IN THE SUPREME COURT
STATE OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, DANIEL RAYNAK, SBN #010098 Appellant/Respondent.	No. SB-19-0053-AP Office of the Presiding Disciplinary Judge No. PDJ-2018-9071 State Bar File No. 17-0195

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

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INTRODUCTION

Dan Raynak is one of the most highly respected capital defense lawyers in Arizona because his clients consistently avoid the death penalty. The Maricopa County Attorney's Office (MCAO) targeted Raynak[1] with a bar charge for conduct that, at worst, is nothing more than "heat of battle" comments. Inexplicably, the State Bar of Arizona has chosen to view Raynak's conduct as a barrier to MCAO's pursuit of justice.[2] The panel of the Presiding Disciplinary Judge and two other members ("the Panel"), which was willing to overlook significantly greater malfeasance as comments in the heat of battle when made by Juan Martinez, endorsed MCAO's and the State Bar's contortions of the trial record in this case.

Whether by design or by effect, the result is singular: capital defense attorneys will be afraid that every single misstep, however slight or irrelevant in the grand scheme of things, will result in a bar complaint and a suspension, and thus lawyers will think twice before even taking such challenging cases—especially when MCAO

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[1] Although this allegation was rejected as a postscript to the decision, *see* Decision at 92, it bears noting that at least one of Raynak's prior admonitions was instigated by MCAO. This issue was discussed in the Raynak's petition for special action asking this Court to stay the suspension order. *See Raynak v. O'Neil,* CV-19-0189, Reply at 4 (filed Aug. 20, 2019) (noting MCAO's involvement in making prior accusations against Raynak).

[2] *See* Answering Brief at 1 ("The State of Arizona sought justice for a four-year-old child abused for at least six months until she finally died as a result of that compounding, routine child abuse."); *id*. at n.1 ("The Court of Appeals described in detail the child's horrifying injury history.").

is on the other side. Additionally, criminal defense lawyers see a double standard in the manner in which the State Bar and the Panel treat prosecutors and defense attorneys. Whereas Raynak gets a six-month suspension for conduct that cannot fairly be classified as anything other than minor missteps, Juan Martinez received a free pass at every turn from the Panel despite the special duties of prosecutors. *See State v. Arias*, 248 Ariz. 546, 566-67 ¶ 83 (App. 2020) (Jones, J., concurring) ("I am left dissatisfied by the serious questions raised by [Martinez's] misconduct, which has previously been raised with the State Bar yet remains unanswered for.").

This case presents the other side of the question raised in *Martinez*, where the Panel rejected the notion that prosecutors are held to a higher standard than other attorneys because of their roles as ministers of justice. This is a rare case where a criminal defense attorney is being disciplined for comments made in the courtroom that are allegedly false yet were easily subject to correction by both opposing counsel and the trial judge. Not only was there no harm in this case, but there was no real potential for harm because of the obvious opportunities to correct any errors. Both the Panel and the State Bar fail to recognize that criminal defense lawyers receive more latitude due to the nature of their role as guardians of the Sixth Amendment right to counsel. This point is especially true for capital defense counsel who are governed by Eighth Amendment standards and ABA Guidelines. Of course this does not mean that defense attorneys are not subject to the rules of ethics; but it absolutely

means that the Panel and the State Bar should use a different lens when considering the actions of capital defense counsel.

Amici curiae Arizona Attorneys for Criminal Justice ("AACJ") and the Arizona Capital Representation Project ("ACRP") recognize that among the purposes of attorney discipline are to ensure proportionality of sanctions and to deter future misconduct. Neither is served by suspending Raynak for any amount of time, much less for six months. Just as this Court's review was necessary to reverse the Panel's erroneous rulings in two separate cases as to Martinez, *see In re Martinez*, 248 Ariz. 548 (2020); *State Bar v. O'Neil*, CV-20-0035-SA (decision order, July 13, 2020), it must again step in, this time to protect the rights enshrined in the Sixth and Eighth Amendments and the ABA Guidelines.

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 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.

ACRP is a statewide non-profit legal services organization founded in 1988 that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* consulting services, training, and education. ACRP tracks and monitors all capital prosecutions in Arizona.

Amici offer this brief because the issue presented in this case touches on the core of their shared missions: to ensure that defendants facing the ultimate punishment are afforded not just a competent but vigorous defense, and to assist capital defense lawyers not only with education and training prior to entering the courtroom but with support during and after the case. This case is the first in which discipline was imposed on a defense attorney for statements made in the courtroom, which, to the extent they were untrue statements, were either corrected or easily subject to correction. The statements that the State Bar and Panel classify as "intentionally false" were comments made in the heat of battle—the kind of statements that the State Bar considered negligent and the Panel considered unworthy of discipline when the respondent attorney was Juan Martinez. *Amici* are gravely concerned that the Panel's disparate treatment of Martinez and Raynak exhibits a double standard that severely punishes defense attorneys for conduct that

is objectively less sanctionable than that which is considered blameless when committed by prosecutors.

Amici are also concerned with the rejection by the State Bar and the Panel of the axiom that "death is different." This axiom is of uncertain origin but is at least a half-century old and informs all of our death-penalty jurisprudence. *See Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *Woodson v. North Carolina*, 428 U.S. 280 (1976) ("the penalty of death is qualitatively different from a sentence of imprisonment, however long."); *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (noting "the qualitative difference between death and all other penalties"); *see also State v. Grell (Grell II)*, 212 Ariz. 516, 534 ¶ 89 (2006) (Bales, J., concurring in part and dissenting in part) (quoting *Evans v. State*, 886 A.2d 562, 584 (Md. 2005) ("Reflected throughout the Supreme Court jurisprudence underlying the Eighth Amendment is the principle that death is different."). Capital defense attorneys stand apart from all other attorneys in the requirement that they be guided by the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines"). *See* Ariz. R. Crim. P. 6.8(a)(5); *see also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)) (emphasizing importance of ABA Guidelines for capital defense

lawyers). The ABA Guidelines certainly do not authorize unethical conduct; but the threat of professional discipline based upon the misperception that vigorous representation is professional misconduct undermines the rights of the accused and increases the chance that a wrongful death penalty will be imposed.

