RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE
Jan 23, 2017, 9:02 am
RECEIVED ELECTRONICALLY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
No. 94047-9
Court of Appeals No. 32507-5-111

STATE OF WASHINGTON
Plaintiff/Respondent,

v.
JOHNATHON M. T. FLORES
Defendant/Appellant,

MEMORANDUM OF AMICUS CURIAE OF THE DEFENDER INITIATIVE

Robert C. Boruchowitz
WSBA # 4563

The Defender Initiative
901 12th Avenue
P.O. Box 222000
Seattle, WA 98122-1090

Table of Contents

A. IDENTITY AND INTEREST OF AMICUS **1**

B. INTRODUCTION **2**

C. STATEMENT OF CASE **3**

D. ARGUMENT **4**

1. SUPREME COURT'S INDIGENT DEFENSE STANDARDS ARE TIED TO THE CONSTITUTIONAL RIGHT TO COUNSEL

2. TRIAL COUNSEL'S FAILURE TO MEET THE EXPERIENCE REQUIREMENTS OF THE SUPREME COURT'S INDIGENT DEFENSE STANDARDS CONSTITUTES CONSTRUCTIVE DENAIL OF COUNSEL AND REQUIRES REVERSAL 5

3. THE SUPREME COURT ADOPTED THE RULE BECAUSE OF THE CONCERN ABOUT INADEQUATE PUBLIC DEFENSE 10

4. THE SUPREME COURT'S SUPERVISORY POWER SUPPORTS A CONCLUSION OF INEFFECTIVENESS 12

5. THE BAR DISCIPLINARY PROCESS IS NOT AN ADEQUATE REMEDY FOR VIOLATION OF THIS RULE 14

6. THE COURT OF APPEALS MISAPPREHENDS THE IMPACT OF *U.S. V. CRONIC*, WHICH SUGGESTED THAT STATES COULD USE SUPERVISORY POWER TO REQUIRE EXPERIENCE IN SERIOUS CASES 15

7. *GOMEZ* DOES NOT SUPPORT THE STATE'S POSITION 17

8. THE SUPREME COURT HAS DECIDED THAT THE EXPERIENCE RULE IS NECESSARY FOR IMPLEMENTING THE RIGHT TO COUNSEL 18

9. THE ETHICS RULES COMPLEMENT AND ILLUMINATE THE CRIMINAL RULES 21

10. THE WSBA PERFORMANCE GUIDELINES, REFERENCED IN THE INDIGENT DEFENSE STANDARDS, ALSO REQUIRE MORE EXPERIENCE THAN TRIAL COUNSEL HAD **23**

D. CONCLUSION **24**

TABLE OF AUTHORITIES

Cases

Washington Supreme Court Cases

City of Seattle v. Ratliff,
100 Wn.2d 212, 667 P.2d 630 (1983)……..... ……..6, 8, 9, 11

In re Pers. Restraint of Brett,
142 Wn.2d 868, 16 P.3d 601 (2001)…….10

In re Gomez,
180 Wn.2d 337, 325 P.3d 142 (2014)…….17, 18

In re Disciplinary Proceeding Against Michels,
150 Wn.2d 159, 75 P.3d 950 (2003)…….....….18

State v. A.N.J.,
168 Wn.2d 91, 225 P.3d 956 (2010)….....2, 10, 11, 20

State v. Bennett,
161 Wn.2d 303, 165 P.3d 1241 (2007)……..….....12, 13

State v. Norris,
121 Wn.2d 1024 (1993)……...……...1

Washington Court of Appeals Cases

Marquardt v. Fein,
25 Wn. App. 651, 612 P.2d 378 (1980)…….....…12

Mt. Vernon v. Weston,
68 Wn. App. 411, 844 P.2d 438 (1992), review denied by *State v. Norris*, 121 Wn.2d 1024, 854 P.2d 1085 (1993)…… …….1

State v. Flores,
32507-5-III, 2016 WL 7107885 (Wash. Ct. App. Dec. 6, 2016)...…… …….2, 3, 4, 14, 16, 20

United States Supreme Court Cases

Arizona v. Fulminante,
499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)……..…7

Cuyler v. Sullivan,
446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)……..…….....8

Davis v. Alaska,
415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)……11

Luis v. United States,
136 S. Ct. 1083, 194 L. Ed. 2d 256 (2016)…….....…….13

Powell v. State of Ala.,
287 U.S. 45, 53 S. Ct. 55, 60, 77 L. Ed. 158 (1932)……..…...19, 20

Strickland v. Washington,
467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984)……11, 14, 20

U.S. v. Cronic,
466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)……...15, 16, 17

U.S. v. Gonzalez-Lopez,
548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)...…….…11, 12

