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NO. 86711-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

MARIBEL GOMEZ,

Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for responding to collateral attacks upon criminal convictions that are filed in state courts. *See* RAP 16.6(b).

WAPA is interested in cases, such as this, that have wide-ranging impact on the criminal justice system. Respect for the courts is lost when extra-constitutional rules are adopted that undermine the finality of judgments and the interests of the victim and society to rapid, efficient, and reliable determinations of guilt.

II. ISSUE PRESENTED

Whether this Court should reject amici curiae Washington Association of Criminal Defense Attorneys and the Defender Initiative’s request to replace the settled *Strickland*¹ test for ineffective assistance of counsel with detailed guidelines that would encourage the proliferation of ineffectiveness challenges?

¹*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2068, 80 L. Ed. 2d 674 (1984).

III. STATEMENT OF THE CASE

WAPA is satisfied with, and adopts, the statement of the case provided by the State in its briefs.

IV. ARGUMENT

A. Ineffective Assistance of Counsel Claims Are Unique in That the Government Is Not Responsible for the Conduct That Results in Reversal

Claims of ineffective assistance of counsel are unique in constitutional criminal procedure. For all other claims of constitutional error, an overturning of a conviction is triggered by some error committed by the state or its agents, such as passing a vague law, *see Connally v. General Constr. Co.*, 269 U. S. 385, 393, 46 S. Ct. 126, 70 L. Ed. 322 (1926), coercing a confession, *see Brown v. Mississippi*, 297 U. S. 278, 286, 56 S. Ct. 461, 80 L. Ed. 682 (1936), or withholding exculpatory evidence, *see Brady v. Maryland*, 373 U. S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In the context of ineffective assistance of counsel, however, “[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.” *Strickland*, 466 U. S. at 693.

While the United States Supreme Court has held that this seemingly counterintuitive result is dictated by the Sixth Amendment,² this expansion

² *See Murray v. Carrier*, 477 U. S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

of the Sixth Amendment right to counsel should be stretched no further than necessary to protect the core purpose of the constitutional right. That purpose is to ensure that counsel's representation does not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U. S., at 686. The integrity of the criminal justice system is threatened when the state is forced to defend its convictions against conduct over which it has no control, and such threats should be minimized.

The remedy for a successful ineffective assistance claim is drastic, especially in light of the state's passive role. Reversing a conviction, particularly in collateral proceedings where these claims are usually litigated, is contrary to the "profound importance of finality in criminal proceedings." *Strickland*, 466 U. S., at 693-694. Such intrusions into this finality both "undermine[] confidence in the integrity of our procedures, and . . . inevitably delay[] and impair[] the orderly administration of justice." *Hill v. Lockhart*, 474 U. S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (internal quotation marks omitted).

A defense attorney is the opponent of the state in a criminal proceeding. When a defendant is able to hire his own attorney, the State has no role in the defense beyond the minimal one of regulating admission to the bar. Denial of defendant's right to choose counsel is per se reversible error.

See United States v. Gonzalez-Lopez, 548 U. S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409(2006). When the trial court appoints counsel for an indigent defendant, the state³ has a role in the initial selection but virtually no control thereafter. *See Polk County v. Dodson*, 454 U.S. 312, 321-22, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981). Ineffective assistance claims are judged by the same standard whether counsel is retained or appointed. *See Cuyler v. Sullivan*, 446 U. S. 335, 344-345, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Whether retained or appointed, defense counsel is the paid opponent of the state. “The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.” ABA Standards for Criminal Justice, *Prosecution Function and Defense Function* 4-1.2(b) (3d ed. 1993). In other words, defense counsel’s duty is “to represent his client zealously within the bounds of the law.” J. Burkoff, *Criminal Defense Ethics* § 5.1, p. 123 (2d ed. 2010) (quoting Model Code of Professional Responsibility, EC 7-19).

³Prosecutors are barred from the selection process. *See* RCW 10.101.040. Some courts interpret the “shall not select the attorneys” provision to also prohibit the prosecutors from offering insights regarding the applicant’s demonstrated proficiency in prior criminal cases. This means an attorney, who has provided constitutionally deficient performance in the past, is as likely to receive a future contract as an attorney who has always provided exemplary representation.

