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NO. 94047-9

IN THE SUPREME

OF THE STATE OF WASHINGTON

JOHNATHON FLORES

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

REPLY TO AMICUS CURIAE BRIEF

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A. SUPPLEMENTAL STATEMENT OF THE CASE

The amicus brief argues the trial attorney had not meet the experience suggested by the Supreme Court's Indigent Defense Standards.[1] This assertion is based entirely on the attorney's post-conviction declaration. The declaration only addressed the amount of time the defendant was employed as a "public defender" and silent on any details about his practice after being admitted, and before his employment with MacDougall, Prince. The standards for indigent defense are not limited to experience as a public defender, but include private or state criminal practice.

B. ARGUMENT

1. The trial attorney's declaration does not support the assertion that he was not in compliance with the indigent defense standards.

[1] WA R STDS INDIG DEF Preamble, states in part: The Court adopts additional Standards beyond those required for certification ***as guidance*** for public defense attorneys in addressing issues identified in *State v. A.N.J.*, 168 Wash. 2d 91, 225 P.3d 956 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. (Emphasis added).

Despite the lack of factual support in the trial attorney's post-conviction declaration, the amicus brief speculates that the declaration supported a finding that the attorney did not meet the indigent defense standards.

The declaration was silent the attorney's practice or experience in the years prior to his last employer.[2] There is no supporting factual basis from the declaration or the existing record to support the assertion that the attorney did not meet the indigent defense standards.

2. Even if there were a factual basis to support non-compliance with the indigent defense standards, non-compliance does not result in a "constructive" denial of counsel.

Even if it were assumed for argument sake, the attorney did not meet the indigent defense standards, the argument that it should operate as a constructive denial of counsel is in conflict with the preamble to the standards and the case law.[3]

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[2] The amicus brief seeks to assert the attorney's association with Kitsap County, even though that is not part of the record, nor referenced in the attorney's declaration.

[3] The preamble to the adopted Washington Standard for Indigent Defense that states in part:

> The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in *A.N.J.*, 168 Wash. 2d 91..

WA R STDS INDIG DEF Preamble.

Court rules are interpreted as though they were enacted by the legislature, giving effect to its plain meaning as an expression of legislative intent. *State v. Greenwood*, 120 Wash. 2d 585, 592, 845 P.2d 971 (1993). Plain meaning is discerned from reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule. *State v. Williams*, 158 Wash. 2d 904, 908, 148 P.3d 993 (2006).[4]

Unless the meaning of the SID under CrR 3.1 is somehow undiscernible from reading the rule, the history of the development of the rule is irrelevant.[5]

An admission to practice law in Washington authorizes an attorney to handle every type of case, with the possible exception

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[4] The attorney for The Defender Initiative has emphasized his significant involvement in the drafting of the standards. If true, the attorney must be aware that the standards do not contain the extreme remedy he now advocates. Moreover, the attorney must also be aware of the language in the preamble to the standards that specifically states the standards are intended as *guidance* for public defense attorneys in addressing issues identified in *A.N.J.*, 168 Wash. 2d 91 *See infra.* In *State v. A.N.J*, this Court held that professional standards do not establish minimum Sixth Amendment standards. This Court also stated that both un-adopted standards and bar association's standards, may be considered *with other evidence* concerning the effective assistance of counsel. *A.N.J.*, 168 Wash. 2d at 110.

[5] The amicus brief cites to *Marquardt v. Fein*, 25 Wash. App. 651, 656–57, 612 P.2d 378, 381 (1980), to argue that the decision of the trial court to remove counsel was without guidance from any court rule. This assertion is not accurate. The decision specifically referred to CR 23(a)(4). The court also held that ultimately, the determination of the adequacy of representation by the class representative's counsel rests in the sound discretion of the trial court.

of a death penalty defense. *See generally Herron v. McClanahan*, 28 Wash. App. 552, 562, 625 P.2d 707 (1981) (a person admitted to Washington State Bar is conclusively deemed qualified by the Washington Supreme Court to practice law); APR 5; SPRC 2. Despite this well-established principle, the attached amicus brief claims a "constructive" denial of counsel when an admitted lawyer, who is employed in public defense, represents a defendant but does not possess the level of experience suggested by the Supreme Court's Indigent Defense Standards.

In order for the indigent defense standards to operate as a measure of *competency* (such that failure would give rise to a per se or constructive determination of denial of counsel) the standard should apply to all attorneys engaged in similar criminal defense cases; not just those who happened to be appointed. Otherwise, the constructive denial suggested in the amicus brief would not be based on *any* genuine determination of competent representation in the courtroom, or showing of prejudice, but instead on how the particular attorney was compensated on a particular case.

The amicus brief relies upon *City of Seattle v. Ratliff*, 100 Wash. 2d 212, 667 P.2d 630 (1983), in which a rule 9 - a person

who was *never* admitted to the bar - represented the defendant. No court has appeared to have abandoned the *Strickland* test and adopted a per se rule based on a claimed violation of bar or court guidelines, where the attorney was a licensed attorney.

In *State v. Edison*, 61 Wash. App. 530, 811 P.2d 958, 961–62 (1991), the defendant argued he should have been granted a new trial because he was per se denied his right to counsel, and that he need not prove that he was prejudiced, where his attorney was suspended for a 2–week period during his representation of the defendant. *Edison*, 61 Wash. App. at 536. In *Edison*, 61 Wash. App. 530. In *Edison*, 61 Wash. App. 530, defendant's the attorney was suspended for failing to complete *required* CLE courses. *Edison*, 61 Wash. App. at 537.

The defendant in *Edison*, 61 Wash. App. 530 relied on numerous cases including *City of Seattle*, 100 Wash. 2d 212. *Edison*, 61 Wash. App. at 537. In *City of Seattle*, 100 Wash. 2d 212, the court held that "representation by a law student intern who fails to comply with the conditions placed upon his or her practice does constitute an absolute denial of the right to counsel". *City of Seattle*, 100 Wash. 2d at 219. The court further held:

> No showing of prejudice from such error need be made. While almost all courts require a showing of prejudice when a defendant claims ineffective assistance of counsel, an outright denial of counsel is conclusively presumed to be prejudicial. Denial of representation by one actually authorized to practice in court constitutes a denial of counsel, not merely ineffective assistance.

City of Seattle, 100 Wash. 2d at 219–20. As the defendant in *Edison*, 61 Wash. App. 530, the amicus brief erroneously relies upon case law where counsel had never been licensed. As in *Edison*, 61 Wash. App. 530, there was no per se or constructive denial of counsel in the present case

In *Edison*, 61 Wash. App. 530, as in this case, the attorney was admitted to the bar. The *Edison* court found the failure to complete mandatory CLE requirements would not logically affect the attorney's ability to ensure the defendant a fair trial. *Edison*, 61 Wash. App. at 537. [6]

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[6] The current version of APR 11(a) states:

> **Purpose.** Mandatory continuing legal education (MCLE) is intended to enhance lawyers' legal services to their clients and protect the public by assisting lawyers in maintaining and developing their competence as defined in WA R RPC 1.1, fitness to practice as defined in APR 22, and character as defined in APR 21. These rules set forth the minimum continuing legal education requirements for lawyers to accomplish this purpose.

The purpose of the mandatory CLE rules for all attorneys arguably serves the same competency goals as the indigent standards that apply only to attorneys appointed at public expense. Neither supports finding a per se or constructive denial of effective assistance of counsel for non-compliance.

The Court in *Edison*, 61 Wash. App. 530 found no authority for the position that suspension itself, without a showing of prejudice, constituted a denial of the right to counsel. The court rejected a per se rule and declined to treat a lawyer who has been suspended the same as one who has never been licensed *Edison*, 61 Wash. App. at 537. The court went on to find that even if the attorney's suspension occurred at a critical stage, the defendant would still have to show that the attorney failed to function as counsel – i.e. that he was prejudiced. *Edison*, 61 Wash. App. at 538.

Similarly, the Ninth Circuit has said that the attorney's disbarment or suspension alone does not require a finding of ineffectiveness. *United States v. Mouzin*, 785 F.2d 682, 696–98 (9th Cir. 1986) cited also in *United States v. Ross*, 338 F.3d 1054, 1056 (9th Cir. 2003) and *Young v. Runnels*, 435 F.3d 1038, 1043 (9th Cir. 2006). See also *United States v. Watson*, 479 F.3d 607, 611 (8th Cir. 2007) (no per se disqualification of attorney with licensing problems); *Berkey v. United States*, 318 F.3d 768 (7th Cir. 2003); *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003); *United States v. Mitchell*, 216 F.3d 1126, 1132 (D.C. Cir.