Decisions of Other Courts
Benbow v. State,
614 So. 2d 398, 403-04 (Miss. 1993) ..... …….6

Mathews v. United States,
518 F.2d 1245, 1246 (CA7 1975)…….....…….…16

Robertson v. State,
2016 WL 7230196 at 8 (S.C. Dec. 14, 2016)…..…… .....…...6, 7

Turner v. American Bar Ass'n,
407 F.Supp. 451. (N.D.Tex.1975).....9

Statutes
RCW 10.101.030 ..... 10, 18

Other Authorities

The American Bar Association's Ten Principles of a Public Defense Delivery System Principle 6……...……..…21

Boruchowitz, Robert C. "State Supreme Court Issues Historic Order on Defender Standards" King County Bar Association Bar Bulletin, September 2012……...…….18

Green, Bruce A., *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment,* 78 Iowa L. Rev. 433 (1993)……...22, 23

Hertz, Guggenheim, and Amsterdam, Trial Manual for Defense Attorneys in Juvenile Delinquency Cases (2013)…….22

Madsen, Barbara, J., "Enacting standards for public defenders is a difficult but necessary balancing act", Full Court Press (July 2012)…..13, 14, 19

Profiles, Washington Leadership Institute Fellows, www.law.washington.edu/career/wliFellows/Fellowsbios.pdf……..4

Washington State Bar Association Blue Ribbon Panel on Criminal Defense Report (2004)…..……13

Washington State Bar Association, Standards Indigent Defense Services ..... …. 2, 10, 17

Washington State Bar Association, Performance Guidelines for Criminal Defense Representation (2011)……23, 24

Washington State Supreme Court, Standards for Indigent Defense std. 14.2 (2012)……18

Rules

CrR 3.1..... …….2, 9, 10, 21, 24

CrR 3.1, Standard 14.1……..….4, 5, 10, 15, 16

CrR 3.1, Standard 14.1(d)……..23

CrR 3.1, Standard 14.2……3,4, 5, 9, 21

CrR 3.1 Stds. Separate Certification Form……..…5

RAP 13.4(b)(1)……3

RAP 13.4(b)(3)……3

RAP 13.4(b)(4)……3

RPC 1.1……..21

Constitutional Provisions

Washington Const., art. 1……8

Washington Const., art. 1, § 22. ……5, 20

U.S. Const., amend 6 ……...5, 13, 20

A. IDENTITY AND INTEREST OF AMICUS

The Defender Initiative is a law school-based project founded in 2008, aimed at providing better representation for people accused of crimes and facing loss of liberty, and in the process, increasing fairness in and respect for the courts. The Initiative is part of Seattle University's Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

The Defender Initiative is deeply involved in issues relating to effective representation of people accused of crimes. Supported by a grant from the United States Department of Justice, the Initiative works with its partner The Sixth Amendment Center to provide technical assistance to improve public defense, including work with the Michigan Indigent Defense Commission and the Mississippi Task Force on Public Defense. In addition, the Initiative's Director has been developing public defense standards for more than 30 years. He was amicus counsel in *Mt. Vernon v. Weston*, 68 Wn. App. 411(1992), review denied by *State v. Norris*, 121 Wn.2d 1024 (1993), the first published Washington appellate court opinion to refer to defender standards.

The Director has written about and presented at seminars about standards. He chairs the Committee on Standards of the Washington State Bar Association (WSBA) Council on Public Defense. He helped to draft the original Washington Defender Association Standards in 1984 and the amended standards in 1990 and

he led the drafting of the revisions to the Indigent Defense Standards approved by the WSBA Committee on Public Defense in August 2007.[1]

B. INTRODUCTION

The failure of the trial counsel to meet the qualifications requirement under CrR3.1 STDS should result in a per se conclusion of ineffective assistance of counsel. The Supreme Court can determine that based on its supervisory power as well as on its own interpretation of constitutional requirements.

The Court of Appeals has misapprehended the relationship between CrR3.1 STDS. and *State v. A.N.J*, 168 Wn.2d 91 (2010). In addition, it has misapprehended the error of the trial lawyer in representing a client in a case for which he was not qualified and the error of the trial court in permitting that representation without the proper certification of counsel.

The Court of Appeals in effect ignored the fact that the Supreme Court adopted the Standards in the court rule. The Court of Appeals wrote, "we hold that violation of the SID is *evidence* of ineffective assistance of counsel." *State v. Flores*, 32507-5-III, 2016 WL 7107885 (Wash. Ct. App. Dec. 6, 2016).

But that is the same holding as the Supreme Court made in *A.N.J. before* the implementation of the rule. It suggests that the *rule* being in place should have no impact in determining whether counsel was effective. That cannot be the logical conclusion of the history of the implementation of the rule.

[1] See Public Defense Standards at http://www.defensenet.org/about-wda/standards/Final%202007%20WDA%20Standards%20with%20Commentary.pdf.

It was error for the trial court to permit the trial counsel to represent Mr. Flores without a certification that he was complying with CrR 3.1, Standard 14.2. But the Court need not reach that issue, because trial counsel's lack of the required experience under the Standard establishes conclusively that he was ineffective as a matter of law. Because his trial counsel was not qualified to be representing a defendant on Class A felony charges, Mr. Flores was denied effective assistance of counsel and his conviction must be reversed.

The Supreme Court should accept review because the decision of the Court of Appeals is in conflict with other decisions of this court (RAP 13.4(b)(1)), this case involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and involves an issue of substantial public interest (RAP 13.4(b)(4)).

C. STATEMENT OF THE CASE

Mr. Flores was convicted by a jury of first degree robbery and first degree assault. CP 95-98, App. Op. Br. At 4. His lawyer failed to object to leading questions and to hearsay, conducted minimal cross examination and failed to ask the complaining witness about previous statements inconsistent with his testimony. App. Op. Br at 4. The Court of Appeals found that trial counsel's performance was deficient but not ineffective. *Flores, supra.*

After trial, trial counsel Mr. Raheem filed a declaration admitting that he knew he was not qualified to handle this case and that his employer did not participate in the trial:

> MacDougall was qualified co-counsel on the case. During the trial itself, MacDougall did not appear at counsel table, or participate in the trial. I was aware that I was not yet qualified under CrR 3.1, Standards for Indigent Defense, to conduct a trial involving two Class A felonies by myself and had discussed that issue with Melissa MacDougall and Michael Prince prior to Mr. Flores's trial. CP 152

At the time, Mr. Raheem had been employed in his firm for only three and a half months and he described having worked as a public defender for a total of only 7.5 months. He described no other criminal law experience. CP 152.[2] The rule requires that attorneys in Class A felony cases have two years of criminal practice experience. CrR 3.1, Standard 14.2.

D. ARGUMENT

1. Supreme Court's Indigent Defense Standards are tied to the constitutional right to counsel.

The Court has explicitly tied the standards to implementing the constitutional right to effective assistance of counsel. It has made clear that the experience qualification is a requirement. The rule states in part:

> Standard 14.1. **In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally**

[2] It appears that four of the 7.5 months were as a volunteer in Kitsap County. See, Profiles, Washington Leadership Institute Fellows, available at https://www.law.washington.edu/career/wli/Fellows/FellowsBios.pdf, checked May 12, 2016. That URL no longer is active, but the volunteer nature of his work in Kitsap County is confirmed in the profile available at http://docplayer.net/12156662-Profiles-washington-leadership-institute-fellows-2016-wli-fellows.html, checked December 24,2016.

> **entitled**, attorneys providing defense services shall meet the following minimum professional qualifications…. [emphasis added]

Standard 14.2 B establishes the minimum experience for attorneys handling adult class A felony matters-- two years of criminal law experience and having "been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury."

By the clear language of the standard, the rule is designed to assure effective assistance of counsel, and that attorneys *shall* meet the minimum experience qualifications. Attorneys are required to certify that they "will not accept appointment in a case as lead counsel unless I meet the qualifications for that case." CrR 3.1 Stds. Separate Certification Form.

The Washington Supreme Court established that rule effective September 1, 2012, more than a year before Mr. Flores' trial.

2. Trial counsel's failure to meet the experience requirements of the Supreme Court's Indigent Defense Standards constitutes constructive denial of counsel and requires reversal.

The trial counsel did not have the required experience under CrR 3.1, Standards 14.1-14.2, to represent Mr. Flores in this case.

While a person with a bar card standing next to a defendant is a lawyer, that person is not able to provide the effective assistance of counsel required by the Sixth Amendment and Washington Constitution Article 1, § 22, when that lawyer does not have the required experience and training to handle the type of case involved.

The Washington Supreme Court decided a similar issue in *City of Seattle v. Ratliff,* 100 Wn.2d 212 (1983). In that case, a Rule 9 intern was not permitted by the trial court to comply with the rule's requirement that he consult with his supervisor. The Court held that the failure to comply with the rule resulted in a denial of counsel, with no showing of prejudice required to reverse the conviction: "an outright denial of counsel is conclusively presumed to be prejudicial." *Ratliff*, 100 Wn.2d at 219. The Court wrote:

> We hold that Mr. Ratliff was denied his right to counsel because the trial court prevented Mr. Edwards from attaining the status of "counsel" by apparently preventing him from contacting his supervisor. Reversal is therefore automatic and hence we need not inquire into the existence of prejudice. The convictions are reversed and the case remanded for a new trial.

