

ARIZONA SUPREME COURT

STATE OF ARIZONA,)	No. CR-15-0270-PC
)	
Petitioner,)	
)	Maricopa County Superior
v.)	Court No. CR-1993-008116
)	
DARREL PETER PANDELI,)	
)	
Respondent.)	
)	

**BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
(AACJ) AND ARIZONA CAPITAL REPRESENTATION PROJECT (ACRP)
IN SUPPORT OF RESPONDENT**

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INTRODUCTION

Constitutionally ineffective representation in capital trials is a serious problem nationwide, and specifically in Arizona, home to one of the country's most active death penalty jurisdictions.¹ As the American Bar Association has recognized, “inadequate investigation by defense attorneys . . . ha[s] contributed to wrongful convictions in both capital and non-capital cases.”² Ineffective representation deprives defendants of their constitutional rights, forces judges and juries to make life-or-death decisions with incomplete information, and undermines the integrity of our justice system. Trial courts initially hear such claims in petitions for post-conviction relief; often they are heard by the same judge who presided over the proceeding where the alleged ineffectiveness occurred. Trial judges assess colorable claims in evidentiary hearings, where they hear witnesses discussing what occurred before and during trial.

The question in this case is whether the trial court properly applied the *Strickland*³ test for ineffective assistance of counsel. The State is under the mistaken

¹ See Robert J. Smith, Bidish Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do it Better)*, 35 *Cardozo L. Rev.* 2397 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743025## (last visited April 11, 2016).

² 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Guidelines (“ABA Guidelines”), Standard 10.7, Commentary.

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

impression that the presence of a few misplaced terms in the trial court's written ruling is fatal to the result. But any errors in terminology used in the ruling are mere technical defects. The evidence supports the conclusion that *Strickland* error occurred and prejudiced Pandeli.

Amici curiae Arizona Attorneys for Criminal Justice (AACJ) and Arizona Capital Representation Project (ACRP) asks this Court to affirm the result while ensuring trial courts articulate and apply the correct standard. As the trial court record overwhelmingly supports the decision to vacate the death sentence, remand is unnecessary here; but in the event that this Court determines that remand is appropriate, the remand order need say nothing more than for the trial court to articulate the correct standard on the existing record.

INTERESTS OF *AMICI CURIAE*

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 the accused. 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.

The Arizona Capital Representation Project (ACRP) is a non-profit legal services organization dedicated to improving the quality of representation afforded to capital defendants in the State of Arizona since 1988. ACRP serves its mission by providing *pro bono* training and intensive consulting services to capital defendants and their teams, case-tracking, monitoring, and data collection in Arizona capital cases at all stages, filing amicus briefs in appropriate cases, and providing targeted direct representation. ACRP is the only statewide office providing such services.

Amici offer this brief in support of Respondent Pandeli because of concern that Pandeli's death sentence may be reinstated solely based on technical defects in terminology. Elevating form over substance, especially in a death penalty case, seriously damages the rights of the accused. *Amici* are committed to upholding the integrity of Arizona's criminal justice system. The Court's decision will send a message to participants in the system and to the public about the nature of the protections provided by the state and federal constitutions. This case provides an opportunity for the Court to make clear that the right to effective assistance of counsel is a right of substance, rather than a recital of magic words.

ARGUMENTS

I. The trial court's imprecise terminology does not mean that it did not correctly apply the *Strickland* standard.

In *Strickland*, the Court noted: "the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision,

the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” 468 U.S. at 696. The trial court is presumed to know and follow the law, even where the trial court’s “remarks could reasonably be interpreted to reflect an erroneous [legal] conclusion by the court.” *State v. Vermuele*, 226 Ariz. 399, ¶ 17 (App. 2011).

Here, the trial judge adopted a somewhat confused set of proposed conclusions of law drafted by defense counsel which did not clearly articulate what prejudice standard was being applied. However, he clearly found that the fundamental fairness of the proceeding was compromised by trial counsel’s failures. In the absence of clear indication to the contrary, this Court should presume that the trial court knew and applied the correct standard. This is especially so in a situation where the factual record is clearly consistent with the result.

The trial court held a four-day evidentiary hearing at which Pandeli presented extensive evidence and the State presented nothing in rebuttal. Pandeli’s counsel submitted proposed findings of fact and conclusions of law, which the trial court adopted on February 27, 2015.

