

SUPREME COURT OF ARIZONA

STATE OF ARIZONA

Petitioner,

v.

HOPE LYNETTE KING,

Respondent.

Supreme Court

No. CR-21-0061-PR

Court of Appeals

No. 1 CA-CR 17-0543 PRPC

Maricopa County Superior Court

No. CR 2001-003384

BRIEF OF *AMICUS CURIAE*
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
IN SUPPORT OF RESPONDENT HOPE LYNETTE KING

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INTRODUCTION

Arizona law authorizes a trial court to consider “newly discovered evidence” to grant post-conviction relief. The newly discovered evidence “must appear on its face to have existed at the time of trial but be discovered after trial.” *State v. Bilke*, 162 Ariz. 51, 52 (1989).

A new diagnosis for a mental health disorder, accompanied by testimony that the defendant suffered from the disorder at the time of trial, satisfies this.

But the majority below reached a different conclusion—the majority below opined that if a *disorder* existed at the time of trial, a recent *diagnosis* was not newly discovered evidence.

This interpretation defies this Court’s jurisprudence, and common sense.

Moreover, this interpretation demands attorneys perform with maximum feasible diligence, not the reasonable diligence this Court expects.

Because the lower court majority misapplied the law regarding newly discovered evidence and attorney diligence, this Court should accept review and reverse.

INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ submits this brief in support of the petition for review because the level of investigation by reasonably diligent counsel is of paramount interest to the courts and to AACJ. AACJ recognizes the fact that despite a lawyer's best efforts, sometimes evidence remains undiscovered until post-conviction proceedings. Through this brief, AACJ hopes to offer a workable test for determining when medical, scientific, or psychological evidence qualifies as newly discovered evidence under [Rule 32.1\(e\)\(1\)-\(2\)](#).

ARGUMENT

A new mental health diagnosis is new evidence. This is especially true when a trial attorney hired and consulted experts, but those experts were unable to accurately diagnose a defendant because of inadequate professional understanding of the disorder.

The lower-court majority rested its decision upon a faulty assumption: if a mental health condition was potentially discoverable, then a reasonably diligent lawyer would have necessarily discovered it. See *State v. King*, 250 Ariz. 433, ¶¶ 35-37, 38-40 (App. 2021).

This assumption presupposes that a *diagnosis* can never be new evidence if the *disorder* existed when the defendant was tried. And the assumption presumes a reasonably diligent lawyer would have been assured of discovering the diagnosis.

But professional understanding of disorders and diagnostic criteria develop over time.

The trial court and dissent understood this. Both acknowledged that under [Rule 32.1\(e\)](#), a new diagnosis is newly discovered evidence. And both recognized that relief is appropriate when that new diagnosis is possible because our understanding of a mental health condition and the related symptom recognition has evolved.

I. The two issues in this case—newly discovered evidence and reasonable diligence.

State v. Bilke, 162 Ariz. 51 (1989), should dispose of the issue here.

In 1974, Bilke was convicted of several offenses and received indeterminate sentences between 59 and 170 years. In prison, he was diagnosed with post-traumatic stress disorder.

In determining that Mr. Bilke was entitled to a resentencing, this Court ruled that a colorable claim of newly discovered evidence is established if five requirements are met:

(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Bilke, 162 Ariz. at 52-53. This Court codified this test in [Rule 32.1\(e\)](#), which has undergone only stylistic changes in the last 30 years.

In King's case, the last three requirements cannot reasonably be debated. The evidence of postpartum psychosis was not cumulative; it was relevant; and, as the trial court found, it would have probably altered the verdict had it been known and presented to the jury.

The first two requirements—newly discovered evidence and reasonable diligence—are in dispute, but only because the State and the court of appeals majority misunderstood the law and conflated [Rule 32.1\(e\)\(1\)](#) with [Rule 32.1\(e\)\(2\)](#).