Id., 100 Wn.2d at 221.

The Mississippi Supreme Court considered a case somewhat similar to both *Ratliff* and the instant case. It ordered a new trial because an intern conducted a felony sentencing hearing without the supervisor present, even though "[t]he statute specifically states that in all court proceedings, a licensed attorney must be present to supervise the intern." *Benbow v. State*, 614 So. 2d 398, 403-04 (Miss. 1993). Similarly, here, the more experienced attorney who employed Mr. Flores' lawyer was not present during the trial.[3]

---

[3] The South Carolina Supreme Court recently discussed the remedy for a lawyer's not meeting experience requirements. The Court wrote:

> Applying the *Strickland* test, we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se. To rule otherwise, we believe would

The U.S. Supreme Court, discussing the types of structural errors that are similar to deprivation of the right to counsel and cannot be considered harmless, wrote:

> Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

Arizona v. Fulminante, 499 U.S. 279, 309–10(1991) (citation omitted).

Similarly, here, the absence of a lawyer who met the minimum two-year criminal law experience requirement was a structural defect, in this case leading to deficient performance. The Washington Supreme Court established the rule, after years of development and consideration, to protect the rights of people accused of serious felonies. The trial lawyer in this case flouted the Court's rule, as did his supervisors. The Court of Appeals in effect attempted to make an end run around the rule, which ignores the mandate of this Court.

In reaffirming that unconstitutional multiple representation is never harmless error, and that a defendant who shows that a conflict of interest actually

---

> render meaningless the Legislature's intent to have *qualified* counsel appointed to capital PCR applicants.

Robertson v. State, 2016 WL 7230196, at 8 (S.C. Dec. 14, 2016) [emphasis in original]. The Court majority found that a post-conviction relief applicant would still have the burden of proving that he was prejudiced by counsel's lack of qualification. Chief Justice Pleicones disagreed, writing:

> I would hold that a capital PCR applicant must be appointed counsel who meet the qualifications set forth in § 17-27-160(B). If upon remand it is determined that Petitioner was not represented by statutorily qualified counsel, then in my view the appropriate remedy is a new PCR proceeding in which he is represented by such counsel.

affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief, the U.S. Supreme Court wrote: "The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler v. Sullivan*, 446 U.S. 335, at 344, 349-350.

In this case, the defendant faced incarceration without adequate legal assistance. His lawyer's failure to comply with the experience rule affected the adequacy of his representation, and he should not need to demonstrate prejudice to obtain relief.

The Court of Appeals misapprehended the teaching of *Ratliff, supra.* In that case, Justice Utter wrote for the Supreme Court:

> This court determines who may or may not appear before the bar. Const. art. § 1 vests judicial power of the state in the Supreme Court. It has since been established that the formulation of rules governing admission to practice is a judicial function inherent in this constitutionally granted power. ... Exercise of "this power is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients". ... It is further recognized that judicial formulation of rules and regulations is to proceed unhampered by encroachment from other branches of government. ... The court's power to regulate the practice of law in this state is thus not only well established but is inviolate as well.

Ratliff, supra, at 215 [citations omitted].

Justice Utter added, "the right to counsel is of paramount importance to all persons appearing in our courts and must be jealously guarded." Id., at 218.

The Court of Appeals wrote about *Ratliff*:

> There the court expressly defined constitutional "counsel" as a person authorized to practice law. *Id.* at 217, 667 P.2d 630. There simply is no rule history or subsequent case law suggesting that the court intended the adoption of Standard 14.2 to redefine the constitutional meaning of "counsel."

The Court of Appeals has misapprehended three different aspects of the argument herein. First, the Court in *Ratliff* found that a law student who was qualified under Rule 9 to practice was *not* qualified "counsel" when the student was not permitted to consult with a supervisor as required by the rule. There is nothing in that formulation that precludes the Supreme Court from limiting Class A felony practice to lawyers with two years of criminal law experience.

In addition, the Court of Appeals ignored this part of the *Ratliff* opinion: "... 'counsel', as used in the Sixth Amendment, encompasses only those persons a court has adjudged "fit to practice by virtue of [their] character and/or training." [citing *Turner v. American Bar Ass'n,* 407 F.Supp. 451, 472-74 (N.D.Tex.1975).] *Ratliff*, at 217. The Supreme Court clearly has the power to adjudge only lawyers with two years of criminal law experience to be fit to defend persons in Class A felony cases.