Defense counsel’s proposed conclusions of law did not clearly explain the application of both required prongs of the *Strickland* standard. One paragraph cited a passage from *Strickland* concerning limited circumstances where prejudice can be presumed (#50, citing *Strickland*, 468 U.S. at 692). They also included two

paragraphs “find[ing] that the Petitioner has established prejudice,” both because “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” but also because “the totality of the evidence ... makes it highly probable that the outcome of the proceeding might have been different.” (#58-59). It was thus not clear from the text of the adopted conclusions which prejudice standard the court had applied.

The trial court subsequently remedied this confusion by filing an additional minute entry on April 3, 2015. The new ruling incorporated the court’s hand-written corrections on the proposed findings and conclusions and unequivocally stated the correct *Strickland* standard and concluded: “this court now however determines that petitioner has proven both prongs of the Strickland test were violated by trial counsel at this Ring-mandated resentencing.” April 3, 2015 Order at 2. Although this second ruling did not recite the “reasonable probability” language of *Strickland*’s prejudice standard, the court did not simply say that the defendant had been prejudiced; it said that it found by a preponderance of the evidence that counsel *violated both prongs of the Strickland test. Id.* This test is a legal standard with specific requirements, which the court is presumed to know and apply, whether or not it spelled out what those requirements are. *Strickland* held that imprecise terminology is not fatal to a finding, asserting that “the minor differences in the lower courts’ precise formulations of the performance standard are insignificant: the different

formulations are mere variations of the overarching reasonableness standard.” 468 U.S. at 696-97. This Court must presume that the trial court knew and applied the correct *Strickland* test. There is no indication to the contrary in the record that could overcome this presumption. Moreover, by finding both *Strickland*’s deficiency and prejudice prongs proven by a preponderance of the evidence, the court found more than is required under *Strickland*’s reasonable probability prejudice inquiry. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986); *Summerlin v. Schriro*, 427 F.3d 623, 643 (9th Cir. 2005) (*en banc*).

In addition, this Court must affirm the trial court’s ruling if it is correct for any reason. *State v. Perez*, 141 Ariz. 459, 464 (1984); *State v. Cañez (Cañez I)*, 202 Ariz. 133, ¶ 51 (2002). Even if the trial court had applied an incorrect test, this Court would need to affirm the ruling so long as the evidence supports the result under the proper standard. There is no question here that it does.

II. The correctly stated *Strickland* standard requires nothing more than what the post-conviction court found here.

The test for ineffective assistance of counsel has two components. The first requires that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Though a “strong presumption” exists that an attorney’s choices are strategic, *id.* at 689, the trial court is entitled to make credibility determinations and weigh competing evidence. If there is conflicting

testimony, the trial court makes credibility determinations. *State v. Pike*, 113 Ariz. 511, 514 (1976).

Although not binding standards, the 2003 ABA Guidelines “are guides to determining what is reasonable.” *Strickland*, 466 U.S. at 688. Moreover, the question is not only what was presented at trial, but “whether the investigation supporting counsel's decision . . . was itself reasonable.” *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). The court does not simply examine the choices counsel made *at trial* based on what they knew; it must examine what counsel did during the entire course of the representation before deciding what to present. And when counsel is on notice of specific damaging information the State plans to present, they must take reasonable steps to learn about that evidence so they can devise a plan for challenging it. *Rompilla v. Beard*, 545 U.S. 374, 385 (2005) (citing ABA standards in condemning counsel’s failure to obtain, scrutinize, and investigate a file).

Regarding prejudice, *Strickland* states, “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding,” 466 U.S. at 693, but also states that the burden is not so high: “On the other hand, we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* Instead, there must be only a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The Supreme Court defined

“reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” *Id.* Following *Strickland*, this Court defined “reasonable probability” as “less than ‘more likely than not’ but more than a mere possibility.” *State v. Lee*, 142 Ariz. 210, 214 (1984).

In a capital case, *Strickland* requires only that “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537. Jury sentencing in death cases is an entirely different creature from guilt-phase verdicts, where jurors are instructed to follow the law as given and not base decisions on sympathy or prejudice. Capital jurors, however, are told to make individual moral judgments, and they may base a life verdict on mercy. In this case, the jurors were properly instructed: “Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence, including any sympathetic or other aspect of the defendant’s character...” Final Jury Instructions, Page 6.

While not given in this case, standard jury instructions remind jurors that they are tasked with “reaching a reasoned, *moral* judgment about which sentence is justified and appropriate.” State Bar of Arizona, *Revised Arizona Jury Instructions* (Criminal) Capital Case 2.6 (3d ed. Rev. 2012) (emphasis added). Because jurors deciding life or death can choose life for any reason, the mathematical weighing of evidence used in a guilt phase, where the jury is tasked with determining objective facts, is not appropriate.

