

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

ISAAC DAMON KING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

Court of Appeals No.
1 CA-SA 25-0074

Maricopa County Superior Court
Nos.
CR2018-137405-001 &
CR2024-007754-001

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE (AACJ) IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ 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.

Amicus offers this brief because the issues presented in the special action petition touches upon the core of AACJ's mission: to ensure that the defendant's constitutional rights to the assistance of counsel of choice and to maintain privileged communications with his attorneys are protected. Petitioner Isaac King has alleged that his appointed counsel pressured him to enter into a plea agreement, and his *Knapp*¹ counsel, who King has chosen to represent him in a motion to withdraw from the plea, is prepared to bring that claim to the superior court. Without cause, the trial court determined that all counsel are essential witnesses to the proceedings. This flawed determination led to a series of grave errors, including (but not limited to):

¹ *Knapp v. Hardy*, 111 Ariz. 107 (1974).

1) appointing an attorney against the wishes of the defendant; 2) ordering discovery that will lead to disclosure of privileged information that is not necessary for the litigation of the motion to withdraw from the plea; and 3) placing a prior restraint on retained counsel's speech with his client and his client's family. This court's intervention is needed to protect these rights, because once the trial court's order goes into effect and disclosure is made, the genie cannot be put back in the bottle and King will suffer irreparable harm.

No case law exists interpreting either the scope of discovery when a legal privilege is at issue or the propriety of appointing new counsel to temporarily replace counsel of choice when the defendant seeks to withdraw from a plea. For this reason, special action jurisdiction is not only appropriate but necessary in this case. See RPSA 12(b)(2) (3), (4). Moreover, the issue would become moot before an appeal. RPSA 12(b)(5). AACJ asks this court to grant special action jurisdiction and grant relief by reversing the trial court's discovery order and reversing the order appointing counsel to represent King in these proceedings.

FACTS

Amicus offers a brief description of the facts to aid the court in understanding the scope of this brief. *Amicus* will not discuss the merits of the withdrawal motion—other than to say it is facially meritorious—or other facts ancillary to the trial court proceedings. Nor will *amicus* discuss the advice given by any of the attorneys to

King in the time surrounding his change of plea. The emails among attorneys that were included in the appendix to the petition for special action are important to this brief only to show the limited extent of King's waiver of the attorney-client privilege. Also, as there are multiple defense attorneys whose roles sometimes have changed, this brief will refer to the defense attorneys not by description but by name.

King was charged with first-degree murder in 2018. The court appointed attorneys from the Office of the Legal Defender ("OLD") to represent him. Around that same time, he retained Seth Apfel as *Knapp* counsel. In early 2025, King entered into a plea agreement with the State. Shortly thereafter, OLD filed an *ex parte* motion to withdraw as counsel, and that motion was granted.

Mr. Apfel remained as sole counsel for King, and he renegotiated with King the scope of his representation so that he would be sole retained counsel for the purpose of litigating the motion to withdraw from the plea, and if that motion was denied, to be sole retained counsel for sentencing. If the court should grant the motion to withdraw, however, Mr. Apfel would return to his prior status as *Knapp* counsel, and the court would appoint new counsel. Thus, at this moment in time, there is no *Knapp* counsel, because Mr. Apfel is not associating with any appointed attorneys on the defense of the case.

Mr. Apfel filed a motion to withdraw from the plea on March 5, 2025, the day before the sentencing hearing. The trial court vacated the sentencing and converted

that hearing into a status conference to discuss how to proceed with an evidentiary hearing and discovery. Transcript pp.1-2. The court also appointed a new attorney for King, Jason Gronski, and set another hearing for March 13, 2025. *Id.* at 2.

At the beginning of that next hearing, the court stated its intent to grant an evidentiary hearing on the motion to withdraw from the plea and that the scope of Mr. Gronski's representation of King is to litigate the motion to withdraw from the plea, but that Mr. Apfel would remain as counsel because he is a witness in the evidentiary hearing but not at any trial. *Id.* at 5-6. The court found a partial waiver of attorney-client privilege based on the nature of the claim. *Id.* at 6-8. Regarding discovery, the court stated it has "broad discretion" to order pre-hearing interviews of the OLD lawyers who represented King as well as Mr. Apfel. *Id.* at 9. Emails between the attorneys that contained any discussion of advising King on the plea would be disclosed, with appropriate redactions permitted. *Id.* at 10-11. The court ordered preparation of a transcript of the *ex parte* hearing with OLD for *in camera* review to determine whether anything relevant should be disclosed to the State. *Id.* at 12.

