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IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Respondent, vs. RONALD BRUCE BIGGER, Petitioner.	S.Ct. Case No. CR-20-0383-PR Court of Appeals No. 2-CA-CR 2019-0012-PR (Pima County Superior Court Cause No. Cr-20043995-002) **BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER**

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INTRODUCTION

A fair trial is the *sine qua non* of our criminal justice system, and the Sixth Amendment's guarantee of the effective assistance of counsel is at the core of our system for providing fair trials. Claims that this right was violated—claims of ineffective assistance of counsel ("IAC")—are ubiquitous in postconviction proceedings. Despite significant discussion of the issue in caselaw, the standards for what constitutes effective representation have remained difficult to define and apply. For this reason, Arizona appellate courts' statements in this area must be careful and precise. In this case, the opinion of the Court of Appeals (COA) lacks precision and creates a grave risk that trial courts may rely on it to deny meritorious Sixth Amendment claims. This Court should grant review to clarify that unconstitutionally deficient performance can occur in any area of representation, even those generally governed by strategy, and that defendants may, but need not, present extrinsic proof of prevailing professional norms.

INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting

the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ submits this brief in support of Mr. Bigger because the Sixth Amendment right to counsel is the very core of AACJ's mission and of our criminal justice system, and it is essential that Arizona courts fully and fairly consider claims that that right has not been respected. Appellate courts' formulation of the standards for claims of ineffective assistance of counsel can have a massive impact on how trial courts evaluate such claims, and it is imperative that the law in this area be consistent, clear, and correct.

ARGUMENT

Although the COA's opinion ultimately appears to recognize that errors on matters generally committed to strategic judgment may lead to constitutionally deficient representation and that there is no *per se* requirement that defendants submit an affidavit to establish prevailing professional standards, its language is inconsistent and unclear, and it contains passages that suggest the opposite on both issues, creating a grave risk of uncertainty and misinterpretation by trial courts.

I. The Court Should Clarify That Defendants Are Entitled to Reasonable Representation Even in Areas Where Attorneys Have Discretion.

The COA's opinion risks significant confusion in its use of the terms "strategy" and "strategic." This Court should clarify that ineffective assistance can occur in any aspect of a case, including those generally committed to the lawyer's discretion, although the claim does not arise simply by virtue of an attorney's choosing one course over another with the aim of advancing the defendant's case.

Discretion vs. Tactics

There are many ways a defense lawyer can go wrong in preparing and presenting a case. As this Court recognized long ago in *State v. Watson,* 134 Ariz. 1, 4 (1982), "every defense attorney would be expected to file pre-trial motions when the facts raise issues concerning the voluntariness of statements, the legality of searches, or the suggestiveness of an identification," and failure to do so would constitute ineffective assistance. These matters are relatively straightforward. Other areas are not so black and white, especially where the presentation of a case to the jury is involved—defense attorneys must exercise their professional judgment and make choices about what is most likely to be effective concerning things like what line of argument to pursue, which witnesses to call, and whether to make certain objections. Similarly, while some areas must be covered in any competent criminal

investigation, once basics are accounted for, attorneys must decide which avenues are worth pursuing.

Although these matters entail significant discretion, they, too, are governed by professional norms. *See, e.g., Strickland v. Washington,* 466 US. 668, 699 (1984) (choice to argue particular mitigating factor was "well within the range of professionally reasonable judgments"); *State v. Nash,* 143 Ariz. 392 (1985) (assessing reasonableness of decision to submit a death penalty case to the judge in particular circumstances); *Wiggins v. Smith,* 539 U.S. 510 (2003) (finding counsel's failure to conduct a sufficient mitigation investigation unreasonable); *Williams v. Taylor,* 529 U.S. 362 (2000) (same). Ultimately, all choices by counsel, whether on elementary matters or matters of strategy, must be reasonable under prevailing professional standards.

At the same time, central to IAC litigation is the principle that simply choosing one possible course over another, even if, in hindsight, the choice turns out to have been unsuccessful, does not establish ineffective assistance. *See Strickland,* 466 U.S. at 689 ("It 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."). This principle is often phrased in terms of "strategy" or "tactics," terms that serve to distinguish informed, intentional

choices (regardless of their success) from true errors rooted in ignorance, misunderstanding, neglect, or malfeasance. *See, e.g., State v. Smith,* 244 Ariz. 482, 485 ¶ 10 (App. 2018) ("[W]e cannot agree counsel made a reasoned, tactical decision to forgo raising the curtilage issue."); *State v. Goswick,* 142 Ariz. 582, 586 (1984) ("defendant must show that counsel's decision was not a tactical one . . ."); *State v. Pandeli,* 242 Ariz. 175, 184 ¶ 23 (2017) ("We conclude the decision not to present further documentation of brain injury and dysfunction was a strategic choice and did not constitute IAC.").