A successful ineffective assistance claim penalizes the state for an act over which it has no control. Not only is the state an innocent bystander throughout the process, but it is also difficult for the state to spot most instances of incompetent assistance until it is too late. "Many aspects of [defense] counsel's performance either occur outside the trial court's notice or reasonably appear to be, though they are not in fact, competent. Thus, the existence of incompetence does not necessarily imply fault on the part of the state." S. Giles, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. Chi. L. Rev. 1380, 1397 (1983). Imputing counsel's error to the state forces the state to stand as an insurer against a criminal defendant's risk of incompetent counsel, thereby spreading the risk from defendants to the people through reversed convictions.

But criminal convictions are not accidents to be insured against, and the Sixth Amendment is not an insurance policy. While some attorney error may reasonably lead to a reversed conviction, the state cannot be required to assure an ideal trial. If counsel's error does not undermine confidence in the result, the error should not be a ground for reversal. Review of counsel's performance should not be a tool to free the guilty, but an assurance of the fundamental justice of our legal system.

Ineffective assistance litigation is a heavy burden on the criminal justice system. In noncapital cases, half of all habeas petitions claim

ineffective assistance. See N. King, F. Cheesman, & B. Ostrom, *Final Technical Report: Habeas Litigation in U. S. District Courts* 28 (2007).⁴ Yet, of a sample of 2,384 cases, there was only one meritorious ineffective assistance claim. See *id.*, at 52. This burden is a necessary evil where the reliability of the result is in grave doubt. It becomes far less necessary and far more harmful as the question moves further away from reliability. The *Strickland* Court did not intend to “encourage the proliferation of ineffectiveness challenges,” 466 U. S., at 690, but that is exactly what it did. To place some limits on this proliferation, *Strickland*’s standard for judging the reasonableness of the attorney’s conduct must be precisely and narrowly construed.

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. ___, 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*

⁴Most state collateral attacks are denied by rulings issued by the chief judge. These rulings are not collected by Lexis or Westlaw. Nonetheless, there is no reason to not believe that a similar proportion of Washington cases include claims of ineffective assistance of counsel. See generally *Baldwin v. Reese*, 541 U.S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64(2003) (state prisoner must present his claim of ineffective assistance of counsel to the state’s highest court before raising the claim in a federal habeas corpus action).

novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690.

In answering this question, courts are reminded that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S., at 689. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. *Ibid.* Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.*, at 688. Even general guidelines are not appropriate as neither an investigation nor the retention of expert witnesses may be required in every case. *See Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1406-07, 179 L. Ed. 2d 557 (2011)

(“*Strickland* itself rejected the notion that the same investigation will be required in every case.”); *Harrington v. Richter*, ___ U.S. ___, 31 S. Ct. 770, 788-89, 178 L. Ed. 2d 624 (2011) (even in cases where it appears the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, defense counsel could provide constitutionally adequate assistance by following a strategy that did not require the use of experts).

“To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (quoting *Strickland*, 466 U.S., 689). In giving shape to the perimeters of this range of reasonable professional assistance, *Strickland* mandates that “[prevailing] norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides.” *Id.*, at 688. These guidelines are not “inexorable commands” with which all defense counsel must fully comply. *Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009).

While the ABA guidelines and other similar documents may identify “best practices”, they do not reflect the reality that lawyers do not enjoy the

benefit of endless time, energy or financial resources. *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994). They are blind to the fact that while “criminal defendants are entitled to competent representation, the Constitution does not insure that defense counsel will recognize and raise every conceivable constitutional claim.” *Engle v. Isaac*, 456 U.S. 107, 133-34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). The *Strickland* standard takes into account an attorney needs to avoid activities that appear to distract from more important duties. *See Harrington*, 131 S. Ct. at 789.

B. Amici Have Not Established That the Current Standard for Evaluating Ineffective Assistance of Counsel Claims Is Both Harmful and Wrong

Strickland's framework for reviewing the adequacy of counsel's representation matched this Court's pre-1984 case law. *See State v. Bradbury*, 38 Wn. App. 367, 371, 685 P.2d 623, *review denied*, 103 Wn.2d 1006 (1984) (Washington Supreme Court concluded that reviewing courts must grant a strong presumption that defendants have received effective assistance of counsel in *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). The presumption that counsel's conduct was proper began in Washington with this Court's 1917 opinion in *State v. Kelch*, 95 Wash. 277, 163 P. 757 (1917). In *Kelch*, this Court presumed that an attorney, having been regularly admitted to practice law prior to his representation of a defendant, has “sufficient skill and learning to properly defend the accused.” *Id.*, at 278.

