

**IN THE SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA,

Plaintiff/Respondent,

v.

RONALD BRUCE BIGGER,

Defendant/Petitioner.

No. CR-20-0383-PR

Court of Appeals (Division 2)
No. 2 CA-CR 2019-0012-PR

Pima County Superior Court
No. CR-20043995-002)

**BRIEF OF AMICUS CURIAE
ARIZONA PUBLIC DEFENDER ASSOCIATION
IN SUPPORT OF PETITIONER BIGGER**

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INTRODUCTION

The right to post-conviction review is an important safeguard to protect individuals from ineffective assistance of counsel (IAC). The Arizona Public Defender Association (APDA) files this Amicus Brief asking that the Court accept review and grant relief because the opinion below arguably created a new requirement that IAC claims must be supported by a standard of care expert at the petition stage. This is not required by the Rules, would increase the cost of indigent post-conviction litigation by millions of dollars, and will create an undue risk that meritorious claims would be improperly dismissed.

Alternatively, this Court should depublish the opinion under Rule 111(g) of the Rules of the Supreme Court of Arizona.

INTERESTS OF AMICUS CURIAE

APDA is a Statewide organization of indigent defense agencies. Through the member indigent defense agencies, APDA provides representation to indigent defendants in Arizona state courts, including in post-conviction review proceedings. All the member agencies are funded at taxpayer expense and operate under significant budget constraints.

A requirement that all IAC claims must be supported by a standard of care expert opinion at the petition stage will negatively impact the ability of the APDA agencies to provide high quality, cost effective legal representation in cases on post-

conviction review. This new “rule” would require that counsel in most post-conviction proceedings would at a minimum need to at least consider—and often consult with—a standard of care expert to investigate an IAC claim. Further, each petition asserting an ineffective assistance of counsel claim would need to include a declaration from a standard of care expert. This would increase the cost and time necessary to file a post-conviction relief petition. This is a drastic, overbroad, and unnecessary departure from existing Arizona law. For decades, Arizona trial court judges have demonstrated the ability to consider the facts and circumstances of IAC claims and determine whether the defendant’s representation “fell below objective reasonable standards” without requiring a standard of care expert opinion in every post-conviction proceeding.

ARGUMENTS

The Court of Appeals rejected the IAC claims at issue in this case. APDA is concerned that the opinion below created a requirement that a standard of care declaration must be attached to any post-conviction relief petition asserting an IAC claim. The Court of Appeals reasoned that “[a]lthough an affidavit may not always be required to establish that counsel’s performance did not meet prevailing professional standards, a defendant must do more than disagree with, or posit alternatives to, counsel’s decisions to overcome the presumption of proper action.” Opinion ¶ 23. The opinion fails to set forth under what circumstances a standard of

care expert is required and leaves open to interpretation when that burden should be imposed on a post-conviction petitioner. APDA asserts that a valid post-conviction IAC claim may be both plead and proven without the need to rely on a standard of care expert opinion.

I. A standard of care expert is not required

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was objectively unreasonable under prevailing professional standards and the deficient performance so prejudiced the defense that there exists a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *State v. Nash*, 143 Ariz. 392, 397–98, 694 P.2d 222, 227–28 (1985). The Strickland standard is one of objective reasonableness that Arizona courts have applied to the facts and circumstances of individual cases for decades without the need for a standard of care expert opinion in every case.

At the pleading stage, a post-conviction relief petitioner is only required to “present[] a material issue of fact or law that would entitle the defendant to relief” in order to obtain review. Rule 32.11, Ariz. R. Crim. P. A defendant is entitled to an evidentiary hearing if his petition for post-conviction relief presents a colorable claim—one that, “if true, would probably have changed the verdict or sentence.”

State v. Kolmann, 239 Ariz. 157, ¶ 8 (2016) (quoting *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016)).

