

**IN THE SUPREME COURT
FOR THE STATE OF ARIZONA**

ERIN KELLIE DENNIS,

Petitioner,

v.

Hon. MICHAEL BUTLER, Judge of
the Superior Court of Arizona in and for
Pima County

and

STATE OF ARIZONA,
Real Party in Interest.

Arizona Supreme Court

No. CR-18-0566-PR

Arizona Court of Appeals, Division 2

No. 2 CA-SA 2018-0070

Pima County Superior Court

No. CR 2017-2983 & 2017-3949

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

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CRIMINAL JUSTICE**

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IDENTITY AND INTERESTS OF AMICUS

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 the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus AACJ offers this brief in support of Appellant because proper competency determination is of paramount import in assuring the rights of some of this State's most vulnerable criminal defendants. Proper competency assessment touches the core of the mission of AACJ to protect individual rights guaranteed by the Federal and State Constitutions and to resist all efforts to curtail such rights.

REASONS TO ACCEPT JURISDICTION

A defendant is incompetent when they lack “sufficient present ability” to “understand the proceedings” in a factual and rational way. *Dusky v. United States*, 362 U.S. 402, 402 (1960). Whether and to what extent the *Dusky* standard specifically applies to a defendant’s understanding of their plea and trial exposure is a purely legal issue of first impression. Special action review and exercise of this Court’s discretionary jurisdiction, therefore, is appropriate. *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997) (granting review, in part, for a purely legal issue); *State v. Butler*, 232 Ariz. 84, ¶ 7 (2013) (granting review, in part, for an issue of first impression).

The alternative method of review—direct appeal—is untenable and contrary to the principle of judicial economy. Direct appeal is available to a defendant only following a jury trial and guilty verdict. Trying and convicting an incompetent defendant, however, violates due process and is, by definition, structural error. *Rohan v. ex rel. Gates*, 334 F.3d 803, 818 (9th Cir. 2003), *abrogated on other grounds by Ryan v. Gonzales*, 568 U.S. 57 (2013). Special action review prior to trial, therefore, is appropriate here. *Chronis v. Steinle*, 220 Ariz. 559, § 4 (2009) (special action review appropriate when there is “no equally plain, speedy, or adequate recovery” on appeal).

ARGUMENT I

This Court Should Require Trial Courts to Make an Explicit Determination that a Defendant Understands the Consequences of Proceeding by Plea or Trial When the Issue is Contested by the Defendant. In the Event the Defendant Does Not Understand, She Cannot Be Found Competent.

1. *To knowingly make the decision to proceed to trial or enter a plea, a defendant must understand the factors that go into making that decision. Those factors include likely and potential liberty deprivations and collateral consequences. If a defendant cannot understand these factors, she cannot make a reasoned choice among alternatives, and, therefore, cannot be found competent.*

The decision to enter a plea agreement or proceed to trial is “ordinarily the most important single decision in a criminal case” *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (citation omitted). The decision to proceed to trial “should not be made by a defendant encumbered with a grave misconception as to the very nature of the proceeding and possible consequences.” *State v. Donald*, 198 Ariz. 406, ¶ 13 (App. 2000). A defendant incapable of making a reasoned choice between alternatives and unable to understand the consequences of her plea is incompetent to plead. *State v. Brewer*, 170 Ariz. 486, 495 (1992). Relevant to the choice of whether to plead or proceed to trial are the consequences of the plea as opposed to the consequences of a guilty verdict. *State v. Bishop (Bishop II)*, 150 Ariz. 404, 406 (1986) (quoting *Brady v. United States*, 397 U.S. 742, 750 (1970)). The collateral consequences of a conviction and whether the defendant has a realistic chance of acquittal are also relevant considerations. Each consideration factors into

an unstated algorithm in a defendant's mind as to whether to plead or proceed to trial. If a defendant, however, fundamentally misunderstands the data behind one or several of these factors, the algorithm is flawed, and the defendant's ultimate decision will not be knowingly reached.

