

**IN THE SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA

Respondent,

v.

STEVEN DEMOCKER

Petitioner.

No. CR-21-0113-PR

Arizona Court of Appeals
No. 1 CA-CR 20-0456-PRPC

Yavapai County Superior Court
No. P1300CR201001325

**Arizona Attorneys for Criminal Justice Amicus Curiae Brief in Support of
Petitioner's Petition for Review in the Arizona Supreme Court**

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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 offers this brief in support of Steven DeMocker's petition for review because the issues touch the core of AACJ's mission. Erroneous convictions are often predicated on the admission of unreliable expert testimony. Likewise, the innocent are more likely to be convicted when there is a breakdown in the adversarial system via ineffective assistance of counsel. This case presents an intersection of both issues and is worthy of exacting scrutiny.

MATERIAL FACTS

Steven DeMocker was convicted of killing his ex-wife based on circumstantial evidence that the trial judge recognized did not amount "to the strongest case." Hence, the trial judge "wouldn't" have been "surprise[d] if there was a not guilty verdict or a hung jury on Count 1 or Count 2 or both." PCR Petition at 15 (quoting RT 09/11/2013).

During post-conviction proceedings, some of Mr. DeMocker's claims centered on trial counsel's ineffectiveness for failing to preclude unreliable expert testimony. *See* PCR Petition at 10-14, 34-39.

Trial counsel believed that the State’s theory on motive revolved around Mr. DeMocker’s “financial problems” surrounding an “acrimonious divorce.” State’s PCR Response Ex. 1 at 85. Trial counsel also knew that the State’s case centered on an implausible theory that the murder weapon was a golf club. The linchpins for both theories rested upon three experts—forensic accountant Peter Davis, medical examiner Dr. Phillip Keen, and forensic analyst Jonathyn Priest—each of whom trial counsel knew intended to offer unreliable testimony at trial.

Yet, trial counsel never considered moving to preclude the testimony of Keen and Priest and never tested Priest’s methods until the middle of trial.

A. Peter Davis’s unreliable expert testimony.

Trial counsel knew that the State’s proffered forensic accountant, Peter Davis, intended to offer “cockeyed” testimony at trial. PCR Court Ruling at 31; State’s PCR Response Ex. 1 at 90. Yet, trial counsel believed that he had no basis to preclude Mr. Davis’s testimony. State’s PCR Response Ex. 1 at 87.

Notably, trial counsel conceded that if his legal assessment regarding the admissibility of the financial expert testimony was wrong, that he had “no strategic reason” for failing to challenge the admissibility of the testimony. Trial counsel admitted that he would have pursued preclusion if he had a basis. *Id.* at 88.

Yet, as the State implicitly confessed below, Davis’s direct examination testimony was the product of unreliable methods wherein Davis “double-count[ed]”

expenses and purchases made on the same lines of credit. State’s PCR Response at 19. Davis’s error inflated his testimony concerning “expenses above income by \$280,000.” PCR Petition at 11. Additional errors were made in Davis’s accounting of DeMocker’s monthly alimony payments. *Id.*

But trial counsel apparently did not become aware of the breadth of Davis’s unreliable methods until after Davis’s trial testimony since counsel’s independent expert did not examine Davis’s methods and conclusions until after Davis’s trial testimony. *Id.* at 12.

Despite the double-counting flaws, the State argued below that there was no issue regarding defense counsel’s failure to preclude Davis since Davis was qualified to testify. State’s PCR Response at 19.

The PCR Court acknowledged trial counsel’s concession that it believed Davis’s proposed testimony to be “cockeyed.” PCR Ruling at 31. Like the State, the PCR Court premised its analysis on an incomplete legal standard—whether “Davis possessed training and experience to testify as a forensic accountant.” *Id.* In rejecting Mr. DeMocker’s claim, the PCR Court credited trial counsel’s unreasoned conclusions without holding an evidentiary hearing or identifying anything in the record to establish that Davis’s testimony was the product of reliable methods. *Id.* at 32.

