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PERSPECTIVE

Ineffective assistance

Reliance on binding precedent may no longer be enough

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In the course of defending a criminal case, defense attorneys make countless strategic choices. Whether to call a witness, whether to pursue a certain defense, whether to emphasize an argument — all are judgment calls we make routinely. But our clients face impossibly high stakes and too often stand to lose their liberty and their vocations if we fail them, imbuing each decision along the way with unique, and sometimes outsized, significance.

A criminal defendant's only failsafe for the misjudgments of her counsel is the Sixth Amendment's guarantee of effective assistance of counsel, the contours of which the Supreme Court first outlined in Strickland v. Washington, 466 U.S. 668 (1984). The familiar Strickland standard for assessing a claim of ineffective assistance has two prongs: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

Strickland is, notoriously, a "highly deferential" standard, which begins from the premise that defense counsel's "challenged action[s]" should be "considered sound trial strategy." Murray v. Schriro, 745 F.3d 984, 1011 (9th Cir. 2014) (citations omitted). A defense attorney's strategic choices, so long as they are made after a "thorough investigation" of the relevant facts and law, are "virtually unchallengeable." Strickland, 466 U.S. at 690-91. Even strategic choices about when to stop investigating the facts, or researching the applicable law, are afforded an equally "heavy measure of deference to counsel's judgments." Id. At every stage of proceedings, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) (citations omitted).

Bridges, like _Winstead_, signals a growing shift away from the deference that has immunized defense counsel's strategic choices from close scrutiny. Both send a powerful message that our duties, as zealous advocates, include a search for non-binding authority and novel arguments that may convince a previously unreceptive circuit to change course.

In practice, Strickland's heavy thumb on the scale in favor of ratifying defense counsel's judgment calls has immunized the vast majority from scrutiny. It is no secret that the Federal Reporters are replete with cases denying relief to criminal defendants claiming that their counsel fell short, while orders granting such relief are few and far between. At the extreme, Strickland's deferential standard has yielded questionable results. See United States v. Crawford, 680 F.Supp.2d 1177, 1208-09 (E.D. Cal. 2009) (finding defense counsel was not ineffective where he was not "noticeably asleep" during trial, though he admitted to closing his eyes and tilting his head back repeatedly during major portions of testimony).

A sea change in this area of precedent appears quietly underway, however — though it has yet to reach the 9th U.S. Circuit Court of Appeals. In a series of notable recent decisions, circuit courts of appeal across the country have concluded that defense counsel rendered ineffective assistance for failing to spot potentially meritorious issues, even where those issues were "counterintuitive," "sophisticated," "convoluted," "artificial," or veritable "legal koan[s]." See, e.g., Bridges v. United States, 20-1632 (7th Cir. Mar. 17, 2021).

In United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018), for example, the D.C. Circuit found that defense counsel rendered ineffective assistance at sentencing where he failed to object to his client's career offender designation on the ground that the client's prior drug offenses qualified as predicates only under the commentary to the Guidelines, and that the commentary was ultra vires. Id. at 1089. That argument was by no means obvious or straightforward. First, it required an appreciation of the principles of administrative law that govern the level of deference owed to the Sentencing Commission's promulgation of commentary (Seminole Rock deference). Id. at 1090, 1092. Second, when sentencing took place, at least five circuits had held that the commentary was a legitimate interpretation of the Guidelines, not an unlawful expansion of the text. Id. at 1089. Nevertheless, the D.C. Circuit concluded that counsel's error was both "serious" and "obvious." Id. at 1090.

Winstead appears to impose obligations on defense counsel that many might think would escape Strickland's deferential standard. Defense counsel's research into potentially meritorious arguments must now extend out of circuit and include challenges that many circuits have rejected.

Most recently, in Bridges, the 7th Circuit faulted defense counsel for failing to challenge his client's career offender enhancement on the ground that Hobbs Act robbery is not a "crime of violence" under an amended Guidelines definition of the term. Only the 10th Circuit had so concluded, in an opinion issued shortly before sentencing took place. Of particular note, Bridges went to great pains to emphasize that the fact that the ultimately winning argument was "complex" or "counterintuitive" was no excuse for counsel's failure to raise it on his client's behalf.

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search for non-binding authority and novel arguments that may convince a previously unreceptive circuit to change course. Though the 9th Circuit has yet to join the growing chorus of courts that are raising the bar for criminal defense counsel, we may not be far behind. The 9th Circuit has already paved the way, holding that it was ineffective assistance of immigration counsel to concede removal rather than "pursue appellate proceedings" where the circuits were split on an issue underlying the removal, and "minimal research" revealed that the issue remained an open question in the 9th Circuit. United States v. Lopez-Chavez, 757 F.3d 1033, 1041 (9th Cir. 2014).

These fairly recent opinions demonstrate an increasing willingness to protect criminal defendants against the potential missteps of their counsel. They also provide an important practice note for defense attorneys: to avoid a finding of ineffective assistance, we should seek out legal arguments — even convoluted ones — supported not only by binding precedent, but also out-of circuit precedent and non-binding authority. While courts cannot make tough strategic calls for defense attorneys, precedents like these may help provide better guidance at the many crossroads we face in the course of zealously defending our clients. ■

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