The post-conviction relief evidentiary hearing exists so that the trial court—who is in the best position to make factual determinations—can consider the evidence and determine issues of fact. Rule 32.13, Ariz. R. Crim. P. It is at this hearing where “evidence may be taken to show th[e] truth or falsity of defendant’s allegations.” *State v. Schrock*, 149 Ariz. 433, 441, 729 P.2d 1049, 1057 (1986) (quoting *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982)). The objective of Rule 32 evidentiary hearings is “to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.” *Schrock*, 149 Ariz. at 441, citing *State v. Carriger*, 132 Ariz. 301, 305, 645 P.2d 816, 820 (1982).

While Rule 32.7(e) requires a petition to be accompanied by “any affidavits, records, or other evidence currently available to the defendant supporting the petitioner’s allegations,” the Rules do not currently require that this evidence take the form of a standard of care expert opinion. Nor do the current Rules require a standard of care expert opinion at an evidentiary hearing. Importantly, this Court recently amended the post-conviction relief rules and did not impose this requirement as part of this comprehensive rule change.

II. Requiring a standard of care expert substantially increases indigent defense costs.

Most post-conviction relief proceedings involve claims of ineffective assistance of counsel. A standard of care expert cannot provide an informed opinion without an in-depth review of case materials. Standard of care experts are necessarily experienced, well-established lawyers who charge a substantial hourly rate. Requiring a standard of care expert opinion at the petition stage of post-conviction relief cases will substantially burden indigent defense budgets.

While the number of cases involving post-conviction relief proceedings in Arizona varies from year to year, Maricopa County provides a window into the substantial financial burden that this new “rule” will impose on all of the APDA defender agencies statewide. Chris Phillis is the director of the Maricopa County Office of Public Defense Services and is responsible for the Maricopa County indigent defense budget, including the cost of representation in post-conviction relief proceedings. In Maricopa County, a yearly average of 431 petitions for post-conviction relief are filed raising IAC claims. A standard of care expert witness in Maricopa County typically charges \$250 an hour and bills an average of 30 hours on each case. If a standard of care expert is required for every Maricopa County case at the post-conviction petition stage where there is an IAC claim, the cost to Maricopa County would be about \$3,232,500.

Sandra Diehl is the director of the Coconino County Public Defender's Office. She is responsible for the budget and is aware of the number of post-conviction relief cases her offices are assigned. For the past 10 years there have been an average of 20 post-conviction relief cases and the office is on track to be assigned 20 cases during this fiscal year. The record year was 2005 when the Coconino County Public Defender's Office handled 57 post-conviction relief cases.

While there will be fewer cases in smaller counties in Arizona, many of these counties are already dealing with budget shortfalls. Requiring a standard of care expert opinion in every post-conviction relief proceeding where there is an allegation of ineffective assistance of counsel will create a substantial financial burden to address a problem that simply does not exist under the current Rules.

III. Requiring a standard of care expert creates an undue risk of dismissal of meritorious claims

If the opinion below is allowed to stand, fiscal limitations and scarcity of experts will create an undue risk that meritorious claims will be dismissed based solely on the lack of a standard of care expert opinion. The high cost of hiring standard of care experts in most post-conviction relief proceedings will likely create an inequity in the representation of indigent defendants. Further, if a standard of expert opinion is required to support every IAC claim, it is likely that a shortage of qualified standard of care experts will result, especially in less-populated areas of the state. These

roadblocks will create delays and further increase costs. In addition, it is unclear how litigants who represent themselves are to find and retain a standard of care expert to investigate and provide declarations and testimony to support an IAC claim. This Court should promote rules that allow for cases to be decided on the merits, rather than logistical problems that create an unnecessary barrier to access to the courts.

CONCLUSION

APDA requests that this Court grant review in this case and reverse the Court of Appeal's holding requiring that all IAC claims must be supported by a standard of care expert opinion at the petition stage. This is not required by the Rules, would increase the cost of indigent post-conviction litigation by millions of dollars, and would create an undue risk that meritorious claims would be improperly dismissed. Alternatively, this Court should depublish the opinion under Rule 111(g) of the Rules of the Supreme Court of Arizona.

This action is necessary to allow APDA and its member defender agencies to continue to provide high quality legal representation in a cost effective manner.

RESPECTFULLY SUBMITTED this 3rd day of February 2021.

By: /s/ Timothy J Agan

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