B. Dr. Keen's unreliable expert testimony.

Trial counsel believed that Dr. Keen's investigation was also fraught with reliability issues, going so far as to conclude that Dr. Keen was "nutty." State's PCR Response Ex 1. at 106.

Dr. Keen had made a quick judgment that the murder weapon was a golf club. To support this conclusion, Dr. Keen rashly decided to seek the assistance of Dr. Fulginiti in Phoenix. He put the victim's body in a bag and transported it from Yavapai County to Phoenix in his own uncovered and exposed pickup truck during the summer heat. Dr. Fulginiti subsequently rejected receipt of the body. The improper transport caused unnecessary damage to the fragmented skull remains. PCR Petition at 35-38.

Dr. Keen proceeded with an unreliable skull reconstruction effort during which he encouraged law enforcement officers to agree with his earlier unfounded suspicion that the murder weapon was a Big Bertha Callaway Wood. *Id.* at 38.

Moreover, Dr. Keen later admitted that he had misplaced a piece of the skull during the reconstruction efforts. *Id.*

Dr. Keen also failed to use adequate sterilization procedures during the autopsy, resulting in cross-contamination of DNA from fingernail clippers used in a prior autopsy. This error was compounded by a failure to properly document his autopsies. *Id.* at 36-37.

Yet, trial counsel never considered whether to preclude Dr. Keen's expert testimony. PCR Reply at 15; State's PCR Response Ex. 1 at 106.

The PCR Court concluded Dr. Keen's testimony would have been admitted if challenged as unreliable. PCR Ruling at 48-50. But the PCR Court's ruling did not address any of the issues concerning the transportation of the body in a pick-up truck during the summer heat, the errors in reconstructing the skull, or the numerous errors in other aspects of the autopsy. *Id.* at 49. Instead, the PCR Court relegated Dr. Keen's "so-called bizarre actions" to a footnote in which it concluded there was no prejudice to Mr. DeMocker. But this was based upon the PCR Court's decision that Dr. Fulginiti reached a "similar" decision to Dr. Keen. That is not accurate. Dr. Fulginiti testified the murder weapon could have been a golf club; Dr. Keen was absolutely certain the murder weapon was a golf club. *Compare* PCR Ruling at 50, fn. 13 *with* PCR Petition at 32.

Nor did the PCR Court assess whether a reasoned decision on preclusion can be made if it is not properly considered by trial counsel in the first place. *Id.* at 49-51.

C. Jonathyn Priest's unreliable expert testimony.

Priest's testimony that the murder weapon was a hosel of a golf club swung from left to right during the offense was the product of unreliable methods and influenced by his pre-investigation knowledge that Mr. DeMocker was left-handed.

PCR Petition at 40, Ex. 7 (Declaration of Robert Tressel). Priest's unreliable testimony mirrored Dr. Keen's. Rather than consider precluding Priest's testimony, trial counsel presumed the evidence would be admitted. State's PCR Response Ex. 1 at 101, 106.

Again, the PCR Court omitted from its analysis any discussion of whether the failure to consider the admissibility of expert evidence may amount to a reasoned trial strategy. Although the PCR Court acknowledged that Mr. Democker's petition included a declaration from Robert Tressel to support his claim that Priest's conclusions were arrived at via unreliable of forensic methods, the PCR Court nonetheless concluded that Priest's testimony would have been admitted if challenged because, according to the PCR Court, the trial court's function is not to preclude "shaky but admissible evidence." PCR Ruling at 53.

D. Rulings below.

The PCR Court rejected Mr. DeMocker's ineffective assistance of counsel claims, finding that each claim of error was incolorable because trial counsel's decisions were rooted in "some reasoned basis." PCR Court Ruling at 55.

Mr. DeMocker appealed to the Court of Appeals, which summarily denied relief. Mr. DeMocker then petitioned this Court for review, asserting among other claims, that the PCR Court erred in rejecting his claims that trial counsel was ineffective for failing to preclude unreliable expert testimony.