ARGUMENTS

The Panel abused its discretion in this case in several ways. First, it failed to appreciate the role of the ABA Guidelines in capital defense. Second, it refused to allow defense experts, thereby denying Raynak a fair hearing. Because of the first two errors, its factfinding process was flawed and clearly erroneous. *See* Ariz. R. Sup. Ct. 59(j). Finally, it imposed a sanction that is grossly disproportionate when considering the Panel's findings of actual misconduct and the sanctions imposed in other cases.

I. The Panel failed to appreciate the role of the ABA Guidelines.

Because "death is different," the lawyers who defend individuals facing the death penalty must also be different. These lawyers must perform at a higher level as set forth in the ABA Guidelines. Arizona Rule of Criminal Procedure 6.8(a)(5) applies these guidelines to defense counsel in a death penalty case in Arizona. The ABA Guidelines are more than aspirational: "they embody the current consensus

about what is required to provide effective defense representation in capital cases." Commentary to Guideline 1.1 ("Objective and Scope of Guidelines"), ABA Guidelines at 2.

Death penalty cases have become so specialized that defense counsel has duties and functions different from those of counsel in ordinary cases. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation. A death penalty defense lawyer must raise all legal claims and even anticipate how the law may evolve in the future. For this reason, only the most experienced, talented, and dedicated lawyers should be allowed to undertake this duty.

Because "death is different," death penalty litigation is more complex and time consuming. ABA Guideline 10.8 requires that trial counsel raise and preserve all arguably meritorious issues:

> Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case. As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; *the client's life may well depend on how zealously counsel discharges this duty.* Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.

Guideline 10.8, *Commentary*, 31 Hofstra L. Rev. at 1032 (citations omitted, emphasis added). The failure to raise claims, even in the face of prior adverse rulings, might result in waiver of claims, and ultimately, execution. *Smith v. Murray*, 477 U.S. 527, 533-39 (1986); *see also* Stephen B. Bright, "Preserving Error at Capital Trials," *The Champion* (April 1997), at 43, 44 (Where a claim has been litigated in other jurisdictions and "recognized by judges in some part of the nation, even in dissents, counsel is charged with knowledge that the 'tools to construct a constitutional claim' exist…In other words, *counsel has a duty to preserve issues in anticipation of changes in the law*.") (quoting *Engle v. Isaacs*, 456 U.S. 107, 133 (1982)) (emphasis in original).

The ABA Guidelines are not a defense construct to cloak misconduct. Rather, they are the required standard of practice for a defense attorney assigned to represent an indigent person facing the death penalty and are mandated by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and article 2, sections 4, 15 and 24 of the Arizona Constitution.

The State Bar invites this Court to ignore the ABA Guidelines, *see* Answering Brief at 41-44, but these Guidelines are more than aspirational: "they embody the current consensus about what is required to provide effective defense representation in capital cases." Commentary to Guideline 1.1 ("Objective and Scope of Guidelines"), ABA Guidelines at 2. Raynak was obligated to inform every action he

took on behalf of his client with these Guidelines in mind. The United States Supreme Court has established the ABA Guidelines as the standard of practice for capital defense counsel. *Wiggins*, 539 U.S. at 525 (referring to the ABA Guidelines as "well-defined norms"). Likewise, this Court requires that capital defense counsel follow the ABA Guidelines. *See* Ariz. R. Crim. P. 6.8(e)(2) (an attorney who receives an exemption to satisfying other qualifications for capital counsel must still satisfy the requirements of Rule 6.8(a)(3)-(5)).

Raynak's case cannot be properly assessed without close consideration of the obligations imposed by the ABA Guidelines. In a capital case, defense counsel faces a dizzying array of tactical decisions, as well as extremely complex legal issues. Trial counsel must demonstrate exceptional knowledge of the ever-changing case law (related to the guilt phase as well as the death penalty), and counsel must have the ability to anticipate future developments and knowledge of post-conviction procedures to avoid waiver of issues during any subsequent appeal. Indeed, death penalty law is so complex, and the stakes so high, that the Guidelines demand that capital case appointments go only to those lawyers that have "demonstrated a commitment to providing zealous advocacy and high quality legal representation." Guideline 5.1, 31 Hofstra L. Rev. at 913.

Because of these obligations, the ABA Guidelines require that defense counsel must consider, investigate, and evaluate all potential claims. Once a claim

is raised, defense counsel must "present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and ensure that a full record is made of all legal proceedings in connection with the claim." ABA Guideline 10.8(B)(1), 31 Hofstra L. Rev. at 1028.[3] "Because of the final and irrevocable nature of death, counsel must be more vigilant in preserving error in [capital] cases than in any other cases." Bright, *supra*, at 43.

