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IN THE WASHINGTON STATE SUPREME COURT

In re the Personal Restraint Petition of:

EDUARDO SANDOVAL

AMENDED BRIEF OF AMICUS CURIAE

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I.
INTRODUCTION

This case provides this Court with the opportunity to clarify the standard for adjudicating claims of ineffective assistance of counsel on appeal. In addition, it provides this Court with an opportunity to remand for an evidentiary hearing to determine if the current rate and method of compensating appellate counsel contributed to the deficient performance of appellate counsel.

II.
ARGUMENT

A. **AMICUS URGES THIS COURT TO CLARIFY THE TEST FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL**

This case demonstrates the need for this Court to clarify appellate counsel's duties and the standard by which counsel's failures to meet those obligations will be judged. In the State's view, *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835, *decision clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994), permits this Court to dismiss any claim of ineffective assistance of appellate counsel because "failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance of counsel." State's Response to Petition at 12-13. But this Court should – once and

for all – disavow *Lord*'s incorrect summary of the test for the effective assistance of counsel.¹

The proper standard for evaluating Sandoval's claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984), and *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 764, 145 L.Ed.2d 756 (2000). Counsel must first investigate all of the potential claims and only then may she select from among them to maximize success on appeal. *Smith*, 528 U.S. at 288. The test for determining whether appellate counsel was incompetent is to look at the list of issues raised by appellate counsel and the issues appellate counsel failed to raise. "[W]hen the ignored issues are stronger than the issue presented, the presumption of effective assistance of counsel be overcome." *Id.* (citing *Gray v. Greer*, 800 F.2d 644, 646 (1986)).

In *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279, 287 (2004), this Court said that "petitioner can show that his

¹ The decision was also reversed. In *Lord* the Court strongly, and in amicus's view, unfairly criticized post-conviction counsel's efforts in a capital case. In doing so this Court said "a claim which is adjudged frivolous in state court will not suddenly develop merit merely from a change in jurisdiction." *Matter of Pers. Restraint of Lord*, 123 Wn.2d at 303, n. 1. But when Lord sought federal review, the Ninth Circuit reversed on an issue this Court deemed "frivolous." Lord was retried and was sentenced to life in prison rather than being subjected to the death penalty.

appellate counsel failed to raise an issue with underlying merit, then the first prong of the ineffective assistance test is satisfied.” But the Court made that statement in conjunction with a citation to *Lord*. This continues to muddy the waters. Amicus ask this Court to reaffirm the formula in *Smith* and hold that while appellate counsel need not raise every nonfrivolous issue on appeal, they must read the entire record and diligently investigate every potential issue. Only then may appellate counsel cull through the list. After doing so, appellate counsel’s duty is to raise the strongest issues.

Applying that standard in this case is fairly easy – even without an evidentiary hearing.² The record demonstrates that appellate counsel knew that trial counsel believed the trial court erred in failing to give certain instructions and that he believed the prosecutor committed misconduct in closing argument. Appellate counsel had a duty to fully investigate those potential errors. Had appellate counsel done so, post-conviction counsel’s briefing clarifies that she would have recognized these were strong claims. Competent counsel would have recognized that

² The vast majority of personal restraint petitions in this State are pro se and the vast majority are decided without an evidentiary hearing – even though many post-conviction petitions seek to add additional facts not presented when the case was tried. In amicus’s view this results in continued injustices. If the Court is tempted to assume that Sandoval’s prior appellate lawyers engaged in well-thought out, strategic decisions, Sandoval is entitled to a remand to the superior court and the appointment of counsel for an evidentiary hearing to prove that is not the case.

a claim of insufficiency of the evidence, while widely made on appeal, rarely ever succeeds. Every component of the test is designed to uphold the jury's verdict. In evaluating the sufficiency of the State's evidence, the appellate courts view all evidence and all reasonable inferences from the evidence in the light most favorable to the State. See, e.g., *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746, 749 (2016). And, the appellate courts treat circumstantial evidence as equally reliable as direct evidence and defer to the trier of fact on issues of conflicting testimony, the credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.2d 970 (2004).

In balancing the merits of those claims omitted on appeal, as set out by post-conviction counsel, and the one claim appellate counsel raised, appellate counsel's deficit performance is clear.