Arizona Attorneys for Criminal Justice now files this amicus curiae brief in support of Mr. DeMocker's Petition for Review.

REASONS THIS COURT SHOULD GRANT REVIEW

Unreliable expert testimony results in unreliable convictions. *Hinton v. Alabama*, 571 U.S. 263, 276 (2014). Here, the State presented a trifecta of unreliable evidence. Mr. DeMocker's trial counsel knew that this proffered expert testimony was unreliable but never considered moving to preclude it. Trial counsel admitted that there would be no strategic basis for failing to preclude inadmissible expert testimony. But instead of investigating and pursuing preclusion of the unreliable expert testimony, trial counsel ignored the admissibility issue.

The record establishes that the methods employed by Davis, Keen, and Priest were unreliable, or, at a minimum, there were material facts in dispute concerning the reliability of the testimony. The record also establishes that trial counsel neglected to make a legally reasoned decision when it failed to consider moving to preclude unreliable expert testimony.

The PCR Court rejected Mr. DeMocker's claims that he was denied effective assistance of counsel without holding an evidentiary hearing. Instead, the PCR Court misapplied the applicable standards and ignored the record.

This Court should grant review for two reasons.

First, the PCR Court concluded the trial attorney made a reasoned tactical decision despite the attorney's deposition testimony that their decision was not tactical, but due to an outright failure to consider the issue. While this Court has not weighed in on this narrow issue, our Court of Appeals has held that an attorney's decision is not strategic when the attorney fails to investigate their options and make a reasonable choice. The lower courts have thus incorrectly decided an important legal issue in this case, thereby warranting review. *See* [Ariz. R. Crim. P. 31.21\(d\)\(1\)\(C\)](#). To the extent the appellate court approved of the post-conviction court's conclusion, the appellate court has issued a decision that conflicts with other opinions it has published. *Id.*

Second, the PCR Court ruled that, despite the shortcomings, challenged expert testimony would have been admitted nonetheless simply because it was expert testimony. This ignored the question of whether the expert testimony was a product of the faithful application of reliable scientific methods—a key component to the court's gatekeeping function. As such, the lower courts again incorrectly decided an important legal issue. *See* [Ariz. R. Crim. P. 31.21\(d\)\(1\)\(C\)](#).

A. The PCR Court erred under the first *Strickland* prong by affording strategic deference to trial counsel's failure to consider precluding unreliable expert testimony.

“An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential

example of unreasonable performance under *Strickland*.” *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Thus, where trial counsel does not make an “informed strategic choice” on an important legal decision, “deference does not come into play.” *Cosio v. United States*, 927 A.2d 1106, 1126 (D.C. 2007); see also *Williams v. Taylor*, 529 US. 362, 396 (2000) (failure to investigate mitigation not “justified by a tactical decision”).

Arizona courts have recognized that trial counsel’s decisions are not tactical where they are the result of “ineptitude, inexperience or lack of preparation.” *State v. Denz*, 232 Ariz. 441, 444 ¶ 7 (App. 2013); accord *State v. Goswick*, 142 Ariz. 582, 586 (1984). “Strategic decisions are ‘conscious, reasonably informed decision[s] made by an attorney with an eye to benefitting his client.’” *Denz*, 232 Ariz. at 445 ¶ 11 (quoting *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir.2001)). Thus, “[a] purportedly strategic decision is not objectively reasonable ‘when the attorney has failed to investigate his options and make a reasonable choice between them.’” *Denz*, 232 Ariz. at 445 ¶ 12 (citing *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir.2005), quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir.1991)).

In *Denz*, counsel was ineffective for failing to consult with an independent medical examiner before settling on a defense strategy. Because the attorney’s omission was not reasonably informed, it could not qualify as a reasoned decision. 232 Ariz. at 447 ¶ 19.

Other courts, including the United States Supreme Court, have consistently found that counsel's failure to make decisions based on a legally correct assessment of the law or a sufficient investigation of the facts renders their performance objectively unreasonable. Consider the following scenarios where the trial attorney:

- Failed to understand the law concerning budget for appointment of an expert. *Hinton*, 571 U.S. at 274.
- Made an investigation omission which “resulted from inattention, not reasoned strategic judgment.” *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).
- Failed to suppress evidence obtained unlawfully under the 4th Amendment. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (finding post hoc rationalizations for “a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation”).
- Failed to call witnesses because counsel believed it to be unnecessary if the motion to dismiss was granted. *Pavel v. Hollins*, 261 F.3d 210, 217 (2d Cir. 2001).
- Failed to investigate arson expert testimony when “possible problems with the state’s experts” were known. *Dugas v. Coplan*, 428 F.3d 317, 332 (1st Cir. 2005).
- Failed to investigate impotence defense in rape case. *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993).
- Failed to interview a self-defense witness. *Chambers v. Armontrout*, 907 F.2d 825, 831 (8th Cir. 1990).
- Failed to investigate a witness despite “having strong reasons to investigate” them. *Cosio v. United States*, 927 A.2d 1106, 1131 (D.C. 2007).

Here, the record is clear that trial counsel believed that the State intended to introduce unreliable expert testimony from Davis, Keen, and Priest. Yet, trial

counsel never considered whether to preclude the unreliable expert testimony. These critical decisions “resulted from inattention, not reasoned strategic judgment.” *Wiggins*, 539 U.S. at 526.

This inescapable conclusion—that counsel’s omissions were not strategic and thus were unreasonable—is supported by Standard 4-1.5 (“Preserving the Record”) and Standard 4-3.7(f) and (g) (“Prompt and Thorough Actions to Protect the Client”) of the American Bar Association’s Criminal Justice Standards For Criminal Justice: Defense Function (4th Ed.). (available https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/). These standards require counsel to give careful consideration to important legal and factual issues in the case. *Id.* Standard 4-1.5 requires trial attorneys to make objections, request hearings, and preserve the record. Standard 4-3.7(f) requires trial counsel to discuss unfamiliar matters with colleagues. Standard 4-3.7(g) requires trial counsel to consult with experts and to personally research specialized factual and legal issues.

The ABA Standards support the *Denz* court’s conclusion that “[a] purportedly strategic decision is not objectively reasonable ‘when the attorney has failed to investigate his options and make a reasonable choice between them.’” *Denz*, 232 Ariz. at 445 ¶ 12; *see also Doe v. Ayers*, 782 F.3d 425, 444 (9th Cir. 2015) (“An uninformed strategy is not a reasoned strategy.”).

The record established that trial counsel never made a reasoned decision on whether to preclude the unreliable expert testimony of Davis, Keen, or Priest. State's PCR Response Ex. 1 at 106.

Each point in the record cited by the PCR Court to support its finding that trial counsel's actions were tactical in nature were nothing more than "a *post hoc* rationalization of counsel's conduct [rather] than an accurate description of [trial counsel's] deliberations prior to" trial. *Wiggins v. Smith*, 539 U.S. at 526–27.

Like the ineffective lawyer in *Denz*, counsel made a decision regarding the admissibility of Davis's testimony without first fully consulting an independent expert on the reliability of Davis's methods. Instead, trial counsel waited until after Davis's trial testimony to have its own expert, Gregg Curry, analyze Davis's methods. PCR Petition at 12. The PCR Court did not explain how trial counsel can make a reasoned pre-trial decision based upon information it does not have until the middle of trial. PCR Ruling at 30-32.

The PCR Court acknowledged that trial counsel never considered precluding Keen's testimony. *Id.* at 50. But the PCR Court credited the failure to be strategic in nature because counsel wanted to admit portions of Keen's testimony. *Id.* at 50-51. But trial counsel never considered limiting Keen's testimony deemed supportive of its theory while precluding the prejudicial and unreliable testimony. This failure to

make a reasoned decision among reasonable choices was not strategic. *Denz*, 232 Ariz. at 445 ¶ 12.