Mr. Apfel objected to the evidentiary hearing and to the discovery and proposed that King could testify *in camera*—a proposition the court rejected. *Id.* at 15-16. Mr. Apfel and the court engaged in a lengthy discussion about the nature of discovery and how to interpret and apply *Waitkus v. Mauet*, 157 Ariz. 339 (App.

1988). *Id.* at 17-27.

Mr. Gronski sought clarification of his role, and the court stated that Mr. Apfel's motion is before the court, but it is Mr. Gronski's decision—after consulting with his client—how to proceed. “I don't expect Mr. Apfel to be in the middle of a discussion with you and Mr. King about it. I believe it's between you and Mr. King as it relates to your position and what you tell me and the positions you take going forward.” *Id.* at 33-34. Mr. Gronski then requested that Mr. Apfel be ordered to have no contact with King or King's family, due to his “influence,” and Mr. Gronski cited *Maples v. Thomas*, 565 U.S. 266 (2012) (a habeas case involving counsel abandoning a client), as authority for that proposition. *Id.* at 34-35. He also provided printouts of a memorandum decision.² *Id.* at 37-38.

Mr. Apfel then explained: “right now, I'm not [*Knapp*]. As of the day that OLD withdrew, Judge Wein appointed me as full counsel,” to which the court responded, “I can modify that.” *Id.* at 39. Mr. Apfel also asserted that allowing him

² Based on the names of the attorneys provided, Mr. Gronski must have provided *State v. McDorman*, 1 CA-CR 06-0130, 2007 WL 5210498 (Ariz. App., Nov. 8, 2007) (mem. decision). Memorandum decisions issued prior to January 1, 2015, may not be cited for any purpose except “to establish claim preclusion, issue preclusion, or law of the case; [or] to assist the appellate court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.” Ariz. R. Sup. Ct. 111(c)(1)(A)-(B). Thus, citation to the memorandum decision was erroneous. In any event, that decision is not helpful to the issue here, as it only shows that relationships between appointed counsel and *Knapp* counsel may sometimes become rancorous.

to speak with King and his family would help rather than hinder Mr. Gronski's efforts, but the court agreed with Mr. Gronski and "essentially treat[ed] what he said as an oral motion that for—that you be temporarily removed as counsel until the conclusion of this issue, until the Court rules on the motion to withdraw. That would include no contact with Defendant, with Defendant's family, etc." *Id.* at 39-40. The court permitted Mr. Apfel to act as counsel only for the purpose of filing a special action; it would not allow Mr. Apfel to explain what just happened to his client or to his client's family. *Id.* at 41-43.

ARGUMENTS

I. The parameters of the relationship between *Knapp* counsel and appointed counsel are not ripe in this special action.

In *Knapp v. Hardy*, 111 Ariz. 107 (1974), the Arizona Supreme Court recognized the value in allowing the defendant to retain an attorney to associate with his appointed counsel. The way appointed counsel and *Knapp* counsel interact largely depends on the individual attorneys involved. It is no surprise that conflicts among the attorneys arise in many cases. In a future case, appellate courts will likely have to grapple with how to resolve such conflicts. But in this case, OLD withdrew and left Mr. Apfel alone to represent King, which apparently was fine with both Mr. Apfel and King. Any questions about the scope of *Knapp* counsel, therefore, are not ripe in this litigation.

II. King retained Mr. Apfel after OLD withdrew. King was denied his constitutional right to counsel of choice when the trial court unilaterally removed Mr. Apfel as counsel of record.

Although Mr. Apfel was originally retained as *Knapp* counsel and represented King alongside OLD, it is undisputed that Mr. Apfel remained as sole counsel once Judge Wein granted OLD's motion to withdraw as counsel. Mr. Apfel plainly stated the scope of his representation: he would represent King to litigate the motion to withdraw from the plea agreement; if the motion was denied he would handle sentencing, and if the motion was granted he would return to his status as *Knapp* counsel and ask the court to appoint new counsel.