B. AMICUS URGES THIS COURT TO CLARIFY THAT *STATE V. BROWN*³ DOES NOT APPLY TO APPELLATE COUNSEL'S PERFORMANCE AND AFFIRM THE REASONING IN *IN RE NETHERTON*⁴

The State, citing *Brown*, says that "counsel's failure to anticipate changes in the law does not constitute deficient performance." State's

³ *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776, review denied, 171 Wn.2d 1025, 257 P.3d 664 (2011).

⁴ *In re Netherton*, 177 Wn.2d 798, 306 P.3d 918 (2013).

Response to Petition at 13. But *Brown* does not apply to appellate counsel.

Brown pleaded guilty to possession of a controlled substance with intent to deliver and second degree unlawful possession of a firearm in January 2009. On April 21, 2009, the United States Supreme Court decided *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), in which it announced a new rule limiting the exception to the warrant requirement for searches incident to arrest. This rule would have benefited Brown. *Brown*, 159 Wn. App. at 369. The appellate court said:

Mr. Brown correctly points out that trial counsel have a duty to research relevant law. At the time Mr. Brown's plea agreement was finalized, the United States Supreme Court had not yet issued *Gant*; it was not yet relevant law. Mr. Brown's trial counsel thus had no responsibility to seek it out. Mr. Brown nonetheless argues that with computer research, his counsel could have determined that *Gant* was pending and that the lower court's holding was on point and favorable to his position. But imposing such a duty would place an unreasonable burden on defense counsel and set a standard for diligence that obliges counsel to raise issues in anticipation of any possible change in the law. The burden on defense counsel would be especially onerous in the plea bargain context, because the consequence of a mistaken prediction could be far more adverse than time and effort spent on a failed argument—it could be the lost offer of a favorable plea. Accordingly, trial counsel's failure to advise his client of pending cases during the plea bargaining process cannot constitute ineffective assistance.

Brown, 159 Wn. App. at 373.

The rule in *Brown* applies only to trial counsel's performance when negotiating a plea. But it has no application when evaluating the performance of appellate counsel. Familiarity with issues pending in the United States Supreme Court and this Court – particularly those of constitutional magnitude – is a basic requirement of appellate counsel. And this Court said so in *In re Netherton*.

Netherton's appeal was "extended for many years due to the changing legal landscape concerning sentence enhancements." *In re Netherton*, 177 Wn.2d at 799.

The Court of Appeals initially reversed the firearm enhancement in light of *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (*Recuenco I*), where we held that imposing a firearm enhancement based on a deadly weapon verdict constituted reversible error. *State v. Netherton*, noted at 131 Wn. App. 1030, 2006 WL 269984 (2006). We granted the State's petition for review and remanded to the Court of Appeals for reconsideration in light of *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (*Recuenco II*), which partly reversed *Recuenco I* and remanded to this court to determine whether the error was harmless under state law. *State v. Netherton*, 158 Wn.2d 1006, 143 P.3d 596 (2006). On remand, the Court of Appeals did not stay Netherton's appeal pending this court's decision on remand in *Recuenco*.

Id. at 799-800. Netherton's conviction became final.

But, had appellate counsel moved to stay Netherton's challenge to her firearm enhancement, the claim would have been meritorious under *State v. Recuenco (Recuenco III)*, 163 Wn.2d 428, 180 P.3d 1276 (2008),

and *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010), two cases pending before this Court during the relevant time period. By the time Netherton filed her PRP she could no longer rely directly on *Recuenco III* and *Williams-Walker* because both decisions were issued after her judgment and sentence became final, and neither is retroactively applicable to previously final judgments. *Id.*

This Court found that experienced appellate counsel would have moved for a stay in the Court of Appeals pending *Recuenco III*, which the Court of Appeals likely would have granted. And had the appeal been stayed, the Court of Appeals likely would have decided the case in light of *Recuenco III* to Netherton's benefit. The failure to anticipate decisions on cases pending in this Court was deficient performance.

Requiring appellate counsel to not only know the current law but also to know what issues are percolating in this Court and the United States Supreme Court is simple. There are numerous ways that appellate counsel can keep current, including this Court's website, Scotusblog and professional publications.