Confusion arises when courts refer to the realms in which lawyers have discretion, and thus may make any number of choices that would be reasonable under prevailing professional norms, as "strategy," because the word is being used in two ways: to describe the discretionary nature of certain choices attorneys must make in defending a case, and also to distinguish particular informed, intentional, goal-directed decisions from actions resulting from misunderstanding, inattention, or similar error. Thus, a decision could be a "matter of strategy," but the choice would still only be "strategic" or "tactical" if it was made in the exercise of informed, reasoned professional judgment. An attorney could choose a given line of argument not because he had determined in the circumstances it was the best shot for winning the case, but because he was unaware of an important piece of evidence, or because he was mistaken about the admissibility of important testimony, or for no

comprehensible reason at all.[1] While in a sense choice of argument remains a "matter of strategy" in that a lawyer could reasonably choose any number of lines of argument, that particular unreasonable choice would certainly not be considered a strategic or tactical one. *See Roe v. Flores-Ortega,* 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.") Maintaining this distinction between the discretionary nature of a decision to be made and the intentional or tactical nature of a particular choice is crucial to protecting defendants' right to reasonably competent professional assistance in the hugely consequential aspects of a defense that fall within the attorney's discretion. No matter what choice is at issue, it must, at the end of the day, be reasonable.

The Opinion Below

The COA began its IAC analysis by stating that several of the claims "focus on strategic choices by trial counsel," before summarizing Bigger's claims about the line of defense presented and an expert witness called. COA Op. ¶ 21. It is unclear whether the COA meant that these areas—what to argue and which witnesses to

[1] The COA appeared to draw a distinction between IAC claims premised on a mistake of law and other instances of unreasonable choices by attorneys. The law does not support such a distinction. If an attorney's actions were unreasonable under prevailing professional norms, it does not matter if the reason for the attorney's behavior was negligence, mistake of law, malfeasance, or any other reason. The result vis-à-vis the defendant is the same, and that is what matters in terms of the defendant's constitutional rights.

call—are generally matters of strategy, or that in this case, those choices were made intentionally as a trial tactic in an attempt to secure an advantage. In fact, it appears the COA may have been making no distinction between the two, suggesting—erroneously—that no choice made in an area generally committed to counsel's strategy could ever constitute deficient performance.

Indeed, the COA went on to state that "'[m]atters of trial strategy and tactics are committed to defense counsel's judgment' and *cannot serve* as the basis for a claim of ineffective assistance of counsel." COA Op. ¶ 21 (emphasis added; internal citation omitted). While this statement comes from one of this Court's earlier cases, *State v. Beaty,* 158 Ariz. 232 (1988), it was clearly not intended to foreclose all IAC claims related to calling or not calling witnesses,[2] and this Court should not allow casual repetition of that language to give rise to a rule that was never intended. Indeed, cases both before and after *Beaty* clarify that "disagreements as to trial strategy will not support an ineffectiveness claim *as long as the challenged conduct could have some reasoned basis*." *Goswick*, 142 Ariz. at 586 (emphasis added; internal citation omitted); *see also Pandeli*, 242 Ariz. at 183 (rejecting IAC claim based on failure to cross-examine because it "was a strategic decision *that defendant has not demonstrated falls below the level expected of a reasonably competent*

[2] Notably, *Beaty*, was explicitly resolved on prejudice grounds, without a determination about performance.

defense attorney" (emphasis added). Reasonableness is *always* required. The U.S. Supreme Court also made this reasonableness requirement crystal clear in its seminal ineffective assistance case, *Strickland v. Washington*: "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 at 690-91. These cases clarify that simply being a matter of strategy is not enough; the choice, be it a straightforward one or a discretionary one, must still be reasonable, and the Court must consider whether it was within reasonable professional norms.

The COA here ultimately did not say it was automatically rejecting the claims because they concerned line of argument or choice of witness, but rather purported to consider whether "counsel's decisions, even if ultimately unsuccessful, were the result of a lack of experience or preparation" (COA Op. ¶ 22). This is the wrong standard; whether an action resulted from inexperience or lack of preparation is not the test for whether counsel's representation was constitutionally sufficient. Those are two reasons why an attorney might take an unreasonable action, but they are certainly not the only possible reasons. An experienced and prepared attorney might forget what she intended to do, or suffer a medical problem that impedes her performance, or come to court drunk, or simply suffer a lapse in judgment. The COA's language creates the risk that trial courts will either reject all claims in areas like witness selection simply because they are typically matters of strategy, or reject

decisions by experienced lawyers without comparing the particular decision in the particular case to prevailing professional norms to assess its reasonableness. This Court should grant review to avoid this misapprehension.

II. Judges Can Assess the Reasonableness of Attorneys' Actions Themselves.

The second IAC-related issue in this case concerns the nature of the Court's assessment of counsel's performance. There are two closely related layers here: what needs to be in a Rule 32 petition to state a colorable claim, entitling the petitioner to a hearing where he can present evidence to prove the violation, and what is necessary to prevail on the claim on the merits.

Nature of the Determination

While the objective nature of the performance standard "allow[s] courts to consult various sources" to assist in the determination of whether an attorney's action was reasonable as a constitutional matter, *Nash,* 143 Ariz. at 397, the applicable professional norm is not, as in a civil professional liability lawsuit, a separate element that requires evidentiary proof to state a claim. Rather, under the Sixth Amendment, the Court must determine two things: whether the attorney's representation was reasonable in the context, and if not, whether that failure prejudiced the defendant.

By contrast, in medical malpractice claims, as a matter of common law, "Arizona courts have long held that the standard of care normally must be established by expert medical testimony," and "a plaintiff cannot satisfy the burden of proving a required element of the tort in the absence of a very specific kind of evidence." *Seisinger v. Siebel,* 220 Ariz. 85, 94, 95 ¶¶ 33, 37 (2009). Indeed, there is even a statute defining the qualifications required for the expert providing this necessary testimony. *See* A.R.S. § 12-2604. These are substantive requirements of a state law tort claim, rooted in policy concerns such as the desire "to improve the malpractice climate in our state, encourage physicians to practice here, and lower medical malpractice rates." *Seisinger,* 220 Ariz. at 92 n.2.

Sixth Amendment claims require a completely different sort of inquiry. Although they share some superficial similarity with professional liability claims—an evaluation of a professional's actions relative to what would be expected—the question in an IAC claim is ultimately about the defendant's constitutional rights, not the attorney's fault. And unlike medical decisions, the actions of lawyers are the province of the courts—success in court is the ultimate goal of legal representation, and an important part of an attorney's job is attending to the requirements and procedures of the court itself. Judges are accordingly well placed to assess the reasonableness of an attorney's actions. This is in sharp contrast to areas where a

standard of care is a factual matter, often for a jury, entirely independent of the court's own understanding.

The cases confirm that this Court and the United States Supreme Court have long recognized courts' ability to themselves assess the constitutional sufficiency of the representation afforded a defendant. In *Nash,* 143 Ariz. 392, the case where this Court first adopted *Strickland'*s modern standard of prevailing professional norms, the Court identified sources courts could consult, but ultimately, it assessed counsel's performance itself, without reference to any external authority. *Id.* at 399. Indeed, *Strickland* itself explains that there can be no "mechanical rules," and "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged"—something courts are uniquely qualified to assess. 466 U.S. at 696. The *Strickland* Court, like the *Nash* Court, ultimately offered its assessment of counsel's performance in the case before it without reference to an expert or any other external source. 466 U.S. at 699. The message is clear: such sources may be helpful, especially in close cases, but they are not required.

In this case, the COA held that "a defendant must do more than disagree with, or posit alternatives to, counsel's decisions to overcome the presumption of proper action." COA Op. ¶ 23. There is nothing necessarily wrong with this statement, but in the context in which it appears, it wrongly implies that at least where discretionary choices are concerned, the "something more" must come from an expert.

Specifically, it follows the COA's observation that the trial court "noted Bigger had not offered 'an affidavit from an expert witness' to support his claims or otherwise shown that counsel's decisions, even if ultimately unsuccessful, were the result of a lack of experience or preparation. We agree." COA Op. ¶ 22. As a whole, the COA opinion could easily be read to suggest that extrinsic evidence of the prevailing professional norms is required even to state a viable claim. The Sixth Amendment requires no such thing; a petition or brief could simply explain how the attorney's decision was not just unsuccessful, but also unreasonable. The Court would then decide whether it agreed the decision was unreasonable, and could consider anything presented that might be helpful in making that determination.

Requirements for the Petition

On the question of what must be included in a Rule 32 petition to state a colorable claim for IAC, again a comparison with malpractice actions is helpful. When asserting a malpractice claim, plaintiffs must immediately produce at least a preliminary expert opinion or face dismissal—but that is because the legislature explicitly requires it, as a matter of policy. A.R.S. § 12-2603. That requirement didn't exist without the statute, and there is no such statute or rule concerning IAC claims in Rule 32 petitions. It would be an entirely different matter for a court to

refuse to take evidence on a plausible constitutional claim because that evidence was not produced in the first filing.

Indeed, the very case cited by the COA, *State v. Nash,* 143 Ariz. 392, specifies that expert testimony could be considered by "trial judges conducting *hearings* pursuant to Rule 32" (emphasis added). It does not say trial judges determining whether even to hold such hearings. Expert opinions and other external sources are most helpful in close cases, where the Court may desire assistance in determining what attorneys in the field would consider reasonable. But by definition, if the case is close, the claim is colorable. If the Court is in a position where an expert opinion might help, it is required to hold an evidentiary hearing, whether the petition included an affidavit or not.

CONCLUSION

Given the foundational nature of the right to counsel and the COA's unclear and misleading statements on the subject, this Court should grant review or at the very least depublish the opinion to avoid creating misapprehensions in trial courts about the standards and procedures for evaluating IAC claims. Accordingly, AACJ urges the court to grant review and reverse the dismissal of the petition for post-conviction relief.

RESPECFULLY SUBMITTED this 3rd day of February, 2021

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