a. Liberty Deprivations

The defendant must assess how a period of incarceration will affect her. See Ariz. R. Crim. P. 17.2(a) (requiring the trial court to “determine that the defendant understands” the “range of possible sentences [and] any special conditions . . .”). In practice, this means that the defendant must be able to understand whether that period is subject to mandatory flat time as opposed to so-called “soft time”, whether sentences on multiple counts will run concurrently or consecutively, and whether any alleged probation violation case has the possibility of being revoked and run concurrent or revoked and run separately. These considerations all presuppose that a term of incarceration will be imposed. In the event that, instead, the defendant will be placed on probation, the defendant must consider the standard terms of that probation, any special terms (sex offender, white collar, substance abuse, drug and alcohol testing), and the length of that probation.

b. Collateral Consequences

While an immediate term of incarceration might be the most significant consequence of a felony guilty plea for most defendants, it is not the only one. If Petitioner is incapable of understanding the difference between simple numbers, it

is highly unlikely that she and others like her could make reasoned decisions concerning significant collateral consequences of a plea agreement.

For many defendants, the period of incarceration is a less-important consideration than a collateral consequence—such as the effect of a conviction on a defendant’s immigration status. *See Padilla v. Kentucky*, 559 U.S. 356, 368 (“preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence”) (citations omitted)(internal quotations and alterations omitted); *Lee v. United States*, ___ U.S. ___, 137 S.Ct. 1958, 1968-69 (2017). Felony convictions can affect a defendant’s:

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| Immigration status | Ariz. R. Crim. P. 17.2(b)(1); <i>Padilla v. Kentucky</i> , 559 U.S. 356, 366 (2010) |
| Right to vote | A.R.S. § 16-101 |
| Right to hold public office | A.R.S. § 13-904(2) |
| Right to sit on a jury | A.R.S. § 13-904(A)(3) and § 21-201(3) |
| Right to bear arms | A.R.S. § 13-904(A)(5) and 13-3101(A)(7)(b). |
| Financial benefits | 21 U.S.C. § 862; A.R.S. § 13-3418(A) |
| Educational benefits | 20 U.S.C. § 1091(r) (federal financial aid); A.R.S. § 13-3418(A) (state financial aid) |
| Housing benefits | 42 U.S.C. § 13661 <i>et seq.</i> , A.R.S. § 13-3418(A) |
| Food | 21 U.S.C. § 862a; A.R.S. § 13-3418(A) |
| Property rights | A.R.S. § 13-4305(A)(3)(b) |
| Service in armed forces | 10 U.S.C. § 504 |
| Parental rights | A.R.S. § 8-533(B)(4) |

ABA criminal justice standards list as a primary objective that a defendant be “fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged.” Standard 19.1.2(a)(iv) of the ABA Standards

for Criminal Justice: Collateral Sanctions and Discretionary Disqualifications of Convicted Persons (3rd Ed) (2004) (available at goo.gl/FkNgbs, accessed January 5, 2019).

Given the importance of these collateral consequences, the trial court should explicitly determine a defendant's capacity to understand the relevant collateral consequences of the plea v. trial determination. Certainly, trial need not to go over every single collateral consequence outlined above. Inquiry can be limited to assessing whether the defendant is capable of making a voluntary choice between plea and trial. *See, e.g., Brady v. United States*, 397 U.S. 742, 748 (1970) (noting that the voluntariness standard for entering a plea requires only "sufficient awareness of *relevant* circumstances and *likely* consequences") (emphasis added).

