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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP002368-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

SAMUEL R. OSORNIO,

Defendant-Appellant.

RESPONSE IN OPPOSITION TO
PETITION FOR REVIEW

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INTRODUCTION

After deliberating for several hours on charges of homicide by delivery of heroin and delivery of heroin, the jury told the court it had reached a conclusion on the delivery of heroin charge but could not reach a conclusion on the homicide charge. The court asked the parties to consider what they should do if the jury remained deadlocked, and only then did defense counsel realize that delivery of heroin was a lesser included offense of homicide by delivery of heroin. Defense counsel brought the error to the court's attention, and in response the court gave the jury additional instructions, and when the jury continued to deliberate, gave them yet another set of instructions; ultimately the jury returned guilty verdicts on both charges. At the postconviction level and on appeal, the parties agreed that the failure to recognize that one charge was a lesser included offense constituted deficient performance, and the only question on appeal was whether the error prejudiced Osornio.

The court of appeals considered the facts of the case and the parties' arguments and concluded that Osornio met his burden to show that there was a reasonable probability that the result in his case would have been different absent counsels' deficient performance. *State v. Osornio*, No. 2024AP2368-CR, 2025 WL 2049460 (Wis. Ct. App. July 18, 2025).

The state claims that the court found prejudice only by improperly shifting the burden of proof to the state and diluting the “reasonable probability” standard. Based on these claims, the state argues that this case would serve as a “useful lodestar” and would provide this Court with the opportunity to “check” lower courts from erroneously lowering the bar for prejudice. (State’s pet. at 8). The state argues this is necessary because it claims that, *yet again*, the court of appeals has misapplied the *Strickland*¹ standard for prejudice. (State’s pet. at 7).

The state cites to the court of appeals’ decision in *State v. Arrington*, 2021 WI App 32, 398 Wis. 2d 198, 960 N.W.2d 459 for the proposition that “a scant four paragraphs” are inadequate for purposes of analyzing prejudice; it notes this Court’s analysis in its review of *Arrington* is the correct way to analyze prejudice. (State’s pet. at 7); *see State v. Arrington*, 2022 WI 53, ¶¶74-80, 402 Wis. 2d 675.

Like this Court in *Arrington*, the court of appeals explained that prejudice required a finding that it was reasonably probable that the outcome of the trial would have been different absent counsels’ error. *Osornio*, 2024AP2368-CR, ¶¶64, 73; *Arrington*, ¶74. The court explained that a reasonable probability was a probability sufficient to undermine confidence in the outcome. *Osornio*, 2024AP2368-CR, ¶45; *Arrington*, ¶74. Like in *Arrington*, the court considered the totality of the evidence that was before the jury.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

Osornio, 2024AP2368-CR, ¶67; *Arrington*, ¶74. Unlike in *Arrington*, where this Court noted the state’s many witnesses who undermined *Arrington*’s defense, here the court noted that here there were potentially viable defense theories, and the court noted that “[t]here is no room for an argument that *Osornio* cannot show prejudice because the evidence was so strong that the jury would have convicted *Osornio* of reckless homicide regardless of the lesser-included offense issue.” *Osornio*, 2024AP2368-CR, ¶67; *see Arrington* ¶¶75-80. The court explained that *Osornio* was required to prove that it was reasonably likely the result would have been different absent the deficient performance, and that the likelihood of a different result needed to be substantial, not just conceivable. *Osornio*, 2024AP2368-CR, ¶73; *Arrington*, ¶74. Applying those standards, the court concluded that there was a substantial, and not merely a conceivable, likelihood that a jury that was properly instructed from the start would have reached a different result. *Osornio*, 2024AP2368-CR, ¶73.

Other than *Arrington*, the state cites to only one other case in which it claims the court of appeals erred in applying the prejudice standard, in spite of its recognition that defendants frequently raise ineffective assistance of counsel claims. (State’s pet. at 7).

Contrary to the state’s assertions, the court of appeals applied the proper standard of law in this case: it neither shifted the burden to the state nor misapplied the standards for prejudice outlined in

Strickland and Harrington v. Richter, 562 U.S. 86 (2011). The state's request is based on its dissatisfaction with the outcome, not on a need for this Court to "clarify or harmonize the law." Wis. Stat. § (Rule) 809.62(1r)(c)3.

This Court should deny the petition for review.