III. This Court must view the facts in the light most favorable to sustaining the ruling.

Appellate courts review a trial court’s grant of post-conviction relief for abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Factual findings are reviewed for “clear error.” *Id.* This Court has explained the abuse of discretion standard:

. . . . Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; **we will not second-guess.**

State v. Chapple, 135 Ariz. 281, 297 n.18, (1983) (emphasis added) (internal citations omitted).

This Court must “defer to the trial court with regard to any findings of fact, explicitly or implicitly made.” *Francis v. Sanders*, 222 Ariz. 423, ¶ 10 (App. 2009) (citing *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 10 (2003)). Credibility determinations are for the trial court and will not be disturbed on appeal. *Pike*, 113 Ariz. at 514. When there are facts that support both parties, it is difficult to “conclude under an abuse-of-discretion standard of review that the [trial] court erred.” *State v. Butler*, 232 Ariz. 84, ¶ 32 (2013) (Pelander, J., concurring).

The proposed findings of fact were extremely detailed, and reflected the evidence presented at the hearing. The court adopted them with corrections consistent with its perceptions. It is perhaps unsurprising that the court adopted them, given that the State did not present any competing evidence.

The State insists it is not challenging factual determinations by the trial court, but that is plainly what its pleadings before this Court say. The State complains that the trial court “ignored lead counsel’s testimony that his challenged decisions were strategic.” Pet. for Rev. at 1. Both counsel worked as “coequals,” #6, and generally agreed that their strategies were not well-informed. Shriver never said the decision to waive cross-examination of Bayless was sound strategy. To the extent that Shriver defended a tactic that Sinclair did not, the post-conviction court was well within its discretion to credit Sinclair’s testimony instead of Shriver’s.

The State spends four pages describing Shriver’s testimony about strategic reasons without a single mention of Sinclair’s take on these events. The court’s findings of fact indicate that Sinclair testified she lacked the skill to do jury selection; this finding is incompatible with any suggestion that jury selection problems were actually strategies. #22a. The findings further indicate that regarding Dr. Bayless, “[t]he attorneys did not know what to ask.” #22d. Again, this is incompatible with a determination that the failure to get their own expert to look at his report or to inform them about the problems they could expose on cross-examination was strategic. The

State argues that Shriver testified that the failure to cross-examine was in fact a strategy. But the trial court heard evidence that the team had not even investigated, through consultation with their own expert, the problems with Dr. Bayless's work, a finding that clearly undercuts any claim of strategy. This is precisely the type of determination a trial court must make and an appellate court must respect. Thus, the State's entire claim about strategic reasons is one massive challenge to the trial court's determination of the facts on competing testimony.

IV. No remand is necessary because the record overwhelmingly supports the trial court's conclusion under the correct legal standard.

A. Performance

Strickland's requirement that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, is easily met on this record. The trial court made an explicit finding of fact that "Dawn Sinclair and Gary Shriver were ineffective in their representation of Petitioner Pandeli." #5. The failures were dramatic. The trial court found:

Failure to investigate and/or present sufficient mitigation on mental health and brain function, #8-10, 15. The trial court found that counsel's performance fell below the objective standard because they were not equipped to understand and analyze the mental health records they had and failed to have any brain or neuropsychological testing done. #35. Dr. Jones testified about what could have been presented if counsel had obtained the necessary assistance to understand the records

they had as well as the problems with Dr. Bayless's tests, #18. The ABA Guidelines make clear that

mental health experts are essential to defending capital cases . . . the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. . . Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests, or genetic studies, and consultation with additional mental health specialists may also be necessary.

Guideline 8.1, commentary. The court found that trial counsel had not obtained tests on Pandeli's brain, and that the State exploited this failing, #9; that trial counsel did not present the information they did have because they did not understand it, #11, #22d; and trial counsel "failed to use their experts to properly help them prepare for cross-examination of Dr. Bayless." #35. The trial court also found that trial counsel "failed to hire a psychologist or neuropsychologist to explore the various different aspects of how Mr. Pandeli's childhood was destructive of his entire personality." #38. In other words, they did not knowingly choose what to present; they never learned what the possibilities were.