The PCR Court credited counsel's characterization of Priest's "weirdly argumentative" testimony style as evidence of counsel's strategic considerations concerning admissibility. PCR Court Ruling at 52. But this, too, was a *post hoc* rationalization since counsel never considered precluding the expert's testimony. State's Response Ex. 1 at 106.

The record establishes that counsel neglected to consider reasonable choices when developing a trial strategy to confront the State's unreliable expert testimony. The rulings below do not distinguish this case from *Denz* or the other jurisdictions which have uniformly held that an attorney does not act strategically when he neglects to investigate options and make a decision among reasonable choices.

This Court should grant review to correct this legal error.

B. The PCR Court erred under the second *Strickland* prong by concluding, without holding an evidentiary hearing, that the unreliable testimony would have been admissible.

The PCR Court buttressed its erroneous ruling on *Strickland*'s first prong by finding that Mr. DeMocker had failed to establish prejudice under *Strickland*'s second prong. But the PCR Court's ruling here was erroneous, too.

1. The PCR Court applied an incorrect admissibility test.

More than “training and experience” is necessary to admit an expert’s testimony. *Compare* PCR Court Ruling at 31 *with* [Ariz. R. Evid. 702\(c\) and \(d\)](#). The PCR Court ignored the plain language of [Rule 702\(c\) and \(d\)](#), which requires that an expert’s testimony be “the product of reliable principles and methods” and that the “expert has reliably applied the principle and methods to the facts of the case.” See PCR Ruling at 31.

The PCR Court’s assertion that the Comment to [Rule 702](#) required it to admit “shaky but admissible evidence” failed to account for the underlying demand that evidence be deemed sufficiently reliable in the first place. PCR Ruling at 31.

“A trial court must consider whether an expert reliably applied the pertinent methodology when expert testimony concerns the facts of a particular case.” [State v. Bernstein, 237 Ariz. 226, 229 ¶ 13 \(2015\)](#). Thus, where an unreliable methodology results in an unreliable opinion, the trial court should preclude the evidence as part of its gatekeeping function. *Id.* at 230 ¶¶ 16-18.

Rather than assess the admissibility of each expert’s testimony under the proper legal test, the PCR Court applied an incorrect legal standard. PCR Court Ruling at 31. This Court should review the lower court’s legal conclusions de novo and find them erroneous. [State v. Newell, 212 Ariz. 389, 397 ¶ 27 \(2006\)](#).

If the admissibility of Davis, Keen, and Priest's expert testimony presents solely a legal issue, then this Court should find that that PCR Court's rulings were erroneous as to both prongs of *Strickland* and remand for a new trial. See *State v. Gutierrez*, 229 Ariz. 573, 579 ¶ 32 (2012) ("when there are no material facts in dispute and the only issue is the legal consequence of undisputed material facts, the superior court need not hold an evidentiary hearing" before granting relief).

2. At a minimum, the PCR Court was required to conduct an evidentiary hearing.

If a petition for post-conviction relief presents issues of material fact which would entitle the defendant to relief, the post-conviction court must set an evidentiary hearing so that the petitioner can prove his claims. *Ariz. R. Crim. P. 32.13* (formerly *Ariz. R. Crim. P. 32.8*); *State v. Watton*, 164 Ariz. 323, 328 (1990); *State v. Spreitz*, 202 Ariz. 1, 2 ¶ 5 (2002).

Mr. DeMocker presented the PCR Court with supporting documentation establishing that the expert testimony of Davis, Keen, and Priest were sufficiently unreliable to render their opinions inadmissible at trial. See PCR Petition at 10-12 (citing trial record of Gregg Curry's testimony), Ex. 7 (Declaration of Robert Tressel), Ex. 8 (Report of Dr. Michael Iliescu).

Rather than order an evidentiary hearing, the PCR Court rejected the arguments based on the application of an erroneous legal standard. PCR Court Ruling at 31.