ARGUMENT

I. The court of appeals properly held Osornio to his burden of proving prejudice.

The state argues that the court of appeals inverted the burden of proof and "rested its conclusion on the State's failure to disprove prejudice rather than Osornio's ability to prove prejudice." (State's pet. at 14). The state appears to believe that the court's discussion of the state's argument as unpersuasive somehow equates to burden shifting. It does not. Instead, the court of appeals properly considered the conflicting and adversarial arguments from both sides and found that Osornio had met his burden and the state's arguments to the contrary were unavailing.

During briefing, Osornio argued that if he had not been deprived of the benefit of a properly instructed jury, there was a reasonable probability that he would not have been convicted of reckless homicide. *Osornio*, 2024AP2368-CR, ¶41. The court agreed: "[a]fter discussing legal standards and additional background, we explain why we agree with Osornio to the extent that he has shown that there is

a reasonable probability that he would not have been convicted of reckless homicide if the jury had been given the lesser-included instruction from the start.” *Id.*, ¶42.

The court’s first paragraph of analysis on the issue of prejudice reiterated that Osornio had shown “at least a reasonable probability” that if counsel had not been deficient, the result of the trial would have been different, and concluded that this undermined the court’s confidence in the outcome of the trial. *Id.*, ¶58.

The court explained that based on the jury’s 3:45 note, it was very likely that the hypothetical verdict would have been guilty on the delivery of heroin. *Id.*, ¶65. Although the state takes issue with the use of “hypothetical,” the state’s request for review based on this language neglects to consider the court’s next, explanatory sentence: “This is because, if the jury’s agreement had been for a verdict of not guilty on Count Two, then the jury should have immediately recognized that it was obligated to return a verdict of not guilty on Count One, since all of the elements of County Two were included in Count One.” *Id.*, ¶65. This makes sense in the context of the facts of the case, as noted by the court, that the 3:45 note stated the jury had reached a “conclusion” on Count Two, the delivery of heroin charge.

Immediately after this, the court properly explained its analysis of prejudice while considering the totality of the evidence that was before the factfinder, as required by *Strickland. Id.*, ¶66.

In addressing the totality of the evidence, the court acknowledged the state's argument that the jury continued to deliberate after being given additional instructions, and noted that "these extended periods of deliberation increase the probability that, even if the jury had been given the lesser-included instruction from the start, it would have returned a guilty verdict on Count One alone at some point." *Id.*, ¶70. But the court did not find the state's argument compelling, noting that the jury's efforts "[did] not reduce to the level of mere conceivability or insubstantiality the probability that [the jury] would have returned a guilty verdict on Count Two alone." *Id.*, ¶70.

In other words, in considering the totality of the circumstances presented by two adversarial parties, the court considered whether the fact that the jury continued to deliberate after being given additional instructions meant that Osornio could not meet his burden that there was a reasonable probability of a different result if the jury had been properly instructed from the outset. *Id.*, ¶70. The fact that the court considered the state's argument but concluded that it did not persuade them that Osornio did not meet his burden is not burden shifting; rather, it shows only that the court considered the state's argument. As the court explained multiple times

throughout its decision, the court found that Osornio met his burden of proving prejudice. *Id.*, ¶¶42, 58, 74.

Given that the court of appeals properly applied the long-standing *Strickland* precedent when addressing prejudice, there is no additional guidance necessary for this Court to give.

II. The court of appeals did not “dilute” the “reasonable probability” standard.

The state also argues that the court of appeals “overread the requirement that a ‘reasonable probability’ be more than ‘conceivable.’” (State’s pet. at 14). The state argues that the court treated prejudice as an “either or” proposition: either the prejudice was conceivable, which was insufficient, and that anything more than conceivable met the standard for reasonable probability. (State’s pet. at 15.)

According to the state, although the court found that there was a substantial likelihood that the jury would have reached a more favorable result for Osornio absent counsels’ deficient performance, this conclusion was based on the court’s “misunderstanding of what constitutes ‘substantial.’” (State’s pet. at 15.) The state latches on to the language in the court’s opinion that the jury’s note “create[d] a substantial probability that the jury might have returned” a more favorable verdict. (State’s pet. at 15). The state argues that the court equated “somewhat more likely” and “somewhat less likely” outcomes, and in doing so, ran afoul of *Richter*. (State’s pet. at 15-16).