“The right to select counsel of one’s choice ... has been regarded as the root meaning of the constitutional guarantee” of the right to counsel. *Gonzalez-Lopez v. United States*, 548 U.S. 140, 147-48 (2006); U.S. CONST. amend. VI. “A defendant who has the funds necessary to retain counsel of choice generally may not be restrained from making that choice.” David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL § 6:2 (2024-25 ed.) (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

No case authorizes the removal of an attorney from a case—even temporarily as occurred here—based on the fact that the attorney may have useful information for deciding a fact at issue in a non-trial setting. The trial court stated that ER 3.7 does not apply here because the hearing on King’s withdrawal from the plea

agreement is not a trial, but the comments to that rule are helpful to explaining why Mr. Apfel does not fall within this Rule. First, there is no risk of a conflict of interest, as he is acting according to his client's wishes. ER 3.7, cmt. 1. Second, the court will not "be confused or misled by a lawyer serving as both advocate and witness," and the prosecution will not be prejudiced. ER 3.7, cmt. 2. Third, the emails provided by Mr. Apfel show that he never spoke to King about the plea outside the presence of OLD attorneys, and therefore he is not an essential witness to any of the communications with King. Fourth, even if he did speak alone with King about the plea, King may testify to these matters—and it is King's perceptions that are far more important than anything his lawyers would have to say on the matter.

The prosecution cannot circumvent a criminal defendant's Sixth Amendment right to counsel by simply declaring that counsel an essential witness. But that is exactly what happened here. But that is what happened here: the prosecution simply declared all attorneys who communicated with King about the plea agreement are essential witnesses and thereby sought to force counsel of choice to the sideline while forcing a newly appointed attorney upon the defendant. The trial court assented to the prosecution's request without first applying any scrutiny to the prosecution's representations.

"[F]or the prosecution to participate in the selection or rejection of its opposing counsel is unseemly if for no other reason than the distasteful impression

which could be conveyed.” *State v. Madrid*, 105 Ariz. 534, 535 (1970). “We have also noted that we will not tolerate impermissible interferences with the right to the assistance of counsel, and that we deplore any governmental action that intrudes on the attorney-client relationship.” *State v. Serna*, 163 Ariz. 260, 268 (1990). “In cases involving disqualification of counsel, we will carefully review the record for any denial of defendant’s sixth amendment rights.” *Id.* In *Serna*, the defendant raised, for the first time on appeal, that his first appointed counsel was removed in violation of his right to counsel. *Id.* The Court described the facts showing defense counsel’s misconduct in violating a court order not to disclose sensitive information on other prison inmates to his client, but he did so anyway (even if not knowingly), and counsel moved to withdraw after the judge suggested the prosecution initiate contempt proceedings. *Id.* at 268-69.

In King’s case, the prosecution does not need to question Mr. Apfel at all (whether at a hearing or in a prehearing interview); at most, it needs to question the OLD attorneys who are alleged to have pressured King to take the plea. Of course, if all other things were equal, it is always better to have more information than less. But the prosecution and the court cannot subvert the Sixth Amendment in pursuit of a complete picture.

Because the trial court did not consider King’s Sixth Amendment right to counsel of choice, it committed legal error, which is sufficient to prove an abuse of

discretion. RPSA 4(c). This court should order the trial court to recognize Mr. Apfel as King's counsel and relieve Mr. Gronski of further responsibility.

III. Motions to withdraw from plea agreements do not require the same modicum of proof as post-conviction relief.

Arizona Rule of Criminal Procedure 17.5 simply states that “[t]he court may allow a defendant to withdraw a plea of guilty or no contest if it is necessary to correct a manifest injustice.” Although “manifest injustice” is strong language, the case law interpreting this rule shows that the hurdle is not so high.

In *State v. City Court of Tucson*, 131 Ariz. 236, 237 (1981), the Arizona Supreme Court answered, “what is meant by the term ‘manifest injustice.’” It quoted the rule’s comment and found that a mistake as to a collateral issue is sufficient to support withdrawal. *Id.* Most importantly, it explained how trial courts should exercise their discretion in deciding whether to grant a defendant’s motion to withdraw: “[T]he discretion of the trial court should be liberally exercised in favor of permitting the withdrawal. Where there is *any showing* that justice will be served thereby, any doubt should be resolved in favor of withdrawing the plea.” *Id.* (quoting *State v. Corvelo*, 91 Ariz. 52, 54 (1962)) (citation omitted) (emphasis added); *see also State v. Wilson*, 95 Ariz. 372, 373 (1964) (same). And in *Duran v. Superior Court*, 162 Ariz. 206 (App. 1989), this court held that the trial court abused its discretion in denying withdrawal from a plea on the basis that the defendant later learned that one of the complaining witnesses had withdrawn her accusation.