Failure to cross-examine Dr. Bayless, #13. The concern here is not simply that defense counsel waived cross-examination; it is that they had not done sufficient investigation about Dr. Bayless's findings to permit an informed decision. While waiving cross-examination can in some cases be a reasonable tactical decision, failing to investigate deficiencies that could have generated useful avenues for

impeachment is ineffective assistance. *Reynoso v. Giurbino*, 462 F.3d 1099, 1112-13 (9th Cir. 2006) (“[I]f counsel's failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel.”). *Strickland* expert Michael Reeves gave un rebutted testimony that defense counsel’s treatment of Dr. Bayless fell below the standard of care, #17(d), and Dr. Jones gave testimony about the problems with Dr. Bayless’s testimony that could have been exposed if defense counsel had investigated, #18(d)-(j). Shriver agreed that the failure was unacceptable, #21, and was “not strategic,” #23; the trial court made the factual finding that the failure to cross-examine was not a reasonable tactical decision. #24.

Failure to conduct appropriate voir dire on the death penalty, #43. The trial court found that “[t]he defense did not voir dire the jury to ask . . . specific questions, such as would you automatically give the death penalty to somebody, who has been convicted of a murder, such as in this case of a sexually charged murder?” The ABA Guidelines devote an entire standard to jury selection, Guideline 10.10.2, which includes the directive that “Counsel should be familiar with techniques . . . for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible,” and in the commentary, explains that “[c]ounsel should conduct a voir dire that is broad

enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law . . . because they will automatically vote for death in certain circumstances.” The commentary also notes this as one of “the starkest failures of capital voir dire.” Courts have found that a capital voir dire conducted by someone without training and experience constitutes deficient performance. *See, e.g., Harris by & through Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1265 (W.D. Wash. 1994) (counsel ineffective where inexperienced associate conducted a small portion of capital voir dire alone).

It is readily apparent that the trial court’s factual findings on counsel’s performance, to which this Court must defer, are fully supported in the record and easily satisfy the correctly stated *Strickland* performance standard.

B. Prejudice

In attacking the trial court’s prejudice determination, the State complains that the trial court “granted a new sentencing based on effectively the same mitigation the jurors—and this Court on independent review—had already considered and determined did not warrant a life sentence.” Pet. for Rev. at 9. But the question before the court was not whether the mitigation warranted leniency, and thus, similarities in the mitigation presented are not determinative of prejudice. Instead, the trial court was tasked with assessing the effect of counsel’s entire performance on the sentencing proceeding. This analysis encompasses not only the mitigation

presented at trial as compared with that available, but also the selection of the jury and the effect of the State's rebuttal. The degree to which trial counsel actively prevented the State from undercutting the mitigation case, for example through cross-examination or the presentation of additional expert testimony to rebut the State's expert, also affected the moral choice each juror was tasked with making. Even assuming that the State's assertion about the comparison between the two mitigation presentations is correct, it misses the point.

This Court noted in this very case that the mitigation was of such quality that a reasonable jury could find a life sentence appropriate. *State v. Pandeli (Pandeli II)*, 204 Ariz. 569, ¶¶ 9-10 (2003). At the re-sentencing, that potentially sufficient mitigation was undercut by what trial counsel should have recognized as badly misleading testimony by Dr. Bayless. For instance, Dr. Bayless testified that Pandeli had antisocial personality disorder, a diagnosis so prejudicial and damaging that capital practitioners have dubbed ASPD the "kiss of death;" one defense lawyer has testified that he kept such testimony out because "you might as well throw gasoline on a fire." *Cummings v. Sec'y for the Dep't of Corr.*, 588 F.3d 1331, 1347 (11th Cir. 2009). Yet trial counsel did nothing to challenge it.

Courts have recognized the damning effect of this sort of testimony. *See, e.g., Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997) (recognizing an ASPD diagnosis as "potentially damaging psychiatric evidence"). Discrediting it is essential to a

competent defense, yet nowhere in the State's prejudice analysis—a simple comparison of the mitigation evidence presented in the two contexts—is this accounted for. It is unreasonable to suggest that a well-researched, competently prepared challenge to this inflammatory evidence would not have a reasonable probability of altering the perceptions of at least one juror.

Furthermore, it is apparent from the record that additional mitigating evidence was presented in post-conviction. Neuroimaging of Pandeli's brain demonstrated that it is asymmetrical and has frontal and temporal lobe damage. 10/30/14 (p.m.) RT 30-39. This evidence has independent mitigating value, in addition to its value as rebuttal to Dr. Bayless's testimony that Mr. Pandeli was a malingerer. *Id.* at 36-37 (Dr. Weinstein testifying that it is impossible to mangle on a QEEG). *See, e.g., State v. Stuard*, 176 Ariz. 589, 606-10 (1993) (organic brain damage warrants reducing death sentence on independent review); *State v. Graham*, 135 Ariz. 209, 213 (1983) (same).