The state fails to consider the entirety of what the court said:

For these reasons, we disagree with the circuit court's conclusion that the record contains "no indication" that the jury "exhausted all reasonable efforts to agree on the reckless homicide charge after deliberation of about three hours, after factoring in time for lunch." The jury's unqualified statements in the 3:45 p.m. note create a substantial probability that the jury might have returned a verdict on Count Two alone by that point, which would have left the court with no reason to give the *Allen* instruction. It is true that, by all appearances, the jury dutifully resumed deliberations after receiving the *Allen* instruction, following its direction to redouble the jury's efforts at reaching one or more verdicts. But again, the fact of extended subsequent jury deliberations, which eventually produced two guilty verdicts, is not necessarily inconsistent with a reasonable probability that, had the jury received the lesser-included instruction from the start, it would have returned a guilty verdict on Count Two alone.

Osornio, 2025 WL 2049460, ¶71. The court continued:

The circuit court essentially conceded as much when it stated in its written decision on the postconviction motion that it appeared to be "equally plausible" either way as to what the jury might have done if it had been given the lesser-included instruction from the start. We need not decide whether it is somewhat more likely, or perhaps somewhat less likely, that the jury under those circumstances would have deadlocked on

the greater offense or instead would have returned a verdict of guilty on that offense. Either way, our confidence in the outcome is undermined.

Id., ¶72.

Despite the state's attempt to cherry pick language from the decision, the court here properly concluded that *even if* it was somewhat less likely that the jury would have reached a conclusion only on Count Two had they been properly instructed from the outset, the court's conclusion was the same: there was a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors. This is exactly what *Strickland* requires. *Strickland*, 466 U.S. at 694.

In order to find prejudice, the court was not required to find that the jury *absolutely* would have returned a verdict on Count Two alone, based on its note that it had reached a conclusion on that charge. As correctly noted by the court of appeals in this case, Osornio was required to prove that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Osornio*, 2025 WL 2049460, ¶45. The court noted at the beginning of its prejudice analysis that Osornio met the reasonable probability standard. *Id.*, ¶24. The court explained:

We conclude that it is reasonably probable that the outcome of Osornio's trial would have been different if defense counsel had taken the following simple steps, consistent with defense

counsel's postconviction hearing testimony, which was credited by the circuit court. Given that the prosecution decided to pursue both charges at trial, counsel should have called the multiplicity problem to the attention of the circuit court and requested the lesser-included instruction well before counsel eventually took these steps. If that had happened, there is at least a substantial likelihood that the jury would have returned a verdict on the heroin delivery count alone.

Id., ¶64.

Contrary to the state's assertion, the court found that there was at least a substantial likelihood of a different outcome, which is consistent with the precedents of this Court and the US Supreme Court. There is no need for this Court to accept review as the court of appeals applied the correct standard in this case. *Id.*, ¶73.

III. The court applied the correct standard and found that Osornio was prejudiced by defense counsel's deficient performance.

As its final argument in support of its petition, the state claims that if the court of appeals had accepted the state's interpretation of the jury's 3:45 note and agreed that the circuit court's subsequent jury instructions were adequate, Osornio would not have been able to prove that he was prejudiced by his counsel's deficient performance. (State's pet. at 16-17). And although the state couches this as a burden of

proof issue, the state is asking this Court to error correct a decision it disagrees with.

The court of appeals properly considered and rejected the state's argument regarding the note. *Osornio*, 2024AP2368-CR, ¶¶69-70. The court of appeals interpreted the note to mean that the jury had reached a deadlock on the reckless homicide charge. *Id.*, ¶¶49, 64-66. The court of appeals further explained its reasoning as to why the jury's continued deliberations did not lead the court to conclude that there was not a reasonable probability of a different outcome absent counsels' deficient performance. *Id.*, ¶71.

As throughout its decision, the court of appeals held *Osornio* to his burden to show that there was a reasonable probability of a different result absent his counsels' deficient performance and ultimately agreed with him that there was.

CONCLUSION

The court of appeals did not shift the burden to prove prejudice to the state and used the proper standard in concluding that Osornio was prejudiced by defense counsels' deficient performance. This Court should deny the state's petition for review.

Dated this 20th day of August, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,492 words.

Dated this 20th day of August, 2025.

Signed:

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