In King’s case, on the other hand, the trial court required far more than “any showing”—it required proof and an evidentiary hearing. Although the record does not expressly state so, it appears the trial court conflated the standard under Rule 17.5 with post-conviction relief. None of the cases related to withdrawing from a plea mention evidentiary hearings, whereas the “good cause” requirement for post-petition discovery now appears in Rules 32.6(b) and 33.6(b). Where the Arizona Supreme Court expects an evidentiary hearing to be held to establish a claim, it has included that language in the rules. *See* Rule 7.2(b) (ineligibility for bail); Rule 16.2(b) (motion to suppress); Rules 32.13 and 33.13 (post-conviction relief). *Amicus* found one Arizona Supreme Court case, *State v. Anderson*, 147 Ariz. 346, 350 (1985), as well as a handful of memorandum decisions where the procedural history mentions an evidentiary hearing on a motion to withdraw from a plea; not one analyzes the proper scope of such an evidentiary hearing.

This court should hold that full-blown evidentiary hearings are not part and parcel of deciding a motion to withdraw from a plea. The trial court can hear testimony from King and the LDO attorneys, but it must be limited. It should order the trial court to consider only whether King has presented evidence of a “manifest justice” as that term is understood through case law.

IV. Even if this court holds that evidentiary hearings are permitted for deciding a motion to withdraw from the plea, the trial court’s discovery order was improper and overbroad.

Just as none of the Arizona case law discusses evidentiary hearings on motions to withdraw from plea agreements, unsurprisingly, it is also quiet as to discovery. The only cases that are relevant to this inquiry are *Waitkus* and *Naranjo v. Sukenic*, 254 Ariz. 467 (2023). *Naranjo* is a post-conviction relief case and therefore procedurally dissimilar. *Waitkus* is also an attack on trial counsel’s effectiveness, but it occurred prior to sentencing so it bears slightly more similarity to King’s case. Even though the attorney-client privilege was waived as to the trial attorney’s effectiveness, this court found the trial court’s discovery order defective both in its overbreadth and in ordering production of any documents. “At most, case law would permit the questioning of the attorney at an evidentiary hearing to determine the validity of a defendant’s ineffective assistance claim.” *Waitkus*, 157 Ariz. at 340. Furthermore, any documents relevant to the claim could be produced for the first time at an evidentiary hearing. *Id.* at 340-41.

Naranjo interpreted the new discovery rules for post-conviction relief cases, Rules 32.6(b) and 33.6(b). These rules only came into existence on January 1, 2020. The Arizona Supreme Court rejected *Naranjo*’s argument that the State should have to comply with the requirements of *Waitkus*, because the post-conviction relief proceedings were several years after the relevant trial court proceedings (which

affected the trial attorneys' memory), and because Rule 32.6(b) specifically permits for discovery upon a showing of "good cause." *Naranjo*, 254 Ariz. at 477 ¶¶ 37-38.

In King's case, AACJ recognizes that the prosecution avowed that it had no intention of engaging in a fishing expedition and that the trial court offered the courtroom for the interview so that the judge could be available during interviews to rule on objections in real time. While this effort is laudable, it is also insufficient. And it also begs the question: if the interview will occur in the judge's courtroom, why not just do the evidentiary hearing with testimony?