II. A new diagnosis is newly discovered evidence.

The majority below reasoned that King did not meet the *Bilke* standard because postpartum psychosis was recognized and diagnosed for years before her trial. [King, 250 Ariz. 433, ¶ 27](#).

But *Bilke* itself demonstrates that the lower court misunderstood how to address this factor. The issue is not whether a *disorder* existed at the time of a defendant's trial; the issue is whether the defendant had been *diagnosed* with that condition.

Mr. Bilke had not been *diagnosed* with PTSD at the time of his trial, but the *disorder* had been understood in some form for thousands of years. See F. Don Nidiffer & Spencer Leach, [To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder](#), 29 *Dev. Mental Health L.* 1, 4 (2010). Egyptian physicians reported combat-related hysteria in 1900 B.C. *Id.* In the 8th century B.C., Homer's *The Odyssey* included portrayals of flashbacks and survivor's guilt. *Id.* A

precursor name—Nostalgia—was given in 1678. *Id.* During the Civil War, it was known as Nostalgia and Da Costa’s Syndrome, among others. *Id.* In the first World War, it was War Neurosis and Shell Shock. *Id.* With World War II, it became Battle Fatigue and Combat Exhaustion. *Id.*¹ And the 1970 blockbuster and Oscar-winning film *Patton* devoted multiple scenes to the event when General Patton slaps a soldier who was in the medical tent for battle fatigue—bringing the disorder to the attention of all moviegoing Americans. *See id.* at 2-3.

In 1974, most educated members of society understood that soldiers returning from Vietnam had psychological “scars.”

What Veterans Administration psychiatrists lacked, however, was a mechanism for diagnosing PTSD. Mental health professionals had undoubtedly observed the relevant symptoms of the disorder for years. Additionally, the DSM-I included Gross Stress Reaction and the DSM-II included Transient Situational Disturbance, both precursors to PTSD. *To Hell and Back*, 29 Dev. Mental Health L. at 4.

¹ *See also* Frances Codd Slusarz, *Workplace Stress Claims Resulting from September 11th*, 18 Labor Lawyer 137, 138 fn.9 (2002); Elizabeth Robertson, *Diagnosing Amaral: Mental Health Conditions as Newly Discovered Evidence*, 58 Ariz. L. Rev. 1165, 1166 (2016).

But inclusion in the DSM and understanding in the psychiatric community does not happen immediately when a psychiatrist has a Eureka moment. Instead, the idea for the diagnosis is published in journals and discussed at conferences. Only when the psychiatric community eventually settles on diagnostic criteria will it be published in the DSM where all mental health professionals can readily access it.

Thus, Bilke's PTSD qualified as newly discovered because (1) his diagnosis was unknown in 1974, and (2) the failure to obtain a diagnosis earlier than 1987 was not due to a lack of diligence.

Ms. King's case presents the very sort of situation we saw in *Bilke*. Ms. King had not been previously diagnosed with postpartum psychosis. And like *Bilke*, the reason subsequent diagnosis was possible was because developments in the decade after Ms. King's trial led to improved recognition of the symptoms of postpartum psychosis. Dr. Barnes testified that "the scope of symptoms has broadened considerably since 2001." *King*, 250 Ariz. 433, ¶ 17. And Dr. Hibbert testified an accurate diagnosis of postpartum psychosis is more likely now than in 2002. *Id.*

The lower court’s difficulty comes in the fact that Ms. King’s experts agreed there were a small number of mental health experts who were on the forefront of the issue in 2002. Dr. Hibbert testified an accurate diagnosis was possible in 2001, “[w]ith the right person evaluating.” *Id.* And Dr. Barnes testified she would’ve been “the right person,” because she likely could have accurately diagnosed Ms. King in 2002. *Id.*

Under the lower court’s view, evidence is not newly discovered so long as a single expert at the forefront of their field could have accurately diagnosed a person.

To support this novel interpretation of *Bilke*, the majority below relied upon this Court’s decision in [State v. Amaral, 239 Ariz. 217 \(2016\)](#), which the majority believed conclusively precluded relief. *See King, 250 Ariz. 433, ¶¶ 29-30.* But the majority reached this belief by changing the holding of *Amaral*.