In 1961, this Court recognized that opinions can differ regarding whether a defendant's interests are best served by one strategy or another. The decision, therefore, of what strategy to pursue must rest exclusively in trial counsel. *State v. Mode*, 57 Wn.2d 829, 833, 360 P.2d 159 (1961). Counsel is also entitled, in the exercise of his professional talents and knowledge, to decide whether to lodge an objection. *State v. Lei*, 59 Wn.2d 1, 6, 365 P.2d 609 (1961). Even when counsel's decisions, in retrospect, appear to have been errors in judgment or trial strategy, incompetence is not established. *Id.*; *Mode*, 57 Wn.2d at 833 ("Mistakes or errors of judgment do not establish the violation of a constitutional right."). It is only when the incompetence or neglect of a lawyer, either appointed or employed to defend one charged with crime, reduces the trial to a farce is the constitutional right violated. *Mode*, 57 Wn.2d at 833.

The Court reaffirmed the presumption of competency in *State v. Keller*, 65 Wn.2d 907, 400 P.2d 370 (1965), after noting a disturbing trend:

In recent months we have reviewed the records of other criminal appeals of defendants represented by court-appointed counsel. We note, with increasing concern, that it seems to be standard procedure for the accused to quarrel with court-appointed counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or cooperate in preparation of a defense. This appears to be done in order to argue on appeal that the accused was deprived of due process alleging he was represented by incompetent counsel.

The instant case is no exception to the general pattern we see developing. As was their right (*State v. Mode*, 55 Wn.2d 706, 710, 349 P.2d 727 (1960)), defendants supplemented the efforts of their appellate counsel by filing a reply brief in which they “. . . take the position of being represented [in the trial court] by an incompetent attorney.” Again they “. . . attack the qualifications of this attorney to practice law before a bar of justice.”

Keller, 65 Wn.2d at 908.

The trend identified in *Keller* continues to this day,⁵ as has this Court’s adherence to the *Strickland* framework. As recently as 2011, this Court

reaffirmed [its] strict adherence to the *Strickland* standard and established that to demonstrate ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's performance was reasonable. When counsel's conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient.

State v. Breitung, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011), citing *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Amici curiae Washington Association of Criminal Defense Attorneys and the Defender Initiative request that this Court overrule its reliance on the *Strickland* standard and replace it with a checkbox approach, in which any deviation from the American Bar Association Guidelines or the Washington State Bar Association Guidelines creates a presumption that the attorney was

⁵According to Lexis®, *Strickland* has been cited in other Washington cases, both published and unpublished, over 2300 times.

not competent and/or did not act pursuant to a legitimate trial strategy. *See* Brief of Washington Association of Criminal Defense Attorneys and the Defender Initiative (hereinafter “Brief of WACDA”), at 10. Amici Washington Defender Association and American Civil Liberties Union of Washington would expand the rule to include deviations from the 2011 WSBA Standards for Indigent Defense Services.⁶ *See* Brief of Washington Defender Association, at 16.⁷ This Court should not consider their request, as Ms. Gomez did not advance this view in her pleadings. *See, e.g., State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010) (“We need not address issues raised only by amici and decline to do so here.”).

Amici’s request to abandon the decades-long adherence to *Strickland*’s presumption of competency must 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

⁶Application of after-adopted standards is inappropriate, as the reasonableness question looks to the professional norms prevailing at the time the representation took place. *See, e.g., Bobby*, 130 S. Ct. at 17 (error to rely upon ABA guidelines announced 18 years after the defendant’s trial). Ms. Gomez’s case was tried between February 12, 2007, and March 28, 2007. *See* PRP Appendix 1 at ¶ 1.1; PRP Appendix 3 at ¶ ¶ 36-41; PRP Appendix 4 at ¶¶ 12-15.

