

IN THE
SUPREME COURT OF THE UNITED STATES

CRONIE LLOYD

Petitioner,

v.

STATE OF OHIO

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY ARGUMENT

The State of Ohio's filing in opposition to Certiorari attempts to distract this Court from the big picture and the important problem this case presents. This Court's landmark case, *Strickland v. Washington*, 466 U.S. 668 (1984), emphasized the importance of context in determining whether the presumption of an attorney's competence was rebutted:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, **to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.** Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, **the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.**

Id. at 689-690 (Emphasis added) (Internal quotations omitted). It is that big picture context in the presumption of competence analysis that has been lost in Ohio's reviewing courts. Full exploration of Cronie Lloyd's case would allow this Court to reassert the significance of *Strickland's* performance prong analysis.

Cronie Lloyd presented the Ohio Supreme Court, and previously Ohio's Eighth District Court of Appeals, with evidence that his trial counsel based her defense of Lloyd on mistake of law. Trial counsel argued to the jury that the State had not proven that Lloyd intended to kill. But Lloyd was charged under Ohio's felony murder statute, which does not require the State to prove any intent to kill.

This is a particularly important distinction because this was a one-punch murder case. Counsel would have believed that the State could not prove that Lloyd had an intent to kill with a single punch. The misunderstanding of what was and was not necessary to secure a conviction against Lloyd pervaded every aspect of counsel's representation of Lloyd – including whether an “all or nothing” strategy was viable. In fact, none of counsel's choices should have enjoyed the presumption of reasonable trial strategy. At a minimum, the reviewing courts needed to grapple with that reality and decide its impact on the *Strickland* analysis. But they did not.

That is why Lloyd is here now. This case shows that Ohio courts need this Court's guidance concerning how to meaningfully review ineffective assistance of counsel claims. Without that input, Ohio courts will continue to dispense with crucial areas of the analysis, such as considering the circumstances under which an attorney's actions took place.

The State of Ohio grounds its opposition to Lloyd's Petition on three points. One, the State argues that the trial transcript does not say what it says. Two, the State argues that courts agree that the presumption of competence does not apply where defense counsel's actions are not strategic but, the State continues, it is settled that Lloyd's counsel's statements “were strategically made.” And, three, the State argues that the questions Lloyd presents before this Court would not change the outcome of his case and do not matter.

Lloyd's replies to those points in the discussion that follows. To the extent that Lloyd does not specifically reply here to everything the State says, he makes no

concessions and is not withdrawing any argument raised in his Petition for Certiorari.

- I. On its face, Lloyd's trial transcript demonstrated that his trial counsel misunderstood the law:

Throughout the appellate process, Lloyd has suffered because reviewing courts have consistently interpreted his trial counsel's comments to mean something other than what they say. Before this Court, the State of Ohio has said:

The lower court looked at the 'totality of counsel's closing argument' and determined that when Petitioner's trial counsel made arguments to the jury about whether Petitioner knowingly caused the victim's death, trial counsel was 'simply using a more precise description of the serious physical harm that occurred.'

Brief in Opp. at 5-6. But a trial transcript is not a Rorschach test. It is not created so that someone may be inspired to attribute new meaning to its contents. A transcript says what it says.

Among the quotations from counsel's closing argument are:

- 1) "... when you think about all of those scenarios, are any or all of those people **intending to cause the death** of the person that they threw a punch at?"
- 2) "... unfortunately, a person could fall to the ground, hit a corner of a table or a machine and **eventually die** from the impact."
- 3) "... there is no way that Mr. Lloyd could have knowingly been aware that hitting someone with one punch would **cause the death** of that individual."
- 4) "... my client could not have ever known that the one punch would **lead to the death** of Mr. Power."
- 5) "But did he knowingly **cause the death** of this gentleman?"

6) “But he did not knowingly do so with the **intent to cause death.**”

Why would counsel repeatedly refer to “intent to cause death” if she was not talking about what she thought the State had to prove? Yes, it is true that the element “serious physical harm”, the predicate crime of felonious assault, can be satisfied by a death. But it is not the same thing to suggest that it is a defense if a defendant did not have the *mens rea* of knowingly causing a death. That misstates and misunderstands the State’s burden. What did Lloyd knowingly intend to do, cause death or serious physical harm? Those are different things and would require different proof.

