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No. 85131-0

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

HOYT WILLIAM CRACE

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**BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

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ORIGINAL

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INTEREST OF *AMICUS CURIAE*

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL’s objectives include “to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights.” WACDL has filed numerous amicus briefs in the Washington appellate courts.

ISSUE ADDRESSED BY *AMICUS*

Whether a personal restraint petitioner alleging ineffective assistance of counsel must prove prejudice beyond that required by Strickland, where the U.S. Supreme Court has explicitly rejected different prejudice standards for direct appeals and collateral attacks for ineffective assistance of counsel claims.

STATEMENT OF THE CASE

Hoyt Crace was convicted of second-degree attempted assault and sentenced to life without the possibility of parole under the “three strikes” statute. He filed a personal restraint petition (“PRP”) seeking relief for ineffective assistance of counsel because his trial attorney failed to request a jury instruction for the lesser-included offense which was consistent with

his theory of the case. A conviction for the lesser offense would have resulted in a maximum sentence of one year.

The Court of Appeals granted the petition, applying a three-part test for deficient attorney performance later rejected by this Court in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). Grier reaffirmed that the proper standard for assessing ineffectiveness claims is that set forth in Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Following its decision in Grier, this Court granted the State's petition for review.

ARGUMENT

The issue in this case is whether Mr. Crace's attorney's performance was deficient when evaluated under the standard set forth in Strickland, rather than the three-part test employed by the Court of Appeals. Amicus agrees with Mr. Crace that the answer is yes.

The State additionally argues that personal restraint petitioners must prove "double prejudice" to obtain relief for violations of the constitutional right to the effective assistance of counsel. The State is wrong, and WACDL respectfully submits this amicus brief to address the latter argument.

***Strickland* set the prejudice standard for ineffective assistance of counsel claims on collateral review; the State's argument on this issue is a red herring.**

The Sixth Amendment guarantees an accused person the right to the effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A court will grant relief for a Sixth Amendment violation if a petitioner shows his trial attorney's performance was deficient and the deficiency prejudiced the defense. Strickland, 466 U.S. at 687. To prove deficient performance, the petitioner must show counsel's representation fell below an objective standard of reasonableness. Id. at 688. If a petitioner makes this showing, he is entitled to relief upon a showing of prejudice. Prejudice in this context means "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The State claims that because of the interest in finality of judgments, a petitioner making a claim of ineffective assistance of counsel in a collateral attack must prove actual and substantial prejudice in addition to showing a reasonable probability of a different result absent counsel's deficient performance. It argues that the U.S. Supreme Court's decision in Frady, adopted by this Court in Hagler, compels this "double prejudice" standard. Petition for Review at 8; State's Supplemental Brief

at 7 (citing United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); In re the Personal Restraint of Hagler, 97 Wn.2d 818, 835, 650 P.2d 1103 (1982)). The State neglects to mention that the U.S. Supreme Court rejected this very argument in Strickland itself.

a. The U.S. Supreme Court has already rejected the State's proposed "double prejudice" standard.

Strickland was not a direct appeal, but a habeas case. Strickland, 466 U.S. at 679. The Supreme Court granted certiorari "to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective." Id. at 671. After explaining the standard for judging attorney performance, the Court turned to the question of when deficient performance would justify relief.

The Court rejected as "unworkable" the petitioner's proposed standard that relief should be granted upon a showing of "some conceivable effect on the outcome of the proceeding." Id. at 693. But it also rejected the standard the State proposes here: "On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. The Court

acknowledged that this standard “reflects the profound importance in finality.” However:

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so **finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.**

Id. at 694 (emphasis added). The Court determined that the appropriate prejudice standard for ineffective assistance claims was the same as that for Brady¹ violations. Id. (citing United States v. Agurs, 427 U.S. 97, 104, 112-13, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Court emphasized that the prejudice standard is the same for direct appeals and collateral attacks – notwithstanding Frady’s finality concerns:

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the “cause and prejudice” test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See United States v. Frady, [456 U.S. at

¹ Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

162-69]. An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 697-98 (additional citations omitted).

Although Strickland was clear, other litigants and courts have occasionally made the same mistake the State makes here. In Kyles, another habeas case, the Supreme Court addressed such an error and reaffirmed that there is no “double prejudice” requirement for Brady or Strickland claims on collateral review. Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The Fifth Circuit had assumed that even if a habeas petitioner proved a violation of Brady and a reasonable probability of a different result absent the violation, he was not entitled to relief unless he additionally proved “substantial and injurious effect” as generally required on collateral attack. Id. at 435 (citing Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).² The Supreme Court disagreed, explaining:

² The Brecht “substantial and injurious effect” standard for federal postconviction relief is analogous to Washington’s “actual and substantial prejudice” standard for postconviction relief.

[C]ontrary to the assumption made by the Court of Appeals, once a reviewing court applying Bagley³ has found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error enquiry were to apply, a Bagley error could not be treated as harmless, since “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different” necessarily entails the conclusion that the suppression must have had “substantial or injurious effect or influence in determining the jury’s verdict.”

Id. (internal citations omitted). The Court summarized, “once there has been Bagley error as claimed in this case, it cannot subsequently be found harmless under Brecht.” In a footnote, the Court endorsed an Eighth Circuit opinion recognizing the same is true in the Strickland context. Kyles, 514 U.S. at 436 n.9 (quoting Hill v. Lockhart, 28 F.3d 832, 839 (8th Cir. 1994)) (“It is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel”).

b. This Court has already rejected the State’s proposed “double prejudice” standard.

