IN THE ARIZONA SUPREME COURT

THE STATE OF ARIZONA, Respondent, v. ADRIAN RAZO, Petitioner.	No. CR-24-0016-PR Court of Appeals No. 2 CA-CR 2023-0165 Pinal County Superior Court No. CR2019-02476

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

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INTRODUCTION

The test for determining whether post-conviction relief (PCR) should be granted based on ineffective assistance of counsel (IAC) requires a faithful application of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant who pleads guilty waives the full set of trial and appeal rights guaranteed by the United States and Arizona Constitutions (not to mention statutory and rule-based rights). Most cases are resolved by plea agreement, underscoring "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Pleading defendants typically obtain a benefit from the State in exchange for waiving these rights, but they are entitled to plead to the indictment unconditionally (as well as sentencing allegations) so long as they are competent and the decision is knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Alejandro v. Harrison*, 223 Ariz. 21, 24-25 ¶ 11 (App. 2009).

When counsel advises a client to plead guilty "straight up" (i.e., plead guilty to all charges and admit all sentencing allegations) without any promises in return, courts should scrutinize that advice. Such advice is wise in rare cases, but in most cases the attorney's judgment is clouded by other factors, such as time pressure and lack of preparation, that conflict with the client's best interest. The lower court rulings disregard prevailing norms in the criminal defense community and instead

postulate that counsel was effective merely because precedent shows it is possible to give effective advice to plead straight up. This Court should grant review to clarify that courts should evaluate the performance of the attorney in the present case against the prevailing norms, and they must grant evidentiary hearings when petitions present colorable claims. In the absence of any objectively reasonable strategy supporting advice to plead straight up, courts should find the petitioner makes a *prima facie* case for IAC.

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.

Many AACJ past-presidents have signed onto this brief. Each year AACJ's Board of Governors elects a President-Elect to serve as President the following year,

followed by two years of Board service as Immediate Past-President and Second Past-President. The signatories are frequently called upon to provide expert opinions to courts and other tribunals regarding the prevailing norms in criminal defense.[1]

AACJ submits this brief because the issues presented in this case, the right of criminal defendants to have competent advice from counsel and the courts' duty to faithfully apply the IAC standards, go to the core of AACJ's mission. It is critical that trial courts give a fair hearing to PCR defendants who claim ineffectiveness rather than summarily dismiss the petition based on a credibility determination. There is a mistaken view that "the number of meritorious cases is 'infinitesimally small.'" *State v. Chavez*, 243 Ariz. 313, 318 ¶ 16 (App. 2017) (quoting *Davila v. Davis*, 582 U.S. 521, 538 (2017)). This quotation is a self-fulfilling prophecy because it influences courts to deny meritorious claims. This Court should clarify that the standard for determining whether to grant an evidentiary hearing on a claim requires crediting every fact properly presented by the PCR petitioner and resolving credibility determinations after an evidentiary hearing.

[1] For example, AACJ past-president Christopher Dupont submitted an expert declaration on behalf of Razo in support of the PCR petition. Because he is a witness, Mr. Dupont has not participated in or been consulted on this brief.

ARGUMENTS

I. When counsel advises a criminal defendant to plead straight up without any apparent benefit to the client, the PCR petition makes a *prima facie* case for IAC.

A. Standard for IAC when client pleads guilty.

A criminal defendant is entitled to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and article 2, section 24 of the Arizona Constitution. Under *Strickland*, counsel is ineffective if (1) his or her acts or omissions fall below objective standards of reasonableness and (2) the defendant suffers prejudice. Effective assistance of counsel means adequate investigation into the case as well as a working familiarity with basic legal principles. *Strickland*, 466 U.S. at 690-91; *State v. Lee*, 142 Ariz. 210, 216 (1984). "A defendant who has detrimentally relied on erroneous legal advice has been prejudiced because the plea could not have been knowing and voluntary and thus has not made an informed choice." *State v. Ysea*, 191 Ariz. 372, 377 ¶ 17 (1998). "Trial counsel … 'has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Fisher*, 152 Ariz. 116, 119 (1986) (quoting *Strickland*, 466 U.S. at 688).