Third, the Washington Supreme Court does have rule history to suggest that the Court intended the adoption of Standard 14.2 and the CrR 3.1 Stds. to be considered in understanding the constitutional meaning of "counsel". As outlined above, the Court explicitly tied the standards to implementing the constitutional right to effective assistance of counsel.

3. The Supreme Court Adopted the Rule Because of Concern About Inadequate Public Defense.

The Supreme Court adopted the Cr R 3.1 Standards because of its concern about inadequate public defense. In *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956, 960 (2010), which is integrally connected to the Court's promulgation of the rule, the Court wrote:

> While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance.

A.N.J., 168 Wn.2d at110.

The Court then explained that professional standards can guide the Court in evaluating effective assistance.

> The State essentially argues that we should not consider these standards because they have not been adopted by the court. We disagree. We accept the State's point that professional standards do not establish minimum Sixth Amendment standards. ... "'Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.' " .... However, while not binding, relevant standards are often useful to courts in evaluating things like effective assistance of counsel. *See, e.g., In re Pers. Restraint of Brett,* 142 Wash.2d 868, 879–80, 16 P.3d 601 (2001). We note that state law now requires each county or city providing public defense to adopt such standards, guided by standards endorsed by the Washington State Bar Association. RCW 10.101.030; *see also* Wash. State Bar Ass'n, Standards for Indigent Defense Services (Sept. 20, 2007). While we do not adopt the WDA *Standards for Public Defense Services,* we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel.

A.N.J., 168 Wn.2d at110, citations omitted.

The Supreme Court now *has* adopted key portions of the standards referenced in *A.N.J.,* so the standards have risen from the status of being "considered" in analyzing effective assistance to being mandatory for representation in a criminal case. Standard 14.1(A) ("attorneys providing defense services shall meet the following minimum professional qualifications").

As in *Ratliff*, *supra*, the failure of trial counsel to comply with the court rule amounts to constructive denial of counsel, and no showing of prejudice under *Strickland v. Washington*, 467 U.S. 1267 (1984), is required.

There are circumstances so likely to prejudice the accused that litigating the effect of conduct in a particular case is unnecessary. For example, no specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.*, at 318 (citations omitted).

And in a somewhat different context concerning the right to counsel of one's choice, the U.S. Supreme Court wrote:

> Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.
>
> *U.S. v. Gonzalez-Lopez*, 548 U.S. 140,148 (2006).

The Justices also reaffirmed their cases that "recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them." *Id.,* at 151.

The Court of Appeals upheld a trial judge's removal of counsel in a class action in part "because the court believed that they did not have the necessary background to represent the class without the association of more experienced counsel." *Marquardt v. Fein*, 25 Wn. App. 651. (1980).

The Court added:

> An essential concomitant of adequate representation is that the class representative's attorneys be qualified, experienced, and generally able to conduct the litigation. The trial court also properly exercised its discretion in removing Cissna's co-counsel. It is apparent that they did lack the necessary experience in view of the complexity of the action.
> *Id.,* at 656-657.

Marquardt was a civil case and there was no court rule to guide the judgment of what is sufficient experience. In this case, this Court has a clear rule requiring a level of experience that the trial lawyer did not have. Mr. Flores should have a new trial with qualified counsel.

4. The Supreme Court's Supervisory Power Supports a Conclusion of Ineffectiveness

The Washington Supreme Court are the "guardians of all constitutional protections". *State v. Bennett*, 161 Wn.2d 303, 316 (2007). The Court exercised its supervisory powers over the State's courts, instructing them to use only a WPIC instruction on reasonable doubt because

> the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.

State v. Bennett, 161 Wn.2d 303, 317–18.

Similarly, the right to counsel is too fundamental to permit flagrant violation of the court rule the Supreme Court established to protect the right. It is the right that protects all others. As Justice Breyer recently wrote for the U.S. Supreme Court:

> No one doubts the fundamental character of a criminal defendant's Sixth Amendment right to the "Assistance of Counsel." ...
>
> It is consequently not surprising: *first,* that this Court's opinions often refer to the right to counsel as "fundamental,"; *second,* that commentators describe the right as a "great engin[e] by which an innocent man can make the truth of his innocence visible,"; *third,* that we have understood the right to require that the Government provide counsel for an indigent defendant accused of all but the least serious crimes,; and *fourth,* that we have considered the wrongful deprivation of the right to counsel a "structural" error that so "affec[ts] the framework within which the trial proceeds" that courts may not even ask whether the error harmed the defendant.

Luis v. United States, 136 S. Ct. 1083, 1089, 194 L. Ed. 2d 256 (2016) [citations omitted].