“When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court’s

³ Bagley was a follow-up to Brady which reaffirmed the “reasonable probability” standard. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

rulings.” State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). A state court misapplying federal law will be reversed on federal habeas review. See Porter v. McCollum, ___ U.S. ___, 130 S.Ct. 447, 452-54, 175 L.Ed.2d 398 (2009) (granting relief to habeas petitioner because state court unreasonably denied postconviction petition where petitioner had shown reasonable probability of a different outcome absent counsel’s deficiency).

Not surprisingly, then, other states apply the Strickland standard – with no extra prejudice requirement – to ineffective assistance of counsel claims on collateral review. See, e.g., Hambrick v. Brannen, ___ S.E.2d ___, 2011 WL 4008304 at *3 (Ga. 2011); Bosque v. Commissioner of Correction, 130 Con. App. 383, 387, 23 A.2d 90 (Conn.App. 2011); In re Crew, 52 Ca. 4th 126, 149-50, 254 P.3d 320 (Cal. 2011); Byrd v. Johnson, 281 Va. 671, 678, 708 S.E.2d 896 (Va. 2011); Ex parte Martinez, 330 S.W. 3d 891, 900-01 (Tex.Crim.App. 2011); State ex rel. Dunlap v. McBride, 225 W.Va. 192, 197-98, 691 S.E.2d 183 (W.Va. 2010); Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25 (Nev. 2004).

The same is true in Washington. In a recent case in which a defendant raised ineffective assistance of counsel in a collateral attack, this Court reaffirmed that the petitioner did “not have to show actual and substantial prejudice” as is ordinarily required for PRPs, but had to satisfy

“the familiar two part Strickland v. Washington test for ineffective assistance claims.” In re the Personal Restraint of Sandoval, 171 Wn.2d 163, 168-69, 249 P.3d 1015 (2011). This Court explained that – as is often true of ineffectiveness claims – some of the evidence necessary to support the claim was outside the trial court record and therefore could not have been brought in a direct appeal. Id. (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Thus, it would make no sense to impose a burden upon the petitioner to show additional prejudice beyond the burden that would be imposed on direct appeal. Id.

Although not an issue in Mr. Crace’s case, Sandoval arguably leaves open the question of whether petitioners who could have raised ineffectiveness claims on direct appeal must bear a burden to prove additional prejudice if they instead raise the issue in a PRP. The U.S. Supreme Court has answered a similar question in the negative for federal habeas cases, and the reasoning applies with equal force in our jurisdiction. See Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). In the federal system, the general rule is that claims not raised on direct appeal are barred on collateral review unless the petitioner shows “cause and prejudice.” Id. at 504 (citing Fraday, 456 U.S. at 167-68). The basis for this rule is to protect finality of judgments. Id. But ineffective assistance of counsel claims are unique. By their

nature, they can never be raised at trial. Massaro, 538 U.S. at 508; compare Frady, 456 U.S. at 166 (Frady already had the opportunity to raise his instructional issue both during trial and on appeal). And although the record is sometimes sufficient to raise ineffective assistance of counsel on direct appeal, more often it is not. Requiring a showing of “cause and prejudice” every time the claim is made on collateral attack would “creat[e] the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim.” Id. at 504. It would also force postconviction courts to “engage in a painstaking review of the trial record solely to determine if it was sufficient to support the ineffectiveness claim and thus whether it should have been brought on direct appeal.” Id. at 507. Thus, the Supreme Court held, petitioners may raise ineffectiveness claims for the first time on collateral attack, whether or not they could have raised the issue on direct appeal. They do not have to show cause for the failure, nor prove an extra layer of prejudice. Id. at 509.

It is also worth noting that although the Strickland prejudice standard is slightly less burdensome for defendants on collateral review than the prejudice standard for other claims, it is more burdensome on direct appeal than the standard for other constitutional errors. For other constitutional claims, once the defendant on direct appeal has shown a

violation, he does not have to show prejudice. Rather, the burden shifts to the government to prove beyond a reasonable doubt the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). But for ineffectiveness claims, the burden to prove prejudice falls on the defendant not only in postconviction petitions, but also on direct appeal. Strickland, 466 U.S. at 697-98. The State's claim that it has to prove harmlessness beyond a reasonable doubt in the ineffective-assistance context is simply wrong.⁴ Petition for Review at 10.

In sum, the standard for assessing ineffective assistance of counsel claims is settled. Whether on direct appeal or collateral review, a petitioner alleging a violation of his Sixth Amendment right to the effective assistance counsel is entitled to relief upon a showing that (1) his counsel's performance was deficient, and (2) there is a reasonable probability the result would have been different absent the deficiency. Strickland 466 U.S. at 687-98. This Court should reject the State's argument and adhere to Strickland.

⁴ It also makes no sense. The State claims that after the appellant proves Strickland prejudice, the State then has to prove the absence of prejudice beyond a reasonable doubt. This is a logical impossibility.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court hold the Strickland prejudice standard applies to PRPs.

Respectfully submitted this 31st day of October, 2011.

By: /s/ Lila J. Silverstein
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IN RE THE PRP OF HOYT CRACE

No. 85131-0

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AND
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