C. AMICUS URGES THIS COURT TO REMAND THIS MATTER FOR AN EVIDENTIARY HEARING BECAUSE THE MANNER IN WHICH THIS APPEAL WAS HANDLED RAISES SIGNIFICANT QUESTIONS ABOUT WHETHER THERE IS A LARGER, SYSTEMIC PROBLEM WITH THE PROVISION OF APPELLATE DEFENSE SERVICES

It may be that appellate counsel was properly compensated and had plenty of time to devote to competently represent Mr. Sandoval on appeal and that her failure to identify, brief and argue the strongest issues on appeal were simple incompetence. The facts, however, suggest there are more fundamental systemic issues involved.

Washington defendants have a state constitutional right to appeal.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed **and the right to appeal in all cases:**

Wash. Const. art. I, § 22 (emphasis added). Washington was the first state in the Union to expressly include a state constitutional right to appeal.

Lobsenz, A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction, 8 Univ. of Puget Sound L. Rev. 375 (1985). And, of course, it is clearly established that such a right is meaningless for indigent defendants without the assistance of competent counsel.

The record suggests that the State's current system of appointment, payment and removal of counsel seriously impairs that right. The current Payment Policies for the Office of Public Defense are found at <http://www.opd.wa.gov/documents/0378-2016>. Applying those policies to this case, Ms. Arnold was paid a total of \$4,000 for her representation of Mr. Sandoval. For that fee Ms. Arnold had to perform these basic tasks: review the superior court file, designate the clerk's papers, review the trial court minutes, contact the court reporter, file a statement of arrangements, read the 4,000-page transcript, research all the potential issues, write an opening brief, communicate with the client, write a reply brief and appear for oral argument.⁵ There is no provision for reimbursement of costs. This fee includes any copy costs, long distance and collect phone calls, legal research charges, postage and travel to and from court.

The PRP reflects that Ms. Arnold was removed from the case after the briefs were filed and Mr. Eric Nielsen of Nielsen, Broman & Koch was appointed. After the opinion was filed, no further requests for review were filed. But, appellate counsel's duties did not end when the Court of Appeals' opinion issued. See Nancy P. Collins, *Does the Right to Counsel*

⁵ OPD allows appointed counsel to seek "extraordinary compensation" under certain criteria. See OPD Policy, page 3, section C2. But the duties listed above are not "extraordinary." They are always required.

on Appeal End As You Exit the Court of Appeals?, 11 Seattle J. for Soc. Just. 987 (2013). In amicus's view, appointed counsel was also required to file a petition for review because a claim that the evidence was insufficient for conviction is also a federal constitutional claim. Because counsel did not file a petition for review, Sandoval could not proceed to federal court because he had not exhausted his state court remedies. *O'Sullivan v. Boerckel*, 526 U.S. 838, 849, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999).

Here, it would have taken counsel about 80 hours to read the transcript if she read 50 pages per hour. If that was all she did, she was paid \$50.00 per hour gross. But that amount must be reduced by the time appellate counsel spent on the other tasks, including consulting with her client, researching the issues presented, writing the brief and, if required, preparing for and presenting oral argument, analyzing any opinion and filing a petition for review.

There is simply no way that a payment of less than \$50 per hour gross in 2016 to experienced appellate counsel is a sustainable model.⁶ It

⁶ By way of comparison, appointed appellate counsel in federal court is paid \$129.00 per hour and is reimbursed for long distance phone calls, copying costs, and travel time, mileage, parking and some legal research expenses. Were this case in federal court, appellate counsel would have been paid about \$10,000 just for reading the transcript. Financially prudent counsel on both panels would be reasonable in declining appointment for state cases if they receive assignments for federal appeals.

is easy then to see why appointed appellate counsel might not be inclined to file a reply brief, push for oral argument or file a petition for review.⁷ The paucity of payment means that the economic incentive is to not file anything after the opening brief. In the context of appointed trial counsel, this Court has criticized similar public contracts for public defenders that discourage appropriate investigation, testing of evidence, research, and trial preparation, and literally reward the public defender financially for every guilty plea the defender delivers. *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956, 960 (2010). This Court should be similarly concerned about flat fee appellate contracts that financially reward appellate counsel who do not properly investigate the appellate issues identified by trial counsel, file no reply brief, do not seek oral argument and fail to file a petition for review.