2000) (suspension of defense counsel from practice of law does not render counsel per se ineffective.); *Hurel Guerrero v. United States*, 186 F.3d 275 (2d Cir. 1999) (counsel's suspension from practice did not render counsel per se ineffective, and counsel was not ineffective under *Strickland* test where defendant could not establish prejudice); *United States v. Bosch*, 914 F.2d 1239, 1244–45 (9th Cir. 1990) (finding no prejudice where counsel was disbarred). [7]

The Ninth Circuit has also upheld exclusion from evidence of other conduct of the attorney that is before the State Bar but which is unrelated to the particular misconduct claim. *See Bonin v. Calderon*, 59 F.3d 815, 828–29 (9th Cir. 1995). *See* also *Robinson v. LaFleur*, 225 F.3d 950, 953 (8th Cir. 2000) (state finding that plea offer communicated not overcome by prior disciplinary against attorney for failure to communicate in unspecified circumstances); *Jones v. Page*, 76 F.3d 831, 845 n. 14 (7th Cir. 1996).

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[7] Other circuits are in accord, *e.g., Morelos v. United States*, 709 F.3d 1246, 1252 (8th Cir. 2013) (disbarment in two other states not a question of joint representation and not related to case at issue); *Ballinger v. Prelesnik*, 709 F.3d 558, 560 (6th Cir. 2013)(district court gave inappropriate weight to later disbarment on unrelated issue); *Reese v. Peters*, 926 F.2d 668, 669–70 (7th Cir. 1991) (suspension for non-payment of dues); *U.S. v. Williams*, 934 F. 847, 851-52 (7th Cir. 1991); *Kieser v. People of State of N.Y.*, 56 F.3d 16, 17 (2d Cir. 1995) (out-of-state attorney not admitted pro hac vice).

Similarly, a claim that multiple disciplinary charges rendered counsel presumptively ineffective under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) was rejected in *Young*, 435 F.3d 1038.[8] *See also*, *Moore v. Chrones*, 687 F. Supp. 2d 1005, 1031, n.13 (C.D. Cal. 2010) (rejected argument that a state bar investigation of defense counsel, as the question does not hinge on what counsel did in other cases). *Vance v. Lehman*, 64 F.3d 119 (3d Cir. 1995) (No denial of counsel occurred where counsel's license was revoked after trial for unrelated conduct that occurred before trial); *Post v. Page*, 22 F. Supp. 2d 887, 891 (C.D. Ill. 1998) (same).

Accordingly, the Court of Appeals did not "misapprehend the impact" of *Cronic*. The amicus brief incorrectly asserts that *Cronic* supports the assertion that a Sixth Amendment claim of ineffective assistance claim can be completely separate from actual performance. To support the argument, the amicus brief makes the inconsistent claim that the trial attorney did not contentiously discharge his *duty to the client*, because the trial attorney did not

[8] In *Cronic*, 466 U.S. at 665 The Court stated: The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.

advise *the judge* of a concern about the indigent defense standards.[9]

The breach of an ethical or practice standards does not necessarily make out a denial of the Sixth Amendment right to counsel. *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 993, 89 L. Ed. 2d 123 (1986). The Ninth Circuit reached the same result in *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993), saying that ABA standards serve only as a guide. See also *United States v. Nickerson*, 556 F.3d 1014 (9th Cir. 2009) concluding that a pretrial violation of a Rule of Professional Conduct is not per se ineffective assistance. *See also Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (per curiam), citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000) and *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (prevailing norms of practice as reflected in ABA standards and the like are only guides, and imposing specific guidelines on counsel is not appropriate and do not define minimum constitutional standards); *Montejo v.*

[9] The amicus brief states in part that "*Nothing in Cronic prevents reversal of Mr. Flores' conviction...*" However, nothing in *Cronic*, or cases citing to *Cronic*, actually supports the extreme position taken in the brief that reversal of a conviction should follow from non-compliance with a practice standard.

Louisiana, 556 U.S. 778, 790, 129 S. Ct. 2079, 2087, 173 L. Ed. 2d 955 (2009) (the Constitution does not codify ABA Model Rules).

3. The Court of Appeals gave proper consideration to the claim of non-compliance with the indigent defense standard under the *Strickland* test, and correctly found that such a claim alone is not per se ineffective assistance of counsel.

Despite the case law, the amicus brief seeks to create a new per se standard to determine ineffective assistance of counsel that is independent of actual representation. The applicable standard to determine ineffective assistance of counsel is the *Strickland* test. There is no question that a criminal defendant has a constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686. However, the benchmark for judging a claim of ineffective assistance is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result". *Strickland*, 80 L. Ed. 2d at 686. The defendant has the burden of establishing that counsel was ineffective. *Strickland*, 80 L. Ed. 2d at 687. To prevail, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning

there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 80 L. Ed. 2d at 687; *State v. McFarland*, 127 Wash. 2d 322, 334–35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995), *as amended* (Sept. 13, 1995).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. *Strickland*, 466 U.S. at 688. Courts must strongly presume competence. *Strickland*, 466 U.S. 668. In any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. *Strickland*, 80 L. Ed. 2d at 689. "The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." *State v. Sardinia*, 42 Wash. App. 533, 540, 713 P.2d 122 (1986) (quoting *Strickland*, 466 U.S. at 689).

Surmounting *Strickland's* high bar is never an easy task. *Padilla v. Kentucky*, 559 U.S. 356, ——, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise

issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011).

Ultimately, the constitution guarantees a fair trial, not a perfect lawyer. A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. *State v. Adams*, 91 Wash. 2d 86, 91, 586 P.2d 1168 (1978) (quoting Finer, *Ineffective Assistance of Counsel,* 58 Cornell L.Rev. 1077, 1080 (1973)).

The defendant must also affirmatively show prejudice. *Strickland*, 466 U.S. 668. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. *Id.* If the standard were so low, virtually any act or omission would meet the test. *Id.* Petitioner must establish a reasonable probability that, but for counsel's

errors, the result of the proceeding would have been different. *Strickland*, 80 L. Ed. 2d at 694; *McFarland*, 127 Wash. 2d at 335. The difference between *Strickland's* prejudice standard and a more-probable-than-not standard is "slight". *Felkner v. Jackson*, 562 U.S. 594, 792, 131 S. Ct. 1305, 179 L. Ed. 2d 374 (2011). Under the *Strickland* standard, "the likelihood of a different result must be substantial, not just conceivable". *Felkner*, 562 U.S. at 792.

Yet the amicus brief argues that the Court should reject its reliance on the *Strickland* standard and replace it with a completely opposition presumption, in which *any* deviation from the Standards of Indigent Defense guidelines creates a presumption that the attorney was not competent. Contrary to the brief, this Court's decision in *In re Gomez*, 180 Wash. 2d 337, 351–52, 325 P.3d 142, 149–50 (2014), does support the Court of Appeals' decision. The *Gomez* court reiterated *Strickland*'s positon that prevailing professional standards may serve as guides for determining what is reasonable but may not serve as a checklist for evaluating attorney performance. *See, In re Gomez*, 180 Wash. 2d at 351 (rejecting argument the attorney fell below objective standard where

attorney's experience roughly met the prevailing professional standard).[10]

The standards are merely guidelines and do not create a new presumption of ineffective assistance of counsel.[11] This is also apparent from the fact that the guidelines do not apply to all attorney's representing defendants in felony criminal matters, but only public defense attorneys. To find otherwise would negate the *Strickland* standard in only a unique subset of cases .

4. The remedy proposed in the amicus brief is not available under the indigent defense standards.

Despite the fact that the standards are intended as guidelines, the amicus brief also argues this Court should create an extreme remedy that is not contained within the rule; and further

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[10] The request to abandon the decades-long adherence to *Strickland*'s presumption of competency should also be denied under the doctrine of stare decisis. Under this doctrine, this Court will reverse itself on an established rule of law only upon a showing that the rule is incorrect and harmful. *State v. Ray*, 130 Wash. 2d 673, 678, 926 P.2d 904 (1996). A decision is harmful when it has a detrimental effect on the public interest. *State v. Siers*, 174 Wash. 2d 269, 276, 274 P.3d 358 (2012).

[11] The *Strickland* court appropriately stated: The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. *Strickland*, 466 U.S. at 690.

argues that utilization of the disciplinary process is not sufficient. Ultimately, the remedy sought in the amicus brief is a strict liability standard of compliance, with any deviation resulting in automatic reversal of convictions.

The argument made in the brief is misleading. It completely ignores that the Court of Appeals holding that a violation of the standards can be evidence of ineffective assistance of counsel. *State v. Flores*, 197 Wash. App. 1, 14, 386 P.3d 298, 305 (2016). If a court finds ineffective assistance of counsel under the *Strickland* test, then there is a remedy. Just not the draconian strict liability remedy that the Defender Initiative seeks.

The Court of Appeals also suggested there is a remedy for an attorney's actual violation of the standards under the disciplinary process.

The disciplinary process is designed to protect the public, and clients, from violations of attorney standards.[12]

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[12] The WSBA public website indicates the following:

> **The Supreme Court and Lawyer Discipline**
>
> The Washington Supreme Court has exclusive responsibility in Washington State to administer the lawyer discipline and disability system and to maintain appropriate standards of professional conduct. The Supreme Court delegates authority for the operation of that system to the Washington State Bar Association through the Disciplinary Board, hearing officers, and the Office of Disciplinary Counsel. Only the

In this case, either trial counsel was not candid with the trial court, or he subsequently filed a false declaration in an attempt to obtain reversal of the defendant's convictions. The fact that the trial attorney did not raise the same indigent defense standard claims in his other felony cases (that he would not have been "qualified" to defend) is also problematic and calls into question the veracity of the declaration in this case. Those issues should properly be raised in the disciplinary process.

This court has previously indicated that violations of Rules of Professional Conduct should be addressed through the disciplinary process rather than as a basis for relief in criminal matters. *See*, *State v. Lord*, 117 Wash. 2d 829, 887, 822 P.2d 177 (1991) (denying the defendant's motion to reverse the conviction

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> Supreme Court can suspend or disbar a lawyer. All lawyers admitted to practice law in Washington are subject to lawyer discipline.
>
> The lawyer discipline system protects the public by holding lawyers accountable for ethical misconduct. Under Title 13 of the Rules for Enforcement of Lawyer Conduct, disciplinary actions include admonition, reprimand, suspension up to three years, disbarment, restitution, and probation.

WSBA, Licensing and Lawyer Conduct, The Supreme Court, found at http://www.wsba.org/Licensing-and-Lawyer-Conduct/Discipline/The-Supreme-Court (last visited March 24, 2017).

and stating that "the remedy for a claimed violation of the RPC is a request for discipline by the bar association").

Despite these issues, the amicus brief proposes that this Court should accept the trial attorney's declaration at face value, even though the trial attorney did not specifically address the issue in his declaration. From that, the brief argues that this Court should concluded that trial counsel did not have the requisite amount of practice time. From that, the brief argues this Court should find per se ineffective assistance of counsel, requiring automatic reversal; without considering any other factors, without requiring any showing of prejudice, or without considering the overwhelming evidence of guilt at trial.

The per se rule proposed in the amicus brief would eliminate the *Strickland* standard and any connection to the actual trial in determining effective assistance of counsel. It would create a new remedy that does not exist in the standards and that is contrary to the applicable case law.

C. CONCLUSION

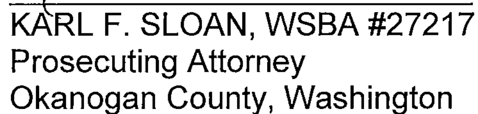
The post-conviction declaration does not establish a factual basis to support non-compliance with the standards. Even if

there was a factual basis, the per se or constructive standard proposed in the amicus brief is without support. The proposed per se standard would completely remove any consideration of actual representation from the determination of whether or not counsel was effective.

The correct standard to determine whether or not the defendant was denied effective assistance of counsel is the *Strickland* standard.

Dated this 29 day of March 2017

Respectfully Submitted by:



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