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." *Strickland*, 466 U.S. at 690-91. "'A purportedly

strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them."'" *State v. Denz*, 232 Ariz. 441, ¶ 12, 306 P.3d 98, 102 (App. 2013) (quoting *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005), *quoting in turn Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)).

Prejudice is established when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*." *Nix v. Whiteside*, 475 U.S. 157, 175 (1986).

"When a claim of ineffective assistance of counsel stems from plea proceedings, a defendant must show a reasonable probability that, 'but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *State v. Nunez-Diaz*, 247 Ariz. 1, 5 ¶ 13 (2019) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "To do so, it must 'have been rational under the circumstances' for a defendant to refuse a plea and go to trial." *Id*. (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). "Rather than asking how a hypothetical trial would have played out absent the error, the Court consider[s] whether there was an adequate

showing that the defendant, properly advised, would have opted to go to trial." *Lee v. United States*, 582 U.S. 357, 365 (2017) (citing *Hill*).

B. Trial counsel's advice for a client to plead straight up should be viewed critically, as it is only in rare cases where such advice is based on a reasonable strategy.

The practice in state and federal courts is markedly different when pleading guilty. In the federal system, defendants who plead guilty obtain a two-level reduction in the sentencing guidelines and a three-level reduction in felony cases where the defendant saves the government the expense of preparing for trial. U.S.S.G. § 3E1.1(a), (b). Arizona law endows no such tangible benefit. Furthermore, whereas A.R.S. § 13-4033(B) divests appellate courts of jurisdiction to hear cases arising from a guilty plea, federal law contains no such constraint, but plea agreements often include a provision that defendants waive their appeal and habeas rights. Thus, a federal defendant who loses a dispositive motion and wishes to raise the issue on appeal while simultaneously reducing sentencing exposure could obtain a tangible benefit from pleading guilty without a plea agreement.

This case concerns Arizona state law, and Mr. Dupont's expert declaration[2] on the subject is consistent with the experience of AACJ's past presidents. While "there is not a scenario [Mr. Dupont] can imagine where [he] would advise a client … to plead guilty to every charge and admit every aggravator without an explicit

[2] Appendix to Petition for Review ep 226-231.

benefit from the State or an inclination from the Court as to sentencing," the collective experience of the *amicus* p shows that such circumstances exist but are exceedingly rare as they can conceive of only two scenarios:

- The State could have charged more serious offenses and pleading straight up would cause jeopardy to attach and prevent the filing of more serious charges. *Cf. United States v. Goodwin*, 457 U.S. 368, 380 (1982) ("[J]ust as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.").
- In a capital trial, where the jury decides the penalty instead of the judge, the willingness of the defendant to plead to the murder and the aggravating factors may build goodwill with the jury and support the mitigating factor of remorse. However, even offering to plead guilty in exchange for a natural-life sentence has mitigating weight. *Busso-Estopellan v. Mroz*, 238 Ariz. 553, 554-55 ¶ 7 (2015).
- In a misdemeanor case, the consequences of the conviction may be less significant than the time and expense of a trial.

These examples are the exception and not the rule, and each presupposes that counsel conducted requisite investigation before advising a straight-up plea.

Mr. Dupont is correct that "as a last resort, trial is as much a gamble for the State as it is for the Defense as juries can be unpredictable." There are plenty of examples of cases where defense attorneys obtained unimaginable acquittals. Sometimes juries convict on most charges but acquit on others, because witnesses who appeared credible in police reports presented differently on the witness stand. And on occasion, prosecutors and judges commit unforced errors leading to appellate reversal. *See State v. Dayton*, 115 Arizona Cases Digest 34, 2024 WL 488382 (App., Feb. 8, 2024) (new trial ordered because courtroom closure violated Sixth Amendment right to public trial).

The PCR court relied on this Court's *Strickland*-era cases to find that pleading guilty is not *per se* ineffective. For example, in *State v. Nash*, 143 Ariz. 392, 399 (1985), this Court held that trial counsel was not ineffective for advