 1989).

74. *Sidebottom*, 781 S.W.2d at 796.

75. *Id.* (emphasis added).

These two statements did not stand for the proposition that a finding of no plain error required a finding of no prejudice under *Strickland*.[76] In *O'Neal*, the defendant's post-conviction claim for relief was based on attorney error that had been preserved at trial but was later determined not to be prejudicial on direct appeal.[77] The *O'Neal* court recognized that the standard for finding prejudice in the context of preserved error was lower than the standard for finding prejudice under either the plain error standard or the *Strickland* standard.[78]

Similarly, the *Sidebottom* court's conclusion was also not that an absence of plain error resulted in an absence of prejudice under the *Strickland* test.[79] The *Sidebottom* court simply concluded that the factual bases upon which the court had relied in concluding that there was no plain error were the same factual bases that the court considered to be relevant to decide if the *Strickland* test for prejudice was met.[80] Despite its somewhat confusing wording, *Sidebottom* clearly applied the *Strickland* test for prejudice, and after doing so, concluded that the defendant had failed to show "but for trial counsel's [error], there was a 'reasonable probability that the result would have been different.'"[81]

In later opinions, such as *State v. Nolan*[82] and *Clemmons v. State*,[83] the Missouri Supreme Court echoed *Sidebottom*'s statement that "the bases [for finding no plain error serve] to establish a finding of no prejudice under the *Strickland* test."[84] Later appellate opinions, however, took this language from

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76. *Id.* at 797.

77. *O'Neal*, 766 S.W.2d at 92.

78. *Id.* The Missouri Supreme Court noted in *Deck* that "[t]he standard for finding prejudice in the context of preserved error is lower than the standard for finding error under *Strickland*, and both are lower than the plain error standard." Deck v. State, 68 S.W.3d 418, 427 n.5 (Mo. 2002).

79. *Id.* at 426.

80. *Id.*

81. *Sidebottom*, 781 S.W.2d at 797 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The *Sidebottom* court's conclusion, while true to *Strickland*, was somewhat misleading:

> Under the reasoning applied in confronting the question of plain error on direct appeal, movant fails to show that, but for trial counsel's failure to object and then to request a mistrial, there was a "reasonable probability that the result would have been different." Movant thus fails to satisfy the prejudice prong of the *Strickland* test.

Id. (citing *Strickland*, 466 U.S. at 694).

82. 872 S.W.2d 99 (Mo. 1994).

83. 785 S.W.2d 524 (Mo. 1990).

84. *Nolan*, 872 S.W.2d at 104 ("Therefore, as in *Sidebottom*, on the facts and circumstances of the present case, the basis for finding no manifest injustice [and thus no plain error] defeats a finding of prejudice under the *Strickland* test for failure to preserve the claim of error."); *Clemmons*, 785 S.W.2d at 530 ("Although [the defendant] attempts to distinguish these claims because they were reviewed for plain error by this

Sidebottom, *Nolan*, and *Clemmons* out of context and simply concluded that "[a] finding that a defendant has not suffered manifest injustice under the plain error rule serves to conclusively establish a finding of no prejudice under the test for ineffective assistance of counsel."[85] Additionally, several appellate decisions, while not explicitly misstating *Sidebottom*'s holding, clearly lost sight of *Strickland*'s admonition that the standard of review for post-conviction relief based on ineffective assistance of counsel could not be outcome-determinative.[86]

Not every appellate opinion suffered from this confusion, however.[87] For example, the Missouri Court of Appeals in *State v. Sublett*[88] clearly recognized

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Court on direct appeal, [*Sidebottom*] held that the basis for this Court's finding of no manifest injustice on direct appeal served to establish a finding of no prejudice under the *Strickland* test.").