2. *Petitioner's hearing demonstrates that when a defendant misunderstands the consequences of the plea or trial determination, they necessarily are incapable of making a reasoned choice between pleading or going to trial.*

Petitioner's case is especially instructive because there is no real factual dispute concerning her analysis of the relevant factors. Petitioner's statements made clear she did not understand the terms of the plea agreement. The trial court, in summing up the evidence, made no attempts to characterize Petitioner's understanding as malingering. Neither the trial court nor the State questioned Petitioner's credibility at the hearing. There was no suggestion of malingering from either of the court-appointed evaluators. Exhibits K and M. As such, this Court is

left with the following facts:

Petitioner hoped she would get probation after a trial loss. Exhibit O, p. 30, lns. 21-23. She could not. She was prison mandatory and faced up to 25 years. *Id.* at p. 70, lns. 2-8. Petitioner also testified that, following a conviction at trial, she expected to receive 3 years in prison. *Id.* at p. 20, lns. 19-25. At best, Petitioner was off by 4.5 years. At worst, she was off by 22. Petitioner’s ability to understand the nature of her potential sentences, therefore, was fundamentally flawed.

Considering the disparity in years in another context is instructive: lawyers in the United States perform a similar analysis when deciding whether to attend law school. They determine that a legal career is generally worth the costs of three years of law school. If law school lasted 7.5 years or 25 years, many lawyers would decide that a legal career is not worth the costs. They would make that determination because they are capable of making a reasoned choice between alternatives. Petitioner is not.

Petitioner did not understand the consequences of going to trial as opposed to entering a plea. Petitioner, therefore, cannot be said to make a reasoned choice between alternatives. Petitioner wanted to go to trial because she thought she could “win some money right now” for going to “La Frontera”—an outpatient treatment facility. Exhibit O, p. 31, ln. 23-p. 32, ln. 2. Petitioner’s assessment of whether she could prevail at trial, therefore, was fundamentally unreasonable as well. As such, Petitioner was incompetent and Respondent Judge erred as a matter of law in

concluding the contrary.

Accordingly, this Court should remand with instructions that, in assessing whether a defendant is capable of making a reasoned choice among alternatives, the trial court make an on-the-record determination whether the defendant understands the consequences of the plea as opposed to the consequences of proceeding to trial. This trial court could readily conduct this inquiry through (1) testimony of the defendant at a competency hearing, (2) defense counsel's *Bishop* evidence, or (3) the reports of the doctors.

This does not require the trial court to make sure the Defendant makes a good choice. Competency is not synonymous with good decision-making. The defendant need not make a reasoned choice between alternatives to be found competent. A defendant must only be *capable* of making that reasoned choice. Thus, no unnecessary hand-holding is required under the proposed rule. Additionally, nothing in the proposed rule prohibits the trial court from determining that a defendant is not credible concerning her understanding of the consequences of the plea or trial decision. The court can ask probing questions of defense counsel in a *Bishop* posture. The court can order that evaluating doctors ask the defendant about the issue. In the event, as here, that the defendant testifies, the Court can ask the defendant questions to make a credibility determination. Trial courts are routinely tasked with assessing the credibility of witnesses. *See State v. Moran*, 232 Ariz. 528, ¶ 6, (App. 2013) (assessing witness credibility in suppression hearing); *State v. Thomas*, 196 Ariz.

312, ¶ 3 (App. 1999) (assessing witness credibility in probation violation hearing); *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (assessing witness credibility in post-conviction relief hearing). Accordingly, a ruling that requires the court to make such a determination is well-within a trial court's recognized abilities.

The decision of whether to proceed to trial or resolve the case by plea is likely the most important decision a defendant will make in her case. *Gordon*, 156 F.3d at 380. It is paramount, therefore, that the court explicitly determine whether the defendant is capable of reasonably making that decision. When raised by defense counsel, this Court should require trial courts to make an on-the-record assessment as to whether the defendant possesses an ability to make a reasoned choice between pleading or proceeding to trial. In the event, as here, that the defendant lacks that ability, the trial court must find the defendant incompetent.

ARGUMENT II

The Trial Court Erred as a Matter of Law in Refusing to Give Appropriate Weight to Defense Counsel’s *Bishop* Evidence.