This requirement has its genesis in the ABA Model Rules of Professional Conduct (2007), which recognizes that criminal defense is different from other types of advocacy. Model Rule 3.1 makes a specific exception for criminal defense attorneys, and the comments to that rule are illuminating. "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Model Rule 3.1, cmt. [1]. "Such action is not frivolous even though the lawyers believes that the client's position ultimately will not prevail." *Id.*, cmt. [2]. "The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a

[3] Recognizing the unique role of the capital defender in the legal field, the ABA Guidelines repeatedly urge the relevant decision makers not to subject counsel "to formal or informal sanctions" for zealous advocacy of her client's life. Guideline 2.1, *Commentary*; Guideline 7.1(F), 31 Hofstra L. Rev. at 942, 971.

claim or contention that otherwise would be prohibited by this Rule." *Id*., cmt [3]. *See also* Restatement (Third) of the Law Governing Lawyers, § 110, cmt. [f] (the bar on frivolous arguments applies "generally" to criminal defense lawyers, but they may nevertheless take "any step" that is either "required or permitted" by the constitutional guarantee of the effective assistance of counsel).

The Model Rules of Professional Conduct also authorize a lawyer to "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer." Model Rule 1.3, cmt. [1]. Moreover, a lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id*.

When viewed properly through the prism of the ABA Guidelines, Raynak's actions are properly considered vigorous representation and not professional misconduct. Raynak engaged in good faith, non-frivolous, exhausting and comprehensive advocacy, all in an effort to avoid a death sentence for his client. None of the alleged misconduct warrants discipline.

II. The Panel erroneously refused to allow Raynak to defend himself by precluding or ignoring experts in the highly specialized field of capital defense.

Expert testimony was a necessary part of Raynak's defense to the allegations of professional misconduct. Raynak offered the testimony of Professor Eric Freedman, a nationally recognized death penalty expert. Professor Freedman would have testified to the unique duties imposed by the ABA Guidelines and the need for vigorous representation in a death penalty case. Vikki Liles, a Phoenix attorney with significant experience defending challenging death penalty cases in Maricopa County, would have testified to her personal experience. Her testimony would have also included the unique stress and difficulty of providing the vigorous duties required by the ABA Guidelines in a lengthy and draining death penalty trial against MCAO. Both would have testified that Raynak provided appropriate and vigorous representation to his client as required in this case. Raynak was entitled to present this expert testimony as part of his defense. The Panel refused to allow this testimony.

Raynak is entitled to a fair opportunity to present his defense. State bar disciplinary proceedings are adversarial and quasi-criminal in nature; therefore, the requirements of procedural due process must be met. *In re Ruffalo*, 390 U.S. 544, 551 (1968); *In re Levine*, 174 Ariz. 146, 169-70 (1993). These requirements include fair notice of the charges made and opportunity for explanation and defense. *Ruffalo*,

390 U.S. at 550. This Court should find that the testimony of legal expert witness is required, especially when the unique duties of defense counsel under the ABA guidelines are at issue.

The performance of counsel in death penalty cases is a frequent subject of post-conviction review—usually for review of claims of ineffective assistance of counsel and not for ethical misconduct. To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687. The ABA Guidelines are universally considered the standard of practice for capital defense counsel. *Wiggins*, 539 U.S. at 525. Lawyers like Professor Freedman often testify as experts on *Strickland* claims and such testimony is often relied upon in determining the standard of care in claims of ineffective assistance of counsel. *Wiggins*, 539 U.S. at 524 (looking to the testimony of an attorney expert on the "professional standards of care that prevailed in Maryland in 1989"); *Karis v. Calderon*, 283 F.3d 1117, 1133 n.9 (9th Cir. 2002); *State v. Speers*, 238 Ariz. 423, 430 ¶ 24, 431 ¶ 29 (App. 2015).

While deficient performance is not at issue here, the trier of fact must still apply the same specialized defense duties imposed by the ABA Guidelines. Post-conviction tribunals often find legal expert testimony helpful, but the Panel, individually and collectively having no meaningful experience in complex death

penalty litigation, refused to consider this testimony. To suggest that none of the three members of the Panel could learn anything from the proposed expert testimony is arbitrary, capricious, and unjustifiable.

The use of legal expert testimony on legal questions has been allowed in disciplinary proceedings in other states. Its use is common in California, even when such testimony goes to the "ultimate issue" in the case. Timothy P. Chinaris, *Even Judges Don't Know Everything: A Call for Presumption of Admissibility for Expert Witness Testimony in Lawyer Disciplinary Proceedings*, 36 St. Mary's L.J. 825, 834 (2005). Chinaris explained that the applicable evidence law of California, which corresponds to Federal Rule of Evidence 704(a), allows for such opinions so long as it does not seek to supplant the independent decision making of the court. *Id*. at 834-35. *See also In re Davis*, 4 Cal. State Bar Rptr. 576, 589-90, 2003 WL 21904732 (Cal. Review Dep't 2003) (bankruptcy expert "may well have been qualified to opine on the ultimate issues within his expertise" but afforded little weight due to lack of expertise in disciplinary matters). Notably, this is also the law in our state; Arizona Rule of Evidence 704(a) similarly states: "An opinion is not objectionable just because it embraces an ultimate issue."

The Supreme Court of Nebraska also recognized that expert testimony as to the reasonableness of a fee is "highly relevant" and should be admitted in a disciplinary case involving charges of improper fees. *State ex rel. Neb. State Bar*

Ass'n v. Miller, 602 N.W.2d 486, 498 (1999). Similarly, expert testimony should be routinely admitted in connection with the alleged violations of many other rules that have elements of reasonableness or that could only be interpreted and applied in light of external standards. *Id*. at 498.

Expert testimony is actually essential to the fair and just operation of the American dispute resolution system in both civil and criminal matters. *See* Lisa M. Panahi and Ann Ching, "When the Lawyer is Also an Expert: Ethical Considerations," *Arizona Attorney*, p.18 (Expert Witness Special Issue, March 2017). Lawyer-experts, like experts from other professions and trades, assist the trier of fact in navigating complex facts and principles integral to the issue at hand. Lawyer-expert witnesses are frequently engaged in matters regarding malpractice, professional conduct, and fee disputes to testify about the requirements of the applicable legal standard or rule. *Id*.