The Washington Supreme Court's concern with the adequacy of criminal defense representation goes back at least to the 2004 Washington State Bar Association Blue Ribbon Panel on Criminal Defense report, which

> concluded that standards for public defense services enacted in RCW 10.101.030 are being ignored in many jurisdictions, and that the lack of enforceable standards, especially caseload standards, "jeopardizes the ability of even the most dedicated defenders to provide adequate representation."[4]

[4] See Chief Justice Barbara Madsen, "Enacting standards for public defenders is a difficult but necessary balancing act", Full Court Press, July 2012, available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclai

Chief Justice Madsen explained in a 2012 article what drove the Court's concern:

> ...we have learned that in areas of our state, the promise of access to effective assistance of counsel promised by our constitution has not been met and that we needed to take new measures to fully enact the rights and protections due to those who enter the criminal justice system.[5]

The failure to comply with this rule should result in a determination of ineffectiveness and no showing of prejudice under *Strickland v. Washington*, 467 U.S. 1267 (1984), should be required.

5. The bar disciplinary process is not an adequate remedy for violation of the rule.

As the Court of Appeals recognized, "there was no certification by Mr. Raheem accompanying his appearance." The court suggested it needed more facts to determine that Mr. Raheem's failure to file the necessary certification was a violation of the rule. But neither MacDougall nor Prince appeared in court during the trial or sentencing.[6] And the violation of the court rule was not only that the trial lawyer did not file a certification, but also, and more importantly, that the trial lawyer did not comply with the experience requirement of the rule.

The Court of Appeals suggests that because no remedy is specified in the Standards for violating them, "This omission suggests that the remedy for violations of the standards rests with the disciplinary process." This cannot be the

---

d_2d_cj_madsen_article.authcheckdam.pdf, checked December 24, 2016.

[5] Id.

[6] Those two lawyers apparently ignored Mr. Raheem's telling them that he was not qualified to handle the case. See Raheem Declaration, CP 152.

case. The failure of the appellate courts to address a clear violation of the court rule standards would weaken them and in effect provide no greater protection against ineffective assistance than if the rule were not in effect. The stated purpose of Standard 14.1 is to assure effective representation to the defendant. Disciplining the lawyer after the fact does not accomplish that.

Punishing the lawyer and his supervisors does not protect the defendant. The rule was designed to protect the defendant at trial, not to punish his lawyer years later in a disciplinary proceeding.

6. The Court of Appeals misapprehends the impact of *U.S. v. Cronic*, which suggested that states could use supervisory power to require experience in serious cases.

The Court of Appeals relies on *United States v. Cronic*, 466 U.S. 648 (1984), to support its conclusion that trial counsel's failure to meet the experience requirement is not constructive denial of counsel per se. It is helpful to examine *Cronic*. The Supreme Court rejected the Tenth Circuit's conclusion that the lack of experience plus other circumstances compelled a finding of ineffective assistance even without proof of an "actual breakdown of the adversarial process during the trial of this case." *Id.,* at 657-658.

The U.S. Supreme Court, in assessing whether there was a *constitutional* violation of the right to counsel, emphasized its presumption that trial counsel is effective. But the Court, quoting a Seventh Circuit case, noted "a presumption that he [trial counsel] was conscious of his duties to his clients and that he sought conscientiously to discharge those duties." *Cronic,* 466 U.S. 648, 667, citing

Matthews v. United States, 518 F.2d 1245, 1246 (CA7 1975). The Court of Appeals in the instant case in effect found that the trial counsel did *not* seek conscientiously to discharge those duties, because he did not tell the trial judge that he was not qualified to represent Mr. Flores. The court wrote:

> ....we are troubled by what took place here. It appears that Mr. Raheem never called the problem to the attention of the trial judge, the person charged with ensuring compliance with the standards, even though he talked to two experienced attorneys at MacDougall & Prince about his noncompliance during the trial.

The court added in a footnote: "Equally troubling is the indication that Mr. Raheem also spoke during trial with attorneys other than MacDougall & Prince seeking advice concerning his situation, but never presented the issue to the judge." *Flores, supra.*

The *Cronic* Court wrote: "...only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." 466 U.S. 648, 662.

The logical conclusion of the *Cronic* opinion is that surrounding circumstances can justify a presumption of ineffectiveness, and a Sixth Amendment claim can be sufficient without inquiry into the trial lawyer's actual performance. The failure of a trial lawyer to meet the experience requirement to represent a client in a Class A felony case, a violation of the court rule that the Washington Supreme Court established because it was concerned about ineffectiveness of appointed counsel, constitutes the kind of surrounding

circumstances that lead to finding a Sixth Amendment violation without an inquiry into actual performance.

Particularly compelling for how the Washington Supreme Court should consider the violation of the court rule on standards and experience is a footnote in *Cronic*:

> We consider in this case only the commands of the Constitution. We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this. **It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified.**

466 U.S. 648, 667, footnote 38, emphasis added.

The Washington Supreme Court has exercised its supervisory power to take greater precautions to ensure that counsel in serious criminal cases are qualified. Trial counsel in this case violated the rule the Court passed in that exercise of supervisory power. Nothing in *Cronic* prevents reversal of Mr. Flores' conviction because his lawyer was not qualified under the rules to represent him.

7. *Gomez* does not support the State's position.

The Washington Court of Appeals erroneously relied on *In re Gomez*, 180 Wn.2d 337, 351 (2014), for its conclusion that the court rule on experience should be treated as prevailing professional standards that are only "guides for determining what is reasonable but may not serve as a checklist for evaluating attorney performance." The *Gomez* Court made clear that it was not considering the new court rule on standards, or the state Bar Association Standards, because they were not in effect at the time of Gomez' trial:

> Gomez submits two other professional standards: Washington State Bar Ass'n, *Standards for Indigent Defense Services* std. 14 (2007), http://www.nlada.net/sites/default/filcs/wa_wsbastandardsforindigdefense_09202007.pdf: and the Washington State Supreme Court *Standards for Indigent Defense* std. 14.2 (2012). Because these standards were not in effect at the time of trial, we do not rely on them to evaluate Moser's experience. *See Strickland,* 466 U.S. at 689.

Gomez, supra, fn.2.

While the Gomez court did cite *A.N.J.* in a footnote to say that “"professional standards are evidence of what should be done, no more’", the Court explicitly was not considering the implications of its own Court Rule which was not in effect at the time. *Id*., fn. 3. [7]

8. **The Supreme Court Has Decided that the Experience Rule Is Necessary for Implementing the Right to Counsel**

The Washington Defender Association first published standards in 1984 and the Washington State Bar Association Board of Governors endorsed them, as it did amended standards in 1990 and 2006. [8] The Washington legislature in 1989 required local governments to adopt public defense standards. RCW 10.101.030. The statute provided that “The standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards.”[9]

[7] There was a strong dissent in *Gomez*, which was a 5-2 decision with the majority opinion written by Justice J. Johnson, P.T.

[8] See Robert C. Boruchowitz, “State Supreme Court Issues Historic Order on Defender Standards,” King County Bar Association Bar Bulletin, September 2012.

[9] In 2003, this Court referred to the importance of the statutorily required standards in a footnote in *In re Disciplinary Proceeding Against Michels*, 150 W. 2d, 159,174, fn.2 (2003).

On June 15, 2012, the Washington Supreme Court ordered that key portions of the WSBA standards be adopted and the standards became effective on September 1, 2012.

Chief Justice Madsen said that the rule requiring certification action was necessary.

> Public defense attorney certification and caseload guidelines will require changes in policy and practice, but such changes are necessary to address documented ongoing flaws in indigent defense programs throughout the state.[10]

She explained that attorneys are required to certify that they comply with the "applicable standards" on the certification form, which include the experience qualification.[11]

In somewhat different circumstances, the United States Supreme Court used a description that is fitting in this case:

> The record indicates that the appearance was rather pro forma than zealous and active * * *.' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.

Powell v. State of Ala., 287 U.S. 45, 58 (1932). In *Powell*, counsel was not actually appointed until the morning of a capital trial with multiple co-defendants. The Court reversed the convictions because the effective denial of counsel was a violation of fundamental due process rights. *Id*., at 68. The Court wrote that the duty to appoint counsel "is not discharged by an assignment at such a time or

[10] Madsen, Full Court Press, cited in fn. 3 supra.
[11] *Id*.

under such circumstances as to preclude the giving of effective aid in the \preparation and trial of the case." *Id*., at 71.

Similarly, providing Mr. Flores with an attorney who lacked the required experience to give "effective aid in the preparation and trial of the case" did not meet the constitutional requirement of having effective counsel. As the Supreme Court said in *Strickland:*

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685.

The Court should find that the errors identified in the appellant's opening brief constituted ineffective assistance under a Sixth Amendment and Article 1, § 22 constitutional analysis. The Court should find ineffectiveness because the trial lawyer simply was not qualified counsel under the rules and standards.

Concurring in *A.N.J.*, Justice Sanders argued that "violation of these [WSBA] standards by appointed counsel should be regarded as prima facie evidence of ineffectiveness." 168 Wn.2d at 121. Now that the Supreme Court has adopted the standards that were to be "considered" at the time of *A.N.J.*, this Court should apply Justice Sanders' reasoning and find that violating the

qualification standards mandated by court rule constitutes denial of effective counsel.

9. The ethics rules complement and illuminate the criminal rules.

The ethics rules complement the Criminal Rules. RPC 1.1 COMPETENCE provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The Commentary provides in part:

> [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

This commentary makes clear that competent handling of a complex case involving two Class A felonies requires significant preparation and the use of methods and procedures that would be used by practitioners meeting standards of practice. Washington's standards of practice for competent criminal practitioners now include CrR 3.1 Standards and in particular the qualifications requirements.

The American Bar Association's Ten Principles of a Public Defense Delivery System Principle 6 is consistent with Standard 14.2B and with RPC 1.1. It states:

> Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the

> experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.[12]

The concept of matching experience to complexity of the work is not new or unique to the court rule at issue here. Writing about representing juveniles charged with crime under a heading entitled, "A Second Caveat—The Need for a Pro", three veteran criminal law professors emphasized: "Juvenile court practice is a specialty, and there is a lot at stake. It remains vital for the lawyer with relatively little juvenile court experience to recognize when s/he is getting into waters deeper than s/he can swim."[13] Representing adult clients on complex felony charges also is a specialty.

A law professor more than 20 years ago urged that "only qualified attorneys can be considered 'counsel' within the meaning of the Sixth Amendment-an interpretation of the Sixth Amendment right that calls for an ex ante inquiry into the defense lawyer's knowledge and experience." Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment,* 78

---

[12] Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf, checked May 13, 2016.

[13] Hertz, Guggenheim, and Amsterdam, Trial Manual for Defense Attorneys in Juvenile Delinquency Cases (2013), at 2. Professor Anthony Amsterdam has more than 56 years of experience including many arguments in the U.S. Supreme Court. He was a law clerk for Justice Felix Frankfurter. Professor Guggenheim, a lawyer for 46 years, was a public defender before becoming a professor. Professor Hertz, Vice Dean of NYU School of Law, is co-author of *Federal Habeas Corpus Practice and Procedure* and a former public defender as well as a former clerk for Washington Supreme Court Chief Justice Robert F. Utter. He has 38 years of experience.

Iowa L. Rev. 433, 435, fn.9 (1993).[14] He called for "[E]establishing a qualified criminal defense bar through court rules or statutes…." Id. This Court adopted this concept and should hold that Mr. Flores was constructively denied counsel.

10. The WSBA Performance Guidelines, referenced in the Indigent Defense Standards, also require more experience than trial counsel had.

The Washington State Bar Association in 2011 adopted Performance Guidelines for Criminal Defense Representation.[15] These Guidelines were in effect at the time of Mr. Flores' trial, and his appointed counsel was required to be familiar with them. Standard 14.1(d).[16] The Guidelines have two provisions requiring sufficient experience to provide quality representation:

> Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation. …
>
> Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that they have available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is

[14] Professor Green is a Council member and past chair of the ABA Criminal Justice Section. Website at https://www.fordham.edu/info/23140/bruce_green.

[15] Available at http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Performance%20Guidelines%20for%20Criminal%20Defense%20Representation%20060311.ashx.

[16] Standard 14. Qualifications of Attorneys Standard 14.1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

> D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; …

unable to offer quality representation in the case, counsel shall move to withdraw.[17]

Mr. Flores' lawyer knew he was not qualified to represent Mr. Flores on these two Class A felony charges, CP 152, and he should have moved to withdraw.

E. CONCLUSION

Mr. Flores' lawyer had only 7.5 months of relevant experience at the time of trial. He knew he was not qualified and he had not certified that he was complying with the qualifications rule. The Washington Supreme Court established CrR 3.1 and the experience qualifications requirements to "assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled".

Amicus urges the Supreme Court to accept review of this case and to establish that a violation of CrR3.1 Stds. is a denial of effective assistance of counsel. The

---

[17] Guideline 1.2 Education, Training and Experience of Defense Counsel

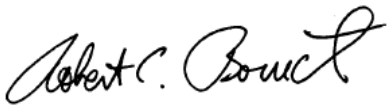
1. To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the practices of the specific judge before whom a case is pending.
2. Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

Guideline 1.3 General Duties of Defense Counsel

3. a. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that they have available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel shall move to withdraw.

Court should find that Mr. Flores was denied effective assistance of counsel and reverse his convictions.

Respectfully submitted,



Robert C. Boruchowitz WSBA # 4563 Dated: January 22, 2017

The Defender Initiative does not, in this brief or otherwise, represent the official views of Seattle University or its School of Law.

The Defender Initiative
901 12th Avenue, P.O. Box 222000
Seattle, WA 98122-1090, Telephone: 206 398 4151