The State further suggests that the absence of specific evidence of prejudice dooms the claim. But neither this Court nor the United States Supreme Court has ever required specific *proof* that a juror or jurors would have voted differently. Such a standard was explicitly rejected in *Strickland*. 468 U.S. at 695 (“Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review . . . should not be considered in the prejudice determination.”). Rather, the

reviewing court considers the *likely* effect of what should have been, but was not, done. Evidence specific to that inquiry rarely enters the picture, and it is disingenuous for the State to suggest that its absence is fatal to Pandeli's claim. As explained above, a capital sentencing decision is qualitatively different from guilt-phase verdicts. Jurors may grant leniency for any reason, and thus, significant factors that were not considered may have a substantial effect, even if the overall amount of evidence is about the same. The record, common sense, and experience easily support the trial court's conclusion that competent challenge to the misleading and highly prejudicial rebuttal testimony by Dr. Bayless alone had at least a reasonable probability of changing at least one juror's assessment.

The State requests that this Court "reverse the PCR court's determination" that Pandeli has proven his ineffective assistance of counsel claim.⁴ Reply at 10. The State's request is based, at least in part, on its unfounded fear that the post-conviction court's ruling granting Pandeli a new sentencing amounts to an "intrusive post-trial inquiry" that "threaten[s] the integrity of the very adversary process the right to counsel is meant to serve." Reply at 1-2 (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *Premo v. Moore*, 562 U.S. 115, 125 (2011) (recognizing that "ineffective-assistance claims that lack necessary foundation may bring instability

⁴ This is a significant change from the relief sought in its Petition for Review, which merely requested that this Court grant review to correct what it deems to be erroneous legal analysis by the court below. Pet. for Rev. at 24.

to the very process the inquiry seeks to protect.”)).⁵ In reality, ineffective assistance of counsel relief in Arizona capital post-conviction proceedings is exceptionally rare; only three others have obtained such relief in the past sixteen years.⁶ To the extent that the State is concerned about having to conduct a third capital sentencing proceeding in this case, it should have been more concerned with such a potential outcome when it introduced Dr. Bayless’s testimony that was so clearly improper at the last sentencing trial. By introducing the evidence, it invited this outcome.

⁵ The State carelessly cites to *Richter* and other federal habeas cases analyzing ineffective assistance of counsel claims under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) (1996). AEDPA was passed by Congress to make federal habeas relief more difficult to obtain, based on “principles of comity, finality, and federalism.” *Williams v. Taylor*, 529 U.S. 420, 436 (2000). AEDPA’s framework thus assumes that state courts have already undertaken a robust collateral review of a federal habeas petitioner’s constitutional claims for relief. Chris Skall, *A Criminal Defendant’s First Bite at the Constitutional Apple: The Eleventh Circuit’s Excessively Deferential Conception of “Adjudication on the Merits” in Childers v. Floyd*, 56 B.C. L. Rev. E-Supplement 164, 164 (2015) (“Under [AEDPA], individuals seeking habeas corpus review in the federal court system face a difficult challenge due to the highly-deferential standard applied to state court decisions.”). Federal AEDPA case law has absolutely no bearing on Pandeli’s initial state post-conviction proceeding, where the post-conviction court must determine in the first instance whether his right to effective counsel was violated. Indeed, the opposite is true; it would pervert the purpose of AEDPA and Rule 32 for Arizona courts to constrict first-instance analysis of Pandeli’s constitutional claims for relief.

⁶ *State v. Sharp*, 193 Ariz. 414 (1999), Cochise County Superior Court No. CR-95-000271; *State v. Villalobos*, 225 Ariz. 74 (2010), Maricopa County Superior Court No. CR2004-005523-001; *State v. Kuhs*, 223 Ariz. 376 (2010), Maricopa County Superior Court No. CR2005-138481-001. In *Villalobos*, the State did not contest that a new sentencing proceeding was necessary. See Maricopa County Superior Court No. CR2004-005523-001, [minute entry dated 2/28/14](#).

CONCLUSION

For these reasons, *amici curiae* request that this Court recognize that the trial court's conclusion was consistent with *Strickland* and find that trial counsel's deficient performance resulted in prejudice to Pandeli. This Court should affirm the trial court's ruling under a clear statement of the *Strickland* standard. If this Court determines that a remand is necessary, it should simply re-state the proper *Strickland* standard and direct the trial court to articulate it on the existing factual record.

RESPECTFULLY SUBMITTED this 13th day of April, 2016

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