When the Panel refused to allow Raynak's legal expert witnesses to testify, it denied Raynak due process because he was prevented from giving the Panel specialized knowledge that would have assisted the Panel in understanding the issues to be decided. The refusal to even consider this testimony requires vacating the suspension order and a remand to allow the legal expert testimony to be presented.

III. The Panel's findings are clearly erroneous and ignore the fact that the trial judge was able to take corrective action at every step.

The State Bar and the Panel viewed the evidence with the benefit of a transcript and hindsight. When judging an attorney's conduct based on a transcript, however, the fact finder should be careful to assess the statements in the context of the stress of being in the midst of a death penalty trial. Furthermore, the conduct should be assessed in the context of an entire trial. In this case, the Panel found a handful of errors in a trial that lasted nearly six months. Most notable is that none of the errors it found touched on the sentencing phases of the trial; instead, all were in the guilt phase of the trial. Since the jury ultimately found Raynak's client guilty as charged, the State suffered no prejudice.

A. Allegation #1 (Decision at 56-57)

The Panel acknowledges that this allegation is not part of the formal complaint, and yet it made findings anyway. This allegation was pointless and irrelevant, and if anything its inclusion validates Raynak's concern that he was targeted by MCAO.

B. Allegation #2 (Decision at 57-60)

Raynak made repeated requests to sever. His dogged approach to this issue was required by ABA Guideline 10.8(B)(1). During the hearing, Raynak accurately stated that in his original motion, filed May 20, 2015, Dr. Posey was not mentioned. The trial court allowed the State a full opportunity to explain when Dr. Posey was

mentioned in any motions to sever and what difference, if any, the timing of this made to the motion to sever and any other relevant facts related to joinder or severance of the charges. There is no suggestion that Raynak's actions prevented the State from advancing its arguments or denied the trial court the information it needed to rule on the motion. Discipline is not proper when no false statement was made. The Panel's finding that the statement is false relies on its own misstatement of the evidence; it states that Raynak falsely stated he did not mention Dr. Posey in the original motion and then disproves that by citing to Raynak's motion to reconsider that was filed three months later. Decision at 8-9.

C. Allegations #4, #7, #8, #9 (Decision at 62-64, 68-69)

The Panel erroneously found that the Raynak "falsely insinuated that the State withheld evidence from the jury during the State's opening statement." It similarly found misconduct for a similar turn of phrase in closing argument. The Panel was principally concerned with the fact that Raynak left the jury with the "misimpression," *see* Answering Brief at 11, that the State did not want the jury to hear the evidence, when in fact the rules of hearsay and confrontation precluded the State's introduction of the co-defendant's statement until the defense used it first. At worst, this was imprecise word selection in the heat of battle. The Panel also found three minor errors in Raynak's closing argument.

No harm could possibly have resulted from this, as the jury had been instructed that nothing the lawyers say in opening statement or closing argument constitutes evidence. *See Revised Arizona Jury Instructions* (Crim. 5th ed. 2019), Prelim. 6 ("Statements or arguments made by the lawyers in the case are not evidence."), Std. 10 ("In their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence."). Nothing suggests that the jury failed to properly consider the actual trial testimony; in fact, the jury's guilty verdicts show that any errors were nonprejudicial. The State had opportunities throughout the trial to present evidence and to address Raynak's closing argument in its rebuttal argument to clarify any improper "insinuations." Lack of clarity in one phrase in an otherwise completely truthful opening statement and a couple of similar issues in closing argument, subject to actual testimony and subsequent arguments, cannot support disciplinary action.

D. Allegation #6 (Decision at 66-68)

At issue were photos that the trial court had precluded as cumulative, Decision at 22-23, but which the State showed to an expert witness just prior to testimony. It is unclear if the State was attempting to circumvent the trial court ruling or if it was a mistake, but it certainly cannot constitute professional misconduct for Raynak to question the witness about the State's action.

The only problem was Raynak asked a poorly worded question about photographs not being marked for admission, which created an impression that the State was not offering evidence that in fact was precluded upon Raynak's motion. The trial court stated in a minute entry that it would take corrective action if Raynak suggested to the jury that the State was withholding evidence from the jury, and in fact the court gave such a curative instruction when it perceived that Raynak had crossed the line. The court also struck Raynak's question and the witness's answer.

Even in the context of hindsight, it simply makes no sense to treat this allegation as Raynak trying to misrepresent the truth. When the trial court determined that a line was crossed, the defendant suffered the consequence of a curative instruction and striking testimony—something that jurors might conceivably hold against the defendant and his counsel. Instead, the only plausible reason why Raynak would ask the question is that, in the heat of battle, he was confronted with a surprise from a witness who viewed photographs that were precluded, and he accidentally chose the wrong words. All lawyers make mistakes. This mistake resulted in no harm whatsoever—especially since the State could clear up any misconceptions on redirect examination. Finding misconduct as to this allegation defies common sense.

E. Allegations #12, #13, #14 (Decision at 75-81)

The Panel found Allegation #12 not proven and Allegation #13 proven, but it is hard to understand how the Panel could distinguish the two given that Raynak's co-counsel, Stephen Johnson, accepted full responsibility for the mistakes made in organizing this disclosure and for inadvertently misleading Raynak into believing that the evidence had not been disclosed properly. The State Bar admits this but tries on appeal to defend the inconsistent rulings by claiming they are distinct. Answering Brief at 55. Its claim is conclusory and devoid of evidentiary support. Moreover, the discovery dispute was ultimately resolved and no harm resulted to any party. The Panel disciplined Raynak for attempting to obtain all the relevant discovery needed to defend his client's life and for relying on co-counsel's error.