85. Hanes v. State, 825 S.W.2d 633, 635 (Mo. Ct. App. 1992) (citing *Clemmons*, 785 S.W.2d at 530). *Hanes* appears to be one of the earliest appellate decisions that misinterprets the holding of *Sidebottom* in this way. *See also* Hamilton v. State, 31 S.W.3d 124, 127 (Mo. Ct. App. 2000) ("[O]ur finding of no manifest injustice under the 'plain error' standard on direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland*."); State v. Williams, 945 S.W.2d 575, 583 (Mo. Ct. App. 1997) ("This court has already found that there was no plain error with regard to [defendant's] claim concerning the closing argument on direct appeal. A finding of no manifest injustice on direct plain error review establishes a finding of no prejudice for purposes of the *Strickland* test."); State v. Kelley, 953 S.W.2d 73, 91 (Mo. Ct. App. 1997) ("[O]ur finding of no manifest injustice under the 'plain error' standard on direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland*."); State v. Clark, 913 S.W.2d 399, 406 (Mo. Ct. App. 1996) ("Furthermore, because we determined that [counsel's mistakes] did not constitute plain error . . . appellant cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding. A finding of no manifest injustice under the 'plain error' standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland*."); State v. Chapman, 936 S.W.2d 135, 141-42 (Mo. Ct. App. 1996) ("[N]o manifest injustice under the plain error standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland*."); State v. Davis, 936 S.W.2d 838, 842 (Mo. Ct. App. 1996) ("A finding that no plain error occurred with regard to a claim raised on direct appeal establishes a finding of no prejudice under the *Strickland* test."); State v. Leady, 879 S.W.2d 644, 649 (Mo. Ct. App. 1994) ("[N]o manifest injustice on direct appeal serve[s] to establish a finding of no prejudice under the *Strickland* test."); State v. Neal, 849 S.W.2d 250, 257 (Mo. Ct. App. 1993) ("[A] finding of no manifest injustice on direct appeal serve[s] to establish a finding of no prejudice under the *Strickland* test.").

86. *See, e.g.*, State v. Suter, 931 S.W.2d 856, 868 (Mo. Ct. App. 1996); State v. McKee, 856 S.W.2d 685, 693 (Mo. Ct. App. 1993); Anderson v. State, 862 S.W.2d 425, 437 (Mo. Ct. App. 1993).

87. *See* Deck v. State, 68 S.W.3d 418, 428 (Mo. 2002).

88. 887 S.W.2d 618 (Mo. Ct. App. 1994).

the difference between the standards of review for plain error and for relief under *Strickland*.[89] Similarly, in *Kenner v. State*,[90] the court concluded that defense counsel's failure to object to certain evidence, while not rising to the level of plain error, did constitute ineffective assistance of counsel that resulted in prejudice against the defendant.[91] Likewise, other opinions rejected the erroneous application of *Sidebottom* found in *Clark* and elsewhere.[92]

As a result of the confusion among the appellate courts, prior to the decision in *Deck*, Missouri courts attempting to determine if defense counsel's errors resulted in prejudice were faced with two alternate and conflicting lines of precedent.[93] One line of precedent, exemplified by *Kenner*[94] and *Sublett*,[95] rejected the notion that a finding of no plain error on direct appeal required a finding of no prejudice under the *Strickland* test. These courts refused to adopt an outcome-determinative standard and heeded Justice O'Connor's admonition in *Strickland* that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."[96] A second line of precedent, on the other hand, exemplified by the decisions in *Hanes*[97] and *Williams*,[98] continued to read *Sidebottom*'s statement that "the bases for the Court's finding of no manifest injustice on direct appeal serve now to

89. *Id.* at 620. In *Sublett*, the court found that defense counsel's failure to object to comments made by the prosecution in closing argument did not constitute plain error on direct appeal, yet remanded the defendant's Rule 29.15 motion for an evidentiary hearing. *Id.* This conclusion, that a finding of no plain error did not necessarily resolve the issue of prejudice under *Strickland*, puzzled later courts erroneously applying *Sidebottom*. *See Clark*, 913 S.W.2d at 406 n.2. Regarding this determination in *Sublett*, the court in *Clark* noted "[h]aving thoroughly reviewed Missouri case law, we find *Sublett* to be an anomaly." *Id.*

90. 709 S.W.2d 536 (Mo. Ct. App. 1986).

91. *Id.* at 539-40.

92. *See, e.g.*, State v. Storey, 901 S.W.2d 886, 900-03 (Mo. 1995); State v. Meanor, 863 S.W.2d 884, 892 (Mo. 1993) (Robertson, J., concurring in part and dissenting in part) (recognizing distinction between inquiries into plain error and prejudice resulting from ineffective counsel); State v. Butler, 24 S.W.3d 21, 44-45 (Mo. Ct. App. 2000); *see also* Barnum v. State, 52 S.W.3d 604, 609 (Mo. Ct. App. 2001); State v. Johnson, 930 S.W.2d 456, 463 (Mo. Ct. App. 1996); State v. Estes, 902 S.W.2d 853, 857 (Mo. Ct. App. 1995); State v. Schlup, 785 S.W.2d 796, 800 (Mo. Ct. App. 1990).

93. Deck v. State, 68 S.W.3d 418, 428 (Mo. 2002).

94. *Kenner*, 709 S.W.2d at 539-40.

95. State v. Sublett, 887 S.W.2d 618, 620 (Mo. Ct. App. 1994).

96. Strickland v. Washington, 466 U.S. 668, 693 (1984).

97. Hanes v. State, 825 S.W.2d 633, 635 (Mo. Ct. App. 1992).

98. State v. Williams, 945 S.W.2d 575, 583 (Mo. Ct. App. 1997).

establish a finding of no prejudice under the *Strickland* test" as equating the plain error standard of review with the standard for prejudice under *Strickland*.[99]

IV. THE INSTANT DECISION

In *Deck v. State*,[100] the Missouri Supreme Court held that a finding of no manifest injustice on direct plain error review does not establish a finding of no prejudice under the *Strickland* test for post-conviction relief due to ineffective assistance of counsel.[101] This decision, the court concluded, was mandated both by *Strickland* and by the very different focuses of inquiries that were involved in making determinations regarding plain error, preserved error, and allegations of ineffectiveness of counsel.[102]

Under Missouri law, plain error can only serve as the basis for relief if it is more likely than not that the error was outcome-determinative.[103] In *Strickland*, the United States Supreme Court considered this outcome-determinative standard as one possibility for the standard of review for ineffectiveness of counsel in a post-conviction setting.[104] Ultimately, however, the *Strickland* Court rejected this standard of review, stating that "we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."[105]

In *Deck*, the Missouri Supreme Court agreed with the *Strickland* Court and attributed the erroneous applications of the *Strickland* standard in *Hanes*, *Williams*, and other similar Missouri cases to confusion concerning the reason why "standards of review of preserved and unpreserved error on direct appeal are different from each other, and why both are in turn different from the standard for review of a post-conviction motion."[106] The court then explained that the focus of inquiries into preserved error, unpreserved error, and allegations of

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99. State v. Sidebottom, 781 S.W.2d 791, 797 (Mo. 1989).

100. 68 S.W.3d 418 (Mo. 2002).

101. *Id.* at 427.

102. *Id.*

103. State v. Armentrout, 8 S.W.3d 99, 110 (Mo. 1999).

104. Strickland v. Washington, 466 U.S. 668, 693-94 (1984). The *Strickland* Court noted that an outcome-determinative standard had some appeal, stating that an outcome-determinative standard:

> has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence.

Id. (citations omitted).

105. *Id.* at 693.