The flat fee arrangement in these payment policies creates a financial conflict of interest for the attorney and can lead to counsel to accept excessive caseloads.⁸ Just this week the Texas Defender Service

⁷ Excellent appellate defenders are working at these reduced rates. But this Court should not condone a model that relies on persons willing to make the personal sacrifice to work at an unacceptably low rate of pay. Given the disparity in pay for appointed work in state court as opposed to federal court, increasing the incentive will be to decline state court work. A payment of less than \$50 per hour gross in 2016 to experienced appellate counsel is an unsustainable model.

⁸ The Washington city of Mount Vernon failed to provide effective assistance of counsel to indigent defendants and this systemic failure was a "natural, foreseeable, and expected

published a report entitled Lethally Deficient: Direct Appeals in Texas Death Penalty Cases, September 20, 2016, <http://texasdefender.org/lethally-deficient-new-tds-report-texas-direct-appeal-process/>. The report concludes that flat or capped compensation schemes create a perverse incentive for lawyers to accept a high volume of appointments and reduce the number of hours expended on each case.

Excessive caseloads also lead to delay. Although this Court recently adopted case load standards, appointed appellate counsel's caseloads appear to regularly exceed them. See Accords, Motion to Extend Time, filed by Mr. Gregory Link, *State v. Allen*, No. 48384-0-II, 9/19/16.

The clerk granted the motion but stated:

The clerk would ordinarily forward any further continuance requests to the Chief Judge for consideration. However, the clerk wishes to address the continuing systemic delays referenced in counsel's motion should counsel require additional time for or the deadline is missed. Clearly the referenced delay is a systemic failure that negatively impacts appointed clients. However, no all the blame for this failure belongs at the doorstep of the Office of Public Defense; the failure is truly systemic.

Accords, Ruling, *State v. Allen*, No. 48384-0-II, 9/20/16.⁹

result of the caseloads the attorneys handled." *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

⁹ Pursuant to RAP 16.7(a)(3), Amicus asks this Court to order this motion and ruling to be transmitted to this Court.

Similarly, in October 2015 the Sixth Amendment Center and the Fred T. Korematsu Center for Law and Equity filed a study commissioned by the Utah Judicial Council Study Committee on the Representation of Indigent Criminal Defendants. The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services, October 2015, http://sixthamendment.org/6ac/6AC_utahreport.pdf.

As the title states, the report focused on trial level indigent defense. Chapter 4 of that report explains the financial conflicts created by flat fee contracting. It notes in a flat fee arrangement, the more time a lawyer spends on carefully preparing a case, the less he or she is rewarded financially. Every hour she works to develop more complex issues, she reduces her actual hourly compensation. This structure incentivizes quick and superficial briefing rather than competent, careful and zealous advocacy. Every dollar spent on client-specific expenses – postage, travel to meet with the client, copies for a client, long distance and collect phone calls – also reduces the lawyer’s actual hourly compensation. This incentivizes minimal contact with the client.¹⁰

¹⁰ The vast majority of the indigent appellate defenders in Washington work along the I-5 corridor in the central Puget Sound region. Only one DOC facility – the Monroe Correctional Center – is within a 90 minute drive of that area. The remaining facilities are in remote areas the State. Walla Walla is 262 miles from Seattle – a four-hour drive. At the time of filing the PRP, Sandoval was actually being housed at the Minnesota Correctional Facility in Bayport, Minnesota – 1,776 miles from Seattle.

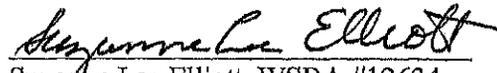
Sandoval is entitled to an evidentiary hearing to develop the facts relating to any systemic issues. He is entitled to prove that any presumption of competence is undermined by the fact that his counsel was not paid enough to competently represent him and that failing to properly pay counsel contributed to the ineffective assistance of counsel.

III. CONCLUSION

This Court should clarify the standards for the effective assistance of appellate counsel. This Court should also remand for an evidentiary hearing to determine whether the lack of adequate compensation for appellate counsel contributed to the deficient performance here.

DATED this 6th day of October, 2016.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Amicus Co-Chairperson, WACDL

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and by First Class United States Mail, postage prepaid, one copy of this amended brief on the following:

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Dear Sir/Madame:

Enclosed for filing in the Washington State Supreme Court in *In re the Personal Restraint of Eduardo Sandoval*; Supreme Court No. 92412-1, is the **Amended Brief of Amicus Curiae**.

Feel free to contact me with any questions or concerns.

Thank you for your kind attention to this matter.

Best,

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