Nor can Allegation #14 properly be considered ethical misconduct. The parties on appeal dispute whether Raynak was referring to different witnesses. Opening Brief at 35-37; Answering Brief at 55-56. Even if, *arguendo*, the State Bar is correct about the three witnesses who were at issue, the State Bar and the Panel ignored the fact that Raynak was in the middle of a very long capital trial. In order to find that Raynak intentionally misled the court, the Panel had to ignore the stress of the situation and the strong likelihood that any incorrect statements were far more likely to be attributable to mistake than to deception.

F. Allegation #19 (Decision at 86-87)

The State Bar is correct in saying that Judge Mroz's opinion that Raynak's recusal motions were not inappropriate "does not tie [this Court's] hands in enforcing the ethical rules." Answering Brief at 58 (citing *Martinez*, 248 Ariz. at 469 ¶ 41). But given that Judge Mroz was the recipient of the recusal motions, her opinion should be afforded such great weight as to be determinative as to this allegation. The reason why the State Bar asks this Court to reject Judge Mroz's opinion is because the State Bar disputes the premise that Judge Mroz correctly accepts as axiomatic: "death is different." *See* Answering Brief at 58-59.

The State Bar further errs by citing case law that explains that recusal motions should not be granted merely because of disagreement with legal rulings, and assuming that this means it is *per se* ethical misconduct to ask for a judge's recusal. No Arizona case discusses a disciplinary referral to the State Bar based on an unfounded recusal motion. Nor is there any legal authority to support the State Bar's argument that noncompliance with Arizona Rule of Criminal Procedure 10.1 subjects a lawyer to discipline. On the contrary, in a previous disciplinary appeal, this Court rejected an "informal request for recusal" as lacking merit, yet it did not refer to the act of asking for recusal as a separate act of professional misconduct. *In re Aubuchon*, 233 Ariz. 62, 65-67 ¶¶ 12-19 (2013).

G. Allegation #20 (Decision at 87-88)

The State Bar seems to admit that it did not provide notice in its Complaint of this separate allegation. Answering Brief at 45-46. If it seeks to use the allegation of a "pattern of misconduct" as an aggravating factor, then it should concede that the Panel erred in finding a separate allegation of wrongdoing.

Furthermore, neither the State Bar nor the Panel explained how Raynak's conduct was "persistent." It is true that Raynak was persistent in pursuing a favorable result for his client, but persistence in that sense is laudable, not sanctionable. Nor is there any evidence that Raynak's conduct was "prejudicial to the administration of justice," ER 8.4(d), since it is indisputable that every single allegation described above resulted in corrective action taken by the judge and by the State. For example, the three alleged acts of misconduct in closing argument pale in comparison to the "masterpiece of misconduct" in Thomas Zawada's rebuttal argument. *State v. Hughes*, 193 Ariz. 72, 83 ¶ 50 (1998).

H. Conclusion.

The evidence does not support the conclusion that Raynak acted unethically in any way. The worst that can be said about Raynak's conduct is that he made a handful of minor mistakes in the heat of battle of a death penalty trial that lasted six months. The State Bar argued that such conduct is negligent in *Martinez*, 248 Ariz. at 470-71 ¶ 52, and the Panel found Martinez's conduct to be completely ethical.

When presented with benign actions by a capital defense lawyer, however, the Panel would deprive Raynak of his livelihood for half a year.

The Panel's willingness to look the other way as to Martinez while bringing the axe down on Raynak gives the unmistakable impression of a double standard and sends a clear message to the criminal defense bar that attorneys should expect discipline anytime prosecutors (or any other observers) are so unhappy with a defense lawyer that they will undertake the expense in time and money to comb the trial for any slip-ups. The Panel's decision is abhorrent to the Sixth and Eighth Amendment rights of defendants to be assisted by counsel and the corollary that criminal defense counsel must zealously defend their clients, especially when a death sentence is at stake.

IV. In part because the Panel misapplied the law related to aggravation and mitigation, it imposed a sanction that is grossly disproportionate to the misconduct it found proven. Assuming any misconduct on Raynak's part, suspension is not appropriate in this case.

Amici note that neither the Panel's decision nor the parties' briefing discusses the propriety of the Panel's findings of aggravating and mitigating factors. The State Bar alleges that Raynak's failure to challenge the sanction on appeal means the issue is waived. Answering Brief at 59. This assertion is incorrect; this Court must conduct a *de novo* review of the sanction. *In re Alexander*, 232 Ariz. 1, 13 ¶ 48 (2013) (citing *In re Phillips*, 226 Ariz. 112, 117 ¶ 27 (2010)).

"In setting the appropriate sanction, we bear in mind that the primary objectives of lawyer discipline are '(1) to protect the public and the courts and (2) to deter the [disciplined] attorney and others from engaging in the same or similar misconduct.'" *Id*. at 15 ¶ 63 (quoting *In re Zawada*, 208 Ariz. 232, 236 ¶ 12 (2004)); *see also In re Peasley*, 208 Ariz. 27, 32 ¶ 19, 35 ¶ 33 (2004) ("Under the [ABA] Standards, consideration is given to the following factors: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the misconduct; and (4) the existence of aggravating and mitigating factors."). Contrary to the State Bar's belief that the Panel's findings are unassailable, a cursory review of this Court's opinions proves that many of the findings are erroneous. Furthermore, when reviewing the cases of other attorneys who received similar sanctions, it is abundantly clear that Raynak does not belong in their company. Instead, this case is similar to those who received lesser sanctions such as a reprimand.