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

ineffectiveness of counsel are different and, thus, warrant differing standards of review.[107]

The court noted that the standard of review for preserved error mandates reversal "only if the error was so prejudicial that it deprived the defendant of a fair trial."[108] Unpreserved error, however, requires a more exacting standard of review because the trial court "cannot normally be accused of error in its rulings, much less prejudicial error" if counsel failed to object and thus preserve the error for appellate review.[109] Nevertheless, appellate courts may, at their discretion, review instances of unpreserved plain error if the error was outcome-determinative and if a failure to review the error would result in manifest injustice.[110] The *Strickland* standard for finding prejudice appears quite similar, requiring a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[111] A "reasonable probability" under this standard is a "probability sufficient to undermine confidence in the outcome."[112]

The standards of review for preserved error and plain error, the court noted, both presuppose a fair and accurate proceeding likely to produce a reliable result.[113] The court contrasted this presumptively fair proceeding with a proceeding where a post-conviction motion has been filed alleging ineffective assistance of counsel.[114] A defendant who files a post-conviction motion alleging ineffective assistance of counsel, the court explained, is asserting "the absence of one of the crucial assurances that the result of the proceeding is reliable."[115] The court, therefore, asserted that the focus of review for ineffective assistance of counsel is fundamentally different than review for other error.[116] "The ultimate determination," the court noted, "is not the propriety of the trial court's actions with regard to an alleged error, but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel, such that this Court's confidence in the fairness of the proceeding is undermined."[117]

In the majority of cases, the court admitted, the theoretical difference in the standards of review for plain error and prejudice under *Strickland* will be of little

107. *Id.*
108. State v. Tokar, 918 S.W.2d 753, 761 (Mo. 1996).
109. *Deck*, 68 S.W.3d at 427.
110. *Id.* at 428-29.
111. *Id.* at 426.
112. *Id.*
113. *Id.* at 428.
114. *Id.*
115. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).
116. *Id.*
117. *Id.*

or no importance.[118] Usually, an error that is not outcome-determinative and, thus, does not meet the plain error standard for relief, will also fail to satisfy the *Strickland* test requiring a "reasonable probability" that the results of the proceeding would have been different without counsel's errors.[119] In other words, most cases would comport with the holding in *Sidebottom* that "the bases for the Court's finding of no manifest injustice on direct appeal serve now to establish a finding of no prejudice under the *Strickland* test."[120] Nevertheless, the court cautioned that, in a few instances, the distinction between the standards of review could produce different results.[121] Deck's case, the court reasoned, was one of these rare instances where the defendant was entitled to relief under *Strickland* despite the fact that counsel's mistakes did not rise to the level of plain error.[122]

In reaching its decision, the court first concluded that Deck satisfied the first prong of the *Strickland* test in that he had successfully shown by a preponderance of the evidence that his trial counsel was ineffective in offering jury instructions that omitted two paragraphs from MAI-CR3d 313.44.[123] These two paragraphs, the court reasoned, served the critical function of informing the jurors that they must consider circumstances in mitigation of punishment and that they need not be unanimous.[124] The court, therefore, held that the submission of incomplete jury instructions regarding the issue of mitigation, a critical issue in Deck's defense, deprived Deck of "reasonably effective assistance" of counsel.[125]

The court next found that the defense counsel's offer of incomplete jury instructions omitting critical information regarding mitigation resulted in prejudice under the *Strickland* standard for post-conviction relief.[126] In so concluding, the court pointed to "multiple circumstances" that created a reasonable probability that trial counsel's errors prejudiced the defense.[127] First, the court noted that Deck's main defense to the state's request for imposition of

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118. *Id.*

119. *Id.*

120. State v. Sidebottom, 781 S.W.2d 791, 796 (Mo. 1989).

121. *Deck*, 68 S.W.3d at 428.

122. *Id.* at 431.

123. *Id.* at 429.

124. *Id.*

125. *Id.* While the court conceded that counsel's actions should be judged by his or her overall performance, it noted that "the right to effective assistance of counsel 'may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.'" *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)). "The submission of faulty instructions on the critical issue of mitigation was a 'sufficiently egregious' error." *Id.*

126. *Id.* at 430.