⁷The Washington Defender Association would also create a checkbox for its own standards. Although the WDA is an organization with a history of service to the bar, it is a private group with limited membership. The views of the association’s members do not necessarily reflect the views of the Washington bar as a whole. It is the responsibility of the courts to determine the training and experience a defense attorney, including retained counsel, must possess in order to meet the obligations imposed by the Constitution. There is no reason why WDA should be given a privileged position in making that determination. *Cf. Bobby*, 130 S. Ct. at 20 (Alito, J., concurring).

harmful. *State v. Ray*, 130 Wn.2d 673, 678, 926 P.2d 904 (1996). A decision is harmful when it has a detrimental effect on the public interest. *State v. Stiers*, 174 Wn.2d 269, 276, 274 P.3d 358 (2012).

The current rule promotes finality of judgments and the independence of defense counsel. Changing from the current presumption to amici's requested checkbox approach undermines such finality and drains court resources. As stated in *Strickland*, itself,

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.

Amici's checkbox approach could result in trial courts meddling in the attorney/client relationship through an endless series of colloquies seeking to establish that defense counsel checked off a particular box. Discussed the advantages and disadvantages of calling a particular witness— check. Discussed whether to pursue an all-or-nothing defense — check. Discussed whether to take the stand — check. These colloquies can undermine the defendant's confidence in his counsel's judgment and may encourage the

defendant to pursue an ultimately ruinous strategy. *Cf. In re Pers. Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994) (“for the court to discuss the choice with the defendant could intrude into the attorney-client relationship protected by the Sixth Amendment and might also appear to encourage the defendant to invoke or to waive his Fifth Amendment rights”).

WACDA does not identify a single jurisdiction in the country that has replaced the *Strickland* presumption of competency with their proposed checkbox standard. This Court may, therefore, assume that none exists. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (where no legal authorities are cited in support of a proposition, a court will assume that counsel, after diligent search, was unable to find any). This assumption is supported by the large number of courts that have expressly rejected WACDA’s checkbox standard. *See generally In re Reno*, 55 Cal. 4th 428, 283 P.3d 1181, 146 Cal. Rptr. 3d 297 (2012) (competency will not be determined based upon ABA standards); *Taylor v. State*, 32 A.3d 374, 383 (Del. 2011) (stating the ABA Guidelines are not the applicable constitutional standard); *Mendoza v. State*, 87 So.3d 644, 653 (Fla. 2011) (refusing to revoke the presumption that trial counsel’s actions, based upon strategic decisions, are reasonable in favor of guidelines); *State v. Hunter*, 131 Ohio St. 3d 67, 960 N.E.2d 955, 964-65 (2011) (refusing to judge counsel’s performance against a set of standards); *Davis v. State*, 268 P.3d 86, 133 (Ok.

Cr. 2011), *cert. denied*, 133 S. Ct. 232 (2012) (same); *Commonwealth v. King*, 57 A.3d 607, 2012 Pa. LEXIS 2744 at *21-22 (Pa. 2012) (refusing to dispense with the presumption of competency for attorneys whose education and training at the time of trial did not match those required by a rule of criminal procedure).

C. Existing Mechanisms for Correcting an Attorney's Deficiencies Will Have a More Salutary Effect on the Level of Representation Received by Criminal Defendants in Washington

Amici contend that abandoning *Strickland* in favor of its proposed checkbox standard is consistent with this Court's inherent power to maintain appropriate standards of professional conduct. *See* Brief of WACDA at 2 n. 2. Amici's argument ignores the fact that 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 Wn.2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992) (denying the defendant's motion to reverse the conviction and stating that "the remedy for a claimed violation of the RPC is a request for discipline by the bar association").

The disciplinary process exists primarily to protect the public and maintain public confidence and trust in the legal system and secondarily to deter other lawyers from similar behavior. *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95, 667 P.2d 608 (1983). The disciplinary

process is the system for maintaining appropriate standards of attorney conduct. An attorney who accepts more cases than he can handle in violation of RPC 1.3⁸ will not be deterred from future violations by the vacation of a conviction pursuant to amici's new "presumption of deficient performance rule", but will be by bar discipline.