A. The Panel clearly erred in finding Raynak's mental state as well as injury

The State Bar argued, and the Panel found, that Raynak acted intentionally in his theme of presenting a false picture of the case to the jury. The evidence does not support this finding, and there is no precedent for such a finding in the case of heat of battle comments such as those that the Panel found proven. As stated above, if the State Bar viewed Martinez's heat-of-battle improper comments as negligent, and the

Panel did not even find misconduct, then Raynak's conduct, which even if improper pales in comparison, could not be intentional or knowing.

The Panel's finding of injury is wholly unsupported. This trial was long because it was a capital case. A couple extra motions hearings in a six-month capital trial does not "unnecessarily protract[ ] the resolution of his client's case." Nor did his conduct "unduly burden[ ] the State and the court" or the jury; to find as the Panel did would require capital defense counsel to essentially roll over in the guilt phase without even trying to defend the case, because every battle "delays the inevitable." *Amici* do not see a guilty verdict in a capital trial as an inevitability that defense counsel must accept.

To the extent that its determination of the appropriate sanction relied on injury caused by Raynak's conduct, the Panel punished Raynak for the offense of holding the State to its burden. Because the primary purpose of lawyer discipline is to deter future misconduct, the Panel's action has the effect of deterring all criminal defense attorneys from defending the accused. Such effect is particularly harmful in the capital context, where zealous advocacy stands between the accused and the ultimate penalty. ABA Guideline 7.1(F), 31 Hofstra L.Rev. at 971 ("An attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions."); ABA Guideline 2.1, *Commentary*, 31 Hofstra L.Rev. at 942 (recognizing that the effective assistance of counsel demands that counsel be free

from the threat of sanctions "for engaging in effective representation."); *see also* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 Hofstra L. Rev. 925, 958-59 (2000) (poor representation of indigent defendants has resulted in the failure to fulfill the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (citations omitted). The Panel's decision runs afoul of the Sixth and Eighth Amendments and their equivalent state constitutional counterparts.

B. The Panel clearly erred in finding aggravating and mitigating factors

The Panel erred by finding proof of the aggravating factor of pattern of misconduct. Decision at 91. This Court has explained, "Commission of multiple offenses does not necessarily equate to a 'pattern of misconduct.' This Court has found patterns when a lawyer had a prior disciplinary record concerning similar misconduct, and a lawyer engaged in misconduct involving multiple parties in different matters that often occurred over an extended period of time." *Alexander*, 232 Ariz. at 15 ¶ 61. Even where there are several acts of misconduct over a period of nine years, it does not constitute a pattern of misconduct if there were not multiple parties. *Levine*, 174 Ariz. at 171-72. In the context of a lawyer who has a prior disciplinary record, the pattern of misconduct is evinced not only by the similarity of the conduct but the severity and frequency of the complaints. *See In re Galusha*, 164 Ariz. 503, 505 (1990) (three complaints in three years, all involving failure to

pursue claims on behalf of clients that resulted in loss of rights to clients); *In re Ockrassa*, 165 Ariz. 176 (1990) (after receiving prior discipline for conflict of interest, prosecutor refused to withdraw from criminal case brought against his former client even when public defender raised conflict issue with the court); *In re Moak*, 205 Ariz. 351, 356-59 ¶¶ 30-44 (2003) (pattern of misconduct involved multiple cases and multiple conflicts of interest, as well as withholding vital information from opposing parties and forging client's signature on complaint). No authority supports extending the pattern of misconduct aggravator to the allegations made against Raynak.

The aggravator for substantial experience in the practice of law is not intended to be applied automatically to any attorney who has practiced for a certain number of years. Instead, "when there is a nexus between a lawyer's experience and the misconduct, substantial experience should be considered a relevant aggravating factor." *Peasley*, 208 Ariz. at 36 ¶ 39. Instead, "when a lawyer's substantial experience places that lawyer in a position that would be unavailable to a less experienced lawyer, and that lawyer's experience also affords, or should afford, a greater appreciation of the advantages of eliciting false testimony, substantial experience may be considered a relevant aggravating factor." *Id*. at 36-37 ¶ 40. This aggravating factor was relevant in *Peasley* not only because his experience resulted in being entrusted with *prosecuting* death penalty cases but also because Peasley had

the opportunity to assign that case to himself and pursued the dishonest course of action with Detective Godoy. *Id.* at 37 ¶ 41. Here, on the other hand, Raynak was appointed to *defend* a capital defendant to the best of his ability, and the mistakes that the Panel found to be misconduct have no nexus to Raynak's years of experience.

The Panel also erred in finding a dishonest motive. Decision at 91. "Simply because an attorney's conduct is intentional or dishonest does not by itself establish a dishonest or selfish motive." *Id.* ¶ 42 (citing *In re Alcorn*, 202 Ariz. 62, 74 ¶ 42 (2002)). This Court had always held that "dishonest or selfish motive is an aggravating factor when an attorney received some financial gain or made misrepresentations to cover his or her negligence," *id.* ¶¶ 43-44, before holding that Peasley's subornation of perjury constituted a dishonest motive. Peasley's conduct involved coordinating with his lead detective to fabricate evidence that was unknown to anyone else in the courtroom. On the contrary, as stated above, Raynak's "false statements" were reasonable inferences from the trial evidence and involved information that the State and the trial court was in a position to correct. Raynak's conduct is not in the same league as Peasley's subornation of perjury. This Court characterized Zawada's conduct as "a dishonest way to represent the State ..., and it was especially dishonest ... where the evidence of insanity was substantial, and where the [s]tate had no evidence that [Defendant] had fabricated an insanity

defense." *Zawada*, 208 Ariz. at 237 ¶ 17 (quoting *State v. Jorgenson*, 198 Ariz. 390, 390 ¶ 2 (2000), *quoting in turn Hughes*, 193 Ariz. at 86 ¶ 61). Yet, when this Court listed the aggravating factors, dishonest or selfish motive was conspicuously absent. *Id*. at 238 ¶ 20.