127. *Id.* at 430-31.

the death penalty was the existence of mitigating circumstances in Deck's background.[128] Deck's trial counsel offered substantial evidence that Deck was abused as a child, lacked parental love, and continually moved from one foster home to another.[129] Further, the trial counsel attempted to show that Deck was capable of love by introducing evidence that Deck provided food for his younger siblings and bathed them when their mother neglected them.[130] Additionally, Deck's trial counsel offered evidence that Deck's former foster parents had loved him and had desired to adopt him but that Deck was instead returned to the custody of his abusive mother.[131] Because of this collection of evidence in support of mitigation, the court concluded that the two missing paragraphs of the instruction were "central to the pivotal defense offered by Mr. Deck."[132] Without these two paragraphs, the court reasoned, the jury had no guidance as to the need to balance the mitigating evidence with the aggravating circumstances.[133]

Additionally, the court concluded that the behavior of the jury clearly demonstrated their confusion concerning the issue of mitigation.[134] Not only had the jury sent a note to the trial judge stating that they were confused about the meaning of "mitigation," but they later requested a dictionary so they could look the term up for themselves.[135] This request, the court reasoned, demonstrated that the jury was focused on the issue of mitigation and confused as to its purpose and meaning in the jury instructions.[136]

Because mitigation was the major focus of Deck's defense to the state's request for the death penalty, and because the jurors were clearly focused on the issue of mitigation, the court held that the defense counsel's failure to provide a complete jury instruction addressing the issue of mitigation or to explain the concept of mitigation during voir dire satisfied the *Strickland* standard for prejudice.[137] The court, therefore, remanded the case for a new penalty phase trial.[138]

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128. *Id.* at 430.

129. *Id.* at 422-23.

130. *Id.* at 430.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 431.

135. *Id.* The Missouri Supreme Court noted that the trial judge's refusal to answer these requests was entirely proper. *Id.*

136. *Id.*

137. *Id.* at 430-31.

138. *Id.* at 432.

V. COMMENT

In *Deck v. State*, the Missouri Supreme Court did not create a new standard for finding prejudice under the test set out by the United States Supreme Court in *Strickland*. Rather, the court responded to the confusion that *Sidebottom* generated regarding the already complicated standard of review for allegations of ineffectiveness of co..nsel. Missouri courts, misguided by the wording in *Sidebottom* and similar decisions, had shifted the standard of review for post-conviction allegations of ineffective assistance of counsel from *Strickland*'s "reasonable probability" that "the result of the proceeding would have been different" to an outcome-determinative standard that required that counsel's errors "more likely than not" altered the outcome of the case.[139] The *Deck* decision simply corrected this error and restored the *Strickland* "reasonable probability" standard.[140]

By the *Deck* court's own admission, only in a very narrow group of cases will the *Strickland* standard of review lead to a different outcome than the standard applied on plain error review.[141] In the vast majority of cases, the court concluded, the outcome will be the same regardless of whether prejudice against the defendant is measured by the *Strickland* "reasonable probability" standard or the outcome-determinative plain error standard.[142] Ultimately, as even the court conceded, the difference between "reasonable probability" and "more likely than not" is minuscule.[143]

Perhaps the Missouri Supreme Court should have allowed this distinction in the applicable standards of review to continue its slow slide into oblivion. Even the majority in *Strickland* admitted that applying an outcome-determinative test for prejudice resulting from ineffective counsel has several advantages.[144] Chief among these advantages is clarity. Because courts are more practiced at applying an outcome-determinative standard and such a standard is inherently more understandable than the "reasonable probability" standard ultimately adopted by the *Strickland* Court, the goal of clarity would be best served by applying an outcome-determinative standard.[145] In fact, Justice Marshall, dissenting from the majority in *Strickland*, contended that the *Strickland* standard for prejudice was exceedingly difficult to apply and fundamentally unhelpful to

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139. *Id.* at 426.

140. *Id.* at 428.

141. *Id.* at 431.

142. *Id.*

143. *Id.*

144. Strickland v. Washington, 466 U.S. 668, 693-94 (1984).

145. *Id.* While courts must commonly apply the plain error standard, the "reasonable probability" test is less common and, thus, more likely to result in confusion. *See supra* notes 51-52.

a court seeking to determine if a criminal defendant's Sixth and Fourteenth Amendment right to effective assistance of counsel has been violated.[146] Many judges, attempting to divine the downright arcane differences between "reasonable probability" and "more likely than not," might very well look back on the decisions abrogated by *Deck* with more than a measure of fondness.