The most knowledgeable witness as to a defendant’s competency is often the defendant’s attorney. *Bishop II*, 150 Ariz. At 408. Mental health experts meet with a defendant under limited circumstances and for a limited time. *See id.* (“All other persons have limited and restricted access to defendant.”) Defense counsel, in contrast, meets with a defendant on numerous occasions, in numerous locations, and under varying circumstances. Defense counsel, therefore, is in a better position than anyone in the courtroom to provide evidence concerning a defendant’s competency. *See, e.g., Balfour v. Haws*, 892 F.2d 556, 561 (7th Cir. 1989) (defense “counsel, perhaps more than any other party or the court, is in a position to evaluate a defendant’s” competency) (*citations and internal quotations omitted*); *United States v. Denton*, 434 F.3d 1104, 1112-13 (8th Cir. 2006) (adopting above language in *Balfour*); *Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir. 1996) (“[D]efendant’s attorney is in the best position to determine whether the defendant’s competency is suspect.”)

Given the recognition that defense counsel is often the best witness as to the issue of competency, the *Bishop* Court concluded that defense counsel has a duty “as an officer of the court . . . to aid the judge in reaching a correct decision” on the issue of competency. *Bishop II*, 150 Ariz. at 410. If defense counsel has a duty to

assist the trial court on the issue of competency, it follows that the court has a duty to properly consider what defense counsel provides. Any conclusion to the contrary would be incongruous. The trial court is, of course, not bound by what is presented. Refusal to admit or consider such evidence, however, is error under *Bishop*.

Respondent Judge indicated that he had difficulty in assessing Petitioner's competency because "conversations that obviously [defense counsel] had with [Petitioner] . . . aren't part of the record." Exhibit O at p. 77, lns. 3-5. This can mean only two things: either the court believed (1) there was no record concerning these conversations presented at the evidentiary hearing or (2) despite such a record existing, Respondent Judge felt compelled not to consider those conversations in reaching a decision.

There was, however, a substantial record of conversations between defense counsel and Petitioner at the evidentiary hearing. *See* Exhibit O at p. 21, lns. 14-18; p. 30, lns. 8-10; p. 33, lns. 9-16; p. 34, ln.16-p. 35, ln. 9; p. 36, lns. 12-14; p. 39, lns. 10-14; p. 41, lns. 8-11; p. 43, lns. 3-12; p. 69, lns. 18-21; p. 71, lns.15-17. Accordingly, possible justification (1) is not at issue. Respondent Judge, therefore, must have believed that, as a matter of law, he was unable to consider those conversations in making a competency determination. This was error. Refusal to consider the representations of defense counsel is a refusal to consider the best evidence available. Respondent Judge instead relied on the reports of doctors—evidence that is only second best. Refusal to consider the best evidence available

was error under *Bishop*.

Nothing in *Bishop* or the other cases cited above requires the trial court to defer to defense counsel's testimony or avowals. The court remains free to assess the credibility of these representations, the motive or bias of defense counsel, and the testimony or avowal in light of all other evidence presented. If the court then believes that all the other evidence outweighs the avowals of defense counsel, so be it. However, the court cannot disregard defense counsel's *Bishop* evidence entirely. Because Respondent Judge did so, this Court should remand with instruction to appropriately consider and weigh defense counsel's *Bishop* evidence.

CONCLUSION

Petitioner's case is the ideal vehicle to instruct the lower courts on two purely legal and recurring issues: first, how to assess competency when presented with evidence that a defendant is incapable of understanding the consequences of proceeding to trial or pleading, and second, how the trial court should assess and weigh *Bishop* evidence. Respondent Judge failed to assess competency appropriately under both analyses. This Court, therefore, should remand with appropriate instructions on how to assess competency.

RESPECTFULLY SUBMITTED this 22nd day of
January 2019.

By: /s/ Brian Thredgold
Brian Thredgold
Arizona Attorneys for Criminal Justice