Counsel’s comments show us that she believed the State had to prove that Lloyd knew he would kill his victim, Gary Power, with one punch. So long as counsel believed that she would also necessarily and mistakenly believe that the State could not make their case.

II. Reviewing courts have mistakenly found trial counsel’s comments were “strategically made.”

Lloyd’s reviewing courts have applied circular logic to find that his trial counsel’s statements were strategic: the statements were strategic because counsel made them, and counsel is presumed to be strategic. And that is precisely why Lloyd is attempting to convince this Court to consider this matter. Lloyd wants this Court to tell reviewing courts that they must engage in a meaningful analysis to determine if that presumption of competence and reasonable trial strategy has been

rebutted. The presumption cannot be both the thing to be overcome *and* the reason it is not overcome.

The practical problem with treating the arguments of Lloyd's counsel as strategic is that, logically, they simply were not. First, one would have to believe that counsel knew the elements that the State had to prove and intentionally misstated them. Second, what would that approach achieve? The jury very well may have agreed with counsel that the Lloyd did not intend to kill Gary Power with a single punch – most reasonable people would. But after the court instructed the jury, the jurors would know that there was no defense at all to consider.

This Court has been clear that decisions made by an attorney laboring under a misunderstanding of the elements of the crime charged should not enjoy the presumptions of competence and reasonable strategy. As cited by the dissent in the Ohio Supreme Court decision in *Lloyd*, this Court found in *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), “decisions based on factual, procedural, and legal misunderstandings are not ‘strategy’ as contemplated by *Strickland*.”

III. How a reviewing court analyzes the circumstances surrounding an ineffective assistance of counsel claim and whether the presumption of competence is rebutted necessarily must be outcome determinative.

Lloyd asked the Ohio Supreme Court to determine if the Eighth District Court of Appeals engaged in a proper *Strickland* analysis when it failed to weigh that counsel misunderstood the law in determining if the presumption of competence and reasonable trial strategy were rebutted. But the Ohio Supreme Court never answered that question. It avoided the question first by saying that it

did not believe counsel misunderstood the law. But secondly, the court continued, even if it “assume[d] that Lloyd’s counsel misunderstood the law” it went directly to the prejudice prong of *Strickland* and still failed to say what impact a mistake of law would have on the presumption of competence. *Lloyd* at ¶¶25-26.

Lloyd is before this Court continuing to ask for a reviewing court to pass judgment on the performance prong of *Strickland* in his case. Did his counsel perform in such a way that an analysis is no longer conducted through the lens of presumed competence? The State now argues that what Lloyd is asking for is not outcome determinative to his case. That is incorrect, but it is also not entirely the point. It is this Court’s analysis as set forth in *Strickland* that is being warped and this Court should inform lower courts of the importance of weighing and considering an attorney’s performance in light of the circumstances. It matters because this Court did not create an irrebuttable presumption and lower courts are acting as if it did.

Does maintaining or dispensing with the presumption of competence change the ultimate determination as to prejudice? Lloyd asks this Court to recognize that it could. It could because ascertaining whether an attorney’s decisions continue to enjoy the presumption of competence involves a thorough interrogation of the circumstances surrounding those decisions. It allows a court to see why decisions were made and whether they were based on a mistake of law or fact or a lack of preparation. And it allows a court to see how mistakes become embedded in a defense. For example, the State of Ohio has often said that instructions on a lesser

degree offense were not appropriate in Lloyd's case because there was no evidence of provocation. Brief in Opp. at 7. The problem is that the case was not tried with an eye towards a provocation defense because counsel mistakenly believed that the State could not make its case against Lloyd. Counsel's misunderstanding of what was required to convict Lloyd changed the record she produced and the decisions she made.

Cronie Lloyd argues that he was denied the rights guaranteed to him by the Sixth and Fourteenth Amendments of the United States Constitution. Lloyd is now serving 15 to years to life following a trial in which his counsel demonstrated that she did not understand the applicable law of his case. Counsel's statements tell us that counsel was under a misapprehension about what the State had to prove to convict her client. We cannot unknow that.

CONCLUSION

Based on the foregoing, this Court should grant Mr. Lloyd's petition for a writ of certiorari.

Respectfully submitted,

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