This confusion inherent in the *Strickland* standard for prejudice is not the standard's only flaw. The standard also creates a problem of fundamental fairness.[147] Why, after all, should a defendant in a capital case who has shown that defense counsel's performance fell below an objective standard of reasonableness, a standard which gives great deference to counsel's actions, also be required to prove resulting prejudice? Determining, after the fact, whether prejudice resulted from attorney error is a nearly impossible task "exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of [the] incompetence of [the] defense counsel."[148] For this reason, Justice Marshall, in his dissent in *Strickland*, argued that the requirement that a defendant demonstrate prejudice be abolished.[149]

The *Deck* court concedes that the significant constitutional difference between the death penalty and lesser punishments mandates a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment."[150] The *Deck* court, however, avoided the question of whether additional safeguards should be added to the *Strickland* test, either by abolishing the prejudice requirement altogether, as Justice Marshall urged, or by modifying the test.

Although most state courts have chosen to follow *Strickland* closely, at least one court has found, on state constitutional grounds, that greater protections must be offered to criminal defendants who can demonstrate ineffectiveness of counsel.[151] The Hawaii Supreme Court has replaced *Strickland*'s prejudice

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146. *Id.* at 707-08 (Marshall, J., dissenting).

147. *Id.* at 710 (Marshall, J., dissenting).

148. *Id.* (Marshall, J., dissenting).

149. *Id.* (Marshall, J., dissenting). Justice Marshall concluded:

> In view of all these impediments to a fair evaluation of the probability that the outcome of the trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

Id. (Marshall, J., dissenting). Justice Marshall is not alone in his criticism of the prejudice requirement of the *Strickland* standard. *See also* Amy R. Murphy, *The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179 (2000).

150. Deck v. State, 68 S.W.3d 418, 429 (Mo. 2002) (quoting Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980)).

151. *See* State v. Aplaca, 837 P.2d 1298, 1305 (Haw. 1992).

requirement with a requirement that counsel's errors "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."[152]

In spite of all this, the *Deck* decision is a step, albeit a small one, in the direction of increasing fairness to criminal defendants who are convicted, and possibly executed, despite assistance of counsel that does not fall "within the wide range of reasonable professional assistance."[153] As a result of the decision, criminal defendants who can demonstrate ineffective assistance of counsel face a slightly lightened burden when trying to demonstrate that counsel's errors prejudiced their defense.

VI. CONCLUSION

In *Deck v. State*, the Missouri Supreme Court resolved the conflict that had arisen following the misinterpretation of *Sidebottom* in later appellate cases.[154] The abrogation of *Hanes* and other cases which equate a finding of no plain error with a finding of no prejudice will certainly make the determination of whether there is prejudice under the second prong of the *Strickland* test more difficult for Missouri courts. Nevertheless, this redrawing of the line between plain error and prejudice under the *Strickland* test will hopefully promote greater fairness for criminal defendants who are convicted or sentenced to death while represented by counsel so deficient as to not be functioning as the counsel guaranteed by the Sixth Amendment. While the decision in *Deck* certainly pushes the law in the direction of greater fairness in capital punishment cases, hopefully further clarification of the prejudice standard will be forthcoming in the near future.

THOMAS L. AZAR, JR.

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152. *Id.* The court stated:

> [T]he test for measuring ineffective assistance of counsel which this court adopted . . . differs from the federal standard enunciated by the Supreme Court in *Strickland v. Washington* . . . . Because the *Strickland* test has been criticized as being unduly difficult for a defendant to meet, we continue to follow the standard first enunciated in *Antone* because under Hawaii's Constitution, defendants are clearly afforded greater protection of their right to effective assistance of counsel.

Id. at 1305 n.2.

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

154. *See supra* note 85.