For the same reason, the Panel clearly erred in failing to find absence of a dishonest or selfish motive as a mitigating factor. Raynak at all times acted with the singular motive to do the best he can to keep his client from receiving a death sentence, and no evidence suggests otherwise. This Court found an absence of dishonest or selfish motive in *Martinez*, 248 Ariz. at 471 ¶ 58. Another mitigating factor that the Panel erred in not finding is Raynak's cooperation with the disciplinary panel. It is not "uncooperative" to defend oneself, as this Court implicitly found in *Martinez* by finding that mitigator even when Martinez admitted no misconduct. *Id*. Furthermore, Raynak offered to engage a practice monitor, but the Panel flatly rejected that offer. Order Denying Stay (issued July 8, 2019). *See also Moak*, 205 Ariz. at 359 ¶ 45 (willingness to engage a practice monitor is mitigating evidence); *In re Nicolini*, 168 Ariz. 448, 450 (1991) (describing duties of practice monitor in context of that case).

Finally, although the Panel has cast Raynak as unrepentant for exercising his right to a hearing and to an appeal,[4] this Court gave a clear picture of what an "unrepentant attorney" looks like:

> Zawada has refused, and to this day continues to refuse, to acknowledge wrongful conduct both in *Hughes* and in *Pool*. His unwillingness to recognize wrongful conduct has led Zawada to outright hostility. Such an attitude is an aggravating circumstance in itself under ABA Standard 9.22(g). At the disciplinary hearing, Zawada stated, "I'm here not because I did anything wrong. I'm not here because I did anything unethical, and I'm not here because I deserve to be punished for anything that's transpired." Since this disciplinary process began, this has been Zawada's attitude. In his own words, Zawada believes that "[t]his Court simply wishes to punish [him] for thinking [differently] on the issue of the admissibility of, reliability of, psychiatric-psychological testimony." He believes this case "expose[s] the Arizona Supreme Court's pro-psychiatry/anti-prosecution position; its pop culture values; it's [sic] overzealousness in pursuit of those values." Finally, he asserts that "there is no precedent in the history of Arizona jurisprudence" to suggest that he acted unethically. As the dissenting Commissioner noted,
>
> > [Zawada] fails to acknowledge that he is single-handedly responsible for much of the law in Arizona on the consequences of extreme prosecutorial misconduct. His sweeping statement about our jurisprudence omits mention of several pertinent cases, each of which addresses whether he has ever done anything unethical. *State v. Pool* [*Pool v. Superior Court*], *State v. Hughes*, and *State v. Jorgenson*.

[4] The Panel order denying Raynak's request of a stay pending the appeal includes the following language: "[Raynak's] argument heightens our concerns that Respondent holds the view that because the assigned judge in the underlying matter and this Panel found Respondent to have substantial experience in capital cases there is nothing to learn or change."

> It would be difficult, in view of Zawada's acrimonious statements to the hearing officer, to the Disciplinary Commission, and to this court, to conclude that Zawada acknowledges even a single violation. As a result, we find, pursuant to ABA Standard 9.22(g), that Zawada's continuing refusal to recognize what is clearly gross misconduct is a further aggravator to be considered in the process of determining the sanction in this case.

Zawada, 208 Ariz. at 239 ¶ 25. *Amici* do not mean to suggest that an attorney's failure to recognize the wrongfulness of actions can be proven only by statements of the magnitude of Zawada's broadside attacks on the rule of law. But at the same time, it is especially concerning to see the Panel punish Raynak for defending himself against allegations when such conduct has never before been the subject of discipline against a criminal defense attorney, much less a capital defense attorney.

C. Raynak's sanction is grossly disproportionate to other cases

Rachel Alexander was suspended for six months for maintaining a frivolous civil lawsuit in federal court, as counsel for Andrew Thomas and Joseph Arpaio, against numerous judges, county supervisors, and other officials. The lawsuit accused the named defendants of bribery and other racketeering offenses, and after assuming responsibility for the case when a defense motion to dismiss was pending, she filed a frivolous response that sought to prolong the inevitable dismissal, and in so doing violated several ethical rules. Then she sought to obstruct and delay the State Bar's investigation with several motions. Even though she was essentially suing her own clients (as an attorney in the Maricopa County Attorney's Office, her

employer was supposed to represent the county in civil suits), and caused tremendous harm not only to the legal profession but to the targets of the frivolous suit, this Court reduced the length of suspension to six months. *See generally Alexander*, *supra*.

Other cases that involved six-month suspensions include attorneys running a sham trial pursuant to a secret agreement of which the court was unaware, *Alcorn*, 202 Ariz. at 65-67 ¶¶ 11-16, and an attorney who filed numerous frivolous lawsuits over nine years against his former law partner for the purpose of burdening him, *Levine*, 174 Ariz. at 171. Nancy Dean had her one-year suspension reduced to six months due to a procedural anomaly where the judge with whom she engaged in a secret romantic affair received no discipline, but the conduct in which she engaged was so severe that the presumptive sanction was disbarment. *In re Dean*, 212 Ariz. 221 (2006).

A defense attorney who became a prosecutor and refused to withdraw from prosecuting his own former client only received a ninety-day suspension even though he had recent prior discipline for a conflict of interest. *Ockrassa*, 165 Ariz. at 580. This Court noted that the *Standards* called for a longer suspension, but reasoned that ninety days was sufficient because Ockrassa "is a public lawyer who is unlikely to receive any income during the period of his suspension, unlike lawyers in private practice who may continue to receive fees from work performed before

the suspension." Although Raynak is in private practice, his work as a court-appointed lawyer is equivalent to that of a public defender and he similarly would not receive income during the period of suspension. And if ninety days is an appropriate sanction for an attorney who prosecuted his own former clients without any concern for the obvious conflict, the conduct charged in the State Bar's complaint here cannot amount to more than a reprimand without violating principles of proportionality.

Finally, the most recent attorney to be disciplined for conduct in the courtroom, Juan Martinez, received only a reprimand despite conduct that courts have described as, among other things, "reprehensible." *Martinez*, 248 Ariz. at 464 ¶ 14. More to the point, the State Bar did not even seek any greater sanction against Martinez for a pattern of misconduct over twenty years.

D. This Court must draw a distinction between prosecutors and criminal defense attorneys when determining misconduct and imposing sanctions.

In *Martinez*, this Court explained the special duties of prosecutors in criminal trials, especially when the prosecutor seeks the death penalty. This Court has never before discussed the distinct special duties of criminal defense attorneys in criminal trials, especially when defending death penalty cases.

In addition to *Martinez*, this Court fully explained the special duties of prosecutors in *Peasley* and *Zawada*. In *Peasley*, this Court explained:

> Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any *right* of the Government, but from the power entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power, and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.

208 Ariz. at 35 ¶ 34 (citing *In re Doe*, 801 F. Supp. 478, 480 (D.N.M. 1992)) (emphasis in original). A "prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" *Id*. (quoting *Pool v. Superior Court*, 139 Ariz. 98, 103 (1984), quoting in turn *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (same); *United States v. Lopez-Avila*, 678 F.3d 95, 956 (9th Cir. 2012) ("Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers . . . .")..

Zawada further explains why ethical violations deserve more severe punishmennt when committed by a prosecutor: "A prosecutor is not simply another lawyer who happens to represent the state. Because of the overwhelming power vested in his office, his obligation to play fair is every bit as compelling as his responsibility to protect the public." 208 Ariz. at 239 ¶ 24 (quoting *New Jersey v. Torres*, 744 A.2d 699, 708 (N.J. App. Div. 2000)); *see also* David Luban, *Are Criminal Defenders Different?*, 91 Mich. L. Rev. 1729, 1756 (1993) (arguing that aggressive advocacy by defense counsel is necessary to protect individuals from the

state, which possesses significant resources and other advantages over an indigent criminal defendant). ER 3.8 and 3.10 create additional duties upon prosecutors that do not apply to any other attorneys.

Conversely, as discussed above, ER 3.1 provides an exception to the general rule that attorneys may not take nonmeritorious positions in court: criminal defense attorneys may require the government to be held to its burden to prove the accused guilty beyond a reasonable doubt. Unlike any other attorneys, a criminal defense attorney represents a client who is protected by a panoply of state and federal constitutional rights. For this reason, a position that is considered frivolous and sanctionable when taken by any other attorney can be fully protected by the constitutional right to counsel when done in a criminal case by a defense attorney. *See Kaufmann v. Cruikshank*, 222 Ariz. 488, 490 ¶ 9 (App. 2009) (rejecting application of civil rules for frivolous pleadings to criminal cases under trial court's inherent authority because of the distinct nature of a criminal case).

It cannot be stressed enough that there is no precedent[5] in Arizona for suspending a criminal defense attorney for conduct committed in the courtroom.

[5] Legal ethics scholars have long argued that professional rules offer insufficient guidance on the sometimes-competing responsibilities of defense counsel as both "vigorous advocate" and an officer of the court. Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant*: *Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65, 65-66 (1988); Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. Rev. 687 (1991). In this case, however,

This Court cited cases in *Zawada*, 208 Ariz. at 240 ¶¶ 29-34, as exemplars of in-court conduct that resulted in discipline, but none before or since was a criminal defense attorney. Of course, it is easy to imagine conduct that would warrant such a sanction; for example, if defense counsel suborned perjury from a defense witness, the attorney would be facing potential disbarment. If there is going to be a first case that holds that a criminal defense attorney can be suspended for in-court conduct, this is exactly the wrong case in which to set that precedent.

Amici do not believe Raynak committed any misconduct, for the reasons stated in Arguments I-III, *supra*. But if this Court disagrees, then the appropriate sanction would still be dismissal, with an opinion from this Court explaining the limits of appropriate in-court conduct by a capital defense attorney. The Panel's decision reflects its view that capital defense attorneys are no different than anyone else who practices law. The Constitution says otherwise.

Raynak was acting within the bounds of the ethical rules and was subject to both the adversarial system and the trial court's ability to regulate the conduct in her courtroom.

CONCLUSION

After a comprehensive review of a six-month capital trial with more than two years of pre-trial litigation, where the State obtained a guilty verdict but no death sentence, the State Bar and the Panel nitpicked to find a handful of statements where Dan Raynak walked close to the line. Despite no prejudice occurring, the State Bar argues that this is egregious conduct requiring a six-month suspension. The record shows otherwise. Instead, when comparing this case against that of prosecutors, most notably Juan Martinez, the public is left with a clear picture of a double standard in the way the State Bar and the Panel has treated prosecutors and defense lawyers. For these reasons, Raynak's order of suspension should be vacated in its entirety.

RESPECTFULLY SUBMITTED this 2nd day of September 2020.

By: /s/ David J. Euchner

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