In *Amaral*, this Court observed that the key in *Bilke* was that the addition of PTSD to the DSM allowed for a new diagnosis:

- “Unlike Amaral, Bilke suffered from a condition that existed at the time of the trial but was not yet recognized by mental health professionals and, consequently, could not have been diagnosed until years after the trial.” [Amaral, 239 Ariz. 217, ¶ 18.](#)

- “Bilke’s PTSD qualified as newly discovered evidence because the advancement of knowledge permitted the diagnosis of a previously existing—but unrecognized—condition.” *Id.* at ¶ 19.

The key to *Bilke* was not that the DSM recognized a new disorder; it was that the lack of recognition meant the disorder had not been previously diagnosed. Only when PTSD was recognized, and symptoms disseminated, could the disorder be diagnosed.

This was where Mr. Amaral was different. Mr. Amaral presented evidence of his youth (he was under 18) and immaturity at the time of sentencing. *Id.* at ¶ 4. The trial court considered that evidence but still imposed consecutive sentences. *Id.* at ¶ 5. Mr. Amaral’s youth operated as a previously recognized condition. In effect, Amaral’s post-conviction argument was that the advancements in our understanding of juvenile brain development would have made his mitigation more persuasive. *See id.* at ¶ 6.

Bilke and *Amaral* thus create an understandable rule:

A new diagnosis is newly discovered evidence; but where developments only change the weight that might be given a pre-existing condition, the evidence is not newly discovered.

This is where the lower court departed from this Court’s jurisprudence.

The lower court claimed *Amaral* stands for the proposition that newly discovered evidence does not come into play when there has been “broadened research into supplemental diagnostic criteria,” or “greater professional awareness or appreciation of suspected risks and known mental disorders,” or “expanded training or the geographic assimilation of specialized knowledge from experts in California to generalists in Arizona” *King*, 250 Ariz. 433, ¶ 30.

This assertion finds no home in *Bilke*, *Amaral*, or Rule 32. Under *Bilke*, *Amaral*, and Rule 32, a new diagnosis is new evidence.

Moreover, if the majority’s interpretation of *Amaral* were true, *Bilke* never would have been decided the way it was. This Court concluded Mr. Bilke had presented newly discovered evidence because the decision to include PTSD in the DSM meant he could be diagnosed with it. *Bilke*, 162 Ariz. at 53; *Amaral*, 239 Ariz. 217, ¶ 19. That is “broadened research into supplemental diagnostic criteria” as compared to prior characterizations of the disorder. That is “greater professional awareness or appreciation of suspected risks and known mental disorders.” And inclusion in the DSM is “expanded training” that

disseminates information to “generalists in Arizona.” The *King* majority read *Bilke* and *Amaral* wrong.

With the line between *Bilke* and *Amaral* properly understood, medical and psychological diagnoses do not present a particularly difficult legal question; the legal analysis is no different than it would be for discovery of a new witness or other factual inquiries. The difficulty in a case like this lies in the fact-finding process for the trial judge because it requires a thorough retrospective analysis.

While it can be challenging to retrospectively diagnose a condition to a particular date, it occurs regularly. For example, after the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), courts throughout the country grappled with determining whether defendants had intellectual disabilities that onset before age 18. See *Williams v. Cahill*, 232 Ariz. 221, ¶ 26 (App. 2013) (noting difficulties with retrospective analyses for intellectual disability). Nevertheless, the fact that such an analysis is more difficult does not make it impossible.

But once the trial judge sifts through all the expert testimony, the ultimate legal question is easy: either the defendant had the condition at the relevant time, or she didn't.

Here, Dr. Hibbert and Dr. Barnes both testified Ms. King had postpartum psychosis at the time of the offense. And both testified Ms. King was not accurately diagnosed at the time of trial because of shortcomings in our understanding of postpartum psychosis. The trial court believed their testimony.

That is new evidence.

III. An attorney is reasonably diligent in attempting to discover mental health issues if they retain and consult local experts.

The second step involves an assessment of the defendant's diligence in discovering the facts. This is essentially a determination of whether trial counsel reasonably could have been *expected* to discover the condition.

A “reasonably diligent” attorney is not perfect. Instead, a reasonably diligent lawyer is one whose “conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *see also Holland v. Florida*, 560 U.S. 631, 653 (2010) (distinguishing “reasonable diligence” from “maximum feasible diligence”).

In a case involving medical or psychological evidence, a reasonably diligent lawyer should at least consult with an expert to determine if the State's evidence is reliable or if the defendant can defend against the charge. *State v. Denz*, 232 Ariz. 441, ¶¶ 19-20 (App. 2013).

But what if a lawyer consults with an expert and still fails to identify the winning issue?

Strickland and its progeny tell us that an objectively reasonable lawyer will sometimes fail to discover an appropriate argument or defense. For example, this Court recently held that a reasonably diligent attorney may fail to discover that a pattern jury instruction misstated the law, even in a capital case. *State v. Miller*, 251 Ariz. 99, ¶ 13 (2021).

Rule 32.1(e)(2) is the alternative to an ineffective assistance of counsel claim. Either the reasonably diligent lawyer should have been able to discover this information, or not. If so, the claim is ineffective assistance of counsel; if not, the claim is newly discovered evidence.

The lower court majority emphasized that postpartum psychosis could have been discovered at the time of Ms. King's trial. It highlighted articles, law reviews, and even a cable news report that discussed

postpartum psychosis. *King*, 250 Ariz. 433, ¶ 15. It pointed out that Dr. Hibbert testified that “the right person” could have accurately diagnosed Ms. King. *Id.* at ¶ 17. It noted that Dr. Barnes testified “that she ‘personally’ could have diagnosed King before” the 2002 trial. *Id.* It doubled-down on Dr. Barnes’s testimony, concluding: “The record is plain and uncontested. ‘With [her] expertise in this field,’ Dr. Barnes said that she could have diagnosed King as suffering from postpartum psychosis in 2001 or 2002, when Dr. Barnes worked out of her Southern California office and already enjoyed a national reputation, having just appeared on a national cable network.” *Id.* at ¶ 40.

But the lower court errantly interprets diligence as perfection. Had an attorney been perfect, perhaps we wouldn’t be in this situation. But that perfection would have required a substantial amount of luck. The attorney would have needed to: 1) spot the issue, 2) research it, 3) decide to pursue the issue, 4) secure funding for the investigation, 5) identify the right doctor to conduct the examination (a specialist in a different state who was on the cutting edge of the issue), and 6) retain that specific doctor.

In King's case, trial counsel accomplished almost all of this. Counsel spotted the issue and researched it. They decided to pursue the issue and secured funding. And they even consulted more than one doctor.

The downfall was that counsel wasn't fortunate enough to retain one of the few doctors who could have accurately diagnosed postpartum psychosis at the time.

This failure is not one of diligence; it is one of luck. It was possible that trial counsel could have discovered one of the only people in the United States who was capable of correctly diagnosing King in 2001; but the chances of success were equivalent to finding a needle in a haystack.

The trial court evaluated the testimony and determined that trial counsel acted with reasonable diligence. That is all that *Bilke* and Rule 32.1(e)(2) require.

CONCLUSION

A new diagnosis is new evidence. This is especially true when the new diagnosis is possible because of evolution in the mental health field.

And neither Rule 32 nor this Court's jurisprudence demand perfection from an attorney; both require reasonable diligence in uncovering facts. An attorney who has consulted with local experts has acted diligently.

Because the lower court majority incorrectly construed Rule 32 and this Court's jurisprudence, this Court should grant review and reverse.

RESPECTFULLY SUBMITTED this 30th day of June, 2021.

Arizona Attorneys for Criminal Justice

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