Mr. Apfel appears to have already provided all the relevant documents, especially emails among the attorneys, in his appendix to the special action.³ There is no reason to believe that further discovery would aid the prosecution or the court (much less good cause). This court should hold that trial courts do not possess such "broad discretion" to order discovery of privileged and confidential information in defense attorneys' files without ensuring that the discovery is the least intrusive

³ In his response to the special action, Mr. Gronski alleges that Mr. Apfel committed an ethical violation because he provided those documents without permission from his client. Mr. Apfel's reply vehemently disputed that allegation. Resolution of that dispute is unnecessary, however, because abundant Arizona law states the privilege is waived to the extent that a claim against a prior attorney is raised. ER 1.6(a) ("the disclosure is impliedly authorized in order to carry out the representation"). *See also Naranjo*, 254 Ariz. at 475 ¶¶ 28-29 (discussing waiver of privilege upon challenging conduct of prior counsel). Rules 32.6(f) and 33.6(f), added in 2020, codify that waiver into the rule. Thus, even if King did not expressly authorize the release of the documents, he impliedly authorized their release when he asked Mr. Apfel to help him withdraw from the plea on the basis of coercion by OLD.

means possible to permit the search for truth. To hold otherwise would contradict the Arizona Supreme Court's interpretation of Rule 17.5, *e.g.*, *Corvelo*, 91 Ariz. at 54, and it would read into the rule a burden that simply does not exist.

V. The trial court's order preventing Mr. Apfel from communicating with his client or his client's family is an unconstitutional prior restraint.

Mr. Gronski's request that the court order Mr. Apfel not to communicate with King or King's family is odd to say the least. This might be appropriate if there was any allegation of misconduct on Mr. Apfel's part. But the only basis for appointing Mr. Gronski in the first place was because the trial court viewed Mr. Apfel as a fact witness who would have to testify, and he cannot question himself at the hearing. Transcript, p.6. The trial court's order was clear that Mr. Gronski's role was to litigate Mr. Apfel's motion; he could modify it to the extent he sees fit, but he was to pursue that motion in the manner that King wished. *Id.* at 34.

Mr. Gronski informed the court that he had already spoken both with King and King's mother and found them "very, very nice." *Id.* at 33. At no time did Mr. Gronski suggest that King changed his mind and no longer wished to pursue the motion to withdraw from the plea.

It is also clear from the trial court's order that Mr. Apfel was not removed as counsel altogether; the prosecution's motion was denied. *Id.* at 5-6. This means that Mr. Apfel will continue to represent King in whatever proceedings occur after the motion is decided (sentencing if it is denied, *Knapp* counsel if it is granted). Since

Mr. Apfel is his counsel, King has a right to communicate with Mr. Apfel, and vice versa.

Mr. Gronski nevertheless wanted Mr. Apfel to have no communications with his own client. His stated reason, that Mr. Apfel “has undue influence,” has no support in law or ethics. Attorneys are supposed to have “influence” over their client’s decisions by giving them advice. “Undue” influence would be coercion or manipulation, and no allegation was made that this occurred here. Essentially, Mr. Gronski improperly assumed the role of a guardian *ad litem* based on the mere fact of King’s mental issues.

The trial court’s order granting Mr. Gronski’s oral motion is nothing short of an unconstitutional prior restraint. For nearly a century, the U.S. Supreme Court has held prior restraints violate the First Amendment. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931) (“[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication.”). The Arizona Constitution’s free speech right is even broader: “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” ARIZ. CONST. art. 2, § 6; *see also Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281-82 ¶ 45 (2019). “Moreover, the temporary nature of a restraint does not make it less objectionable or reduce the burden on the government to justify it.” *Phoenix Newspapers, Inc. v. Otis*, 243 Ariz. 491, 495 ¶ 14

(App. 2018) (citing *Neb. Press Ass'n et al. v. Stuart*, 427 U.S. 539, 559 (1976)).

There was no legitimate—much less compelling—reason to restrain Mr. Apfel in this way. But even if there was, Mr. Apfel's offer to speak to King and his family only in the presence of Mr. Gronski was more than enough to assuage any concerns. Mr. Apfel only asked for one opportunity to explain to them what just happened, as he is the attorney that King and the family trust. The fact that Mr. Gronski and the trial court both refused that suggestion out of hand shows that the order is a clear abuse of discretion; it violated not only the Sixth Amendment right to counsel of choice but also basic free speech rights. This court's action to reverse that order is necessary to remind trial courts and practitioners of the importance of the constitutional right of an attorney and client to communicate.

CONCLUSION

This court should grant special action jurisdiction. The questions presented by King, through Mr. Apfel, are not only novel and of great statewide importance, but irreparable harm will result from the trial court's order if it is not vacated.

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By /s/ David J. Euchner

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