This Court, and many others, have been hesitant to "stigmatize and scar [an attorney's] professional reputation"⁹ by resorting to the discipline process when an attorney's representation of a criminal defendant demonstrates a lack of competence and/or diligence. Most courts have declined to adopt a per se rule that successful post-conviction relief based on ineffective assistance of counsel automatically results in an ethical violation.¹⁰ See, e.g., *Florida State Bar v. Sandstrom*, 609 So.2d 583, 584 n. 1 (Fla.1992) (noting that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation); *In re Riccio*, 131 A.D.2d 973, 517 N.Y.S.2d 791, 795 (1987) (finding that a prior ruling that attorney did not provide effective assistance of counsel did not necessarily establish the

⁸*Comment 2* to RPC 1.3 states that "A lawyer's work load must be controlled so that each matter can be handled competently."

⁹*Discipline of Longacre*, 155 Wn.2d 723, 752, 122 P.3d 710 (2005) (Madsen, J., dissenting).

¹⁰Conversely, a denial of post-conviction relief predicated upon a claim of ineffective assistance of counsel will not always insulate an attorney from professional discipline. *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94, 98 (1993).

disciplinary violation of neglect); *In re Lewis*, 445 N.E.2d 987, 989 (Ind.1983) (holding that successful post-conviction relief based on ineffective assistance of counsel is not controlling in a subsequent disciplinary matter).

These courts do recognize, however, that a finding of ineffective assistance of counsel should impel the trial judge and the appellate courts to look at the circumstances and determine whether there is arguably some infraction that should be called to the attention of the appropriate bar authorities. *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94, 99 n. 5 (1993).¹¹

Granting new trials to criminal defendants based upon representation that fulfilled the defendant's constitutional rights, but did not check off each item in the ABA standards, erodes the public's trust in the legal system by imposing the penalty for the attorney's failure on the victim and society, rather than the attorney. Holding the lawyer accountable for his or her deficiencies and instituting a remedial program to improve the lawyer's future performance will improve the quality of representation received by all individuals charged with crimes.

More than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or

¹¹In Washington, the prosecuting attorney has referred at least one incident of ineffective assistance of counsel to the Bar Association when the trial judge did not. *See Discipline of Longacre*, 155 Wn.2d 723, 731-32, 122 P.3d 710 (2005). At least some members of this Court found the source of the grievance to be "troubling." *Id.* at 757 (Madsen, J., dissenting).

interview witnesses. *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983) (defense counsel ineffective for failing to interview witnesses); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974) (same); *In re Warmington*, 212 Wis. 2d 657, 568 N.W.2d 641, 646 (1997) (lawyer disbarred for, among other things, “failing to supervise the preparation of an expert witness”); *Wolfram*, 847 P.2d at 96 (failure to interview witnesses cited among reasons for suspending attorney). In Washington, a lawyer whose representation falls below the Sixth Amendment floor is unlikely to see a reduction in future appointments. *Compare Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000) (finding that Ron Ness’s failure to personally interview three witnesses before rejecting them as witnesses at trial violated the capital defendant’s Sixth Amendment rights), *with* Washington State Supreme Court Capital Counsel Panel List of Attorneys Qualified for Appointment in Death Penalty Cases (May 8, 2012) (Ron Ness qualified to serve at trial in a capital case since 9/22/00).¹² Amici’s goal of improving overall representation for criminal defendants is better served through the Bar diversion program,¹³ which would remediate the deficiencies demonstrated by the attorney, than through reversal of

¹²The current list is available at http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=attorney (last accessed Feb. 6, 2013).

¹³See ELC 6.1 (a diversion in lieu of discipline can include monitoring, continuing legal education, or “any other program or other corrective course of action.”).

convictions.

V. CONCLUSION

WAPA respectfully requests that the Court reaffirm its adherence to the *Strickland* test for ineffective assistance of counsel. Where counsel's deviations from published guidelines do not violate a defendant's Sixth Amendment right of counsel, the existing disciplinary system – not the reversal of convictions – is the appropriate avenue for ensuring competence and engendering confidence in the legal system.

Respectfully submitted this 8th day of February, 2013.



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Subject: RE: In re Personal Restraint of Gomez, No. 86711-9

Rec'd 2-8-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: In re Personal Restraint of Gomez, No. 86711-9

Dear Clerk and Counsel:

Attached for filing is WAPA's motion to file amicus curiae brief, the proposed brief, and a proof of service. Please let me know if you should encounter any difficulty in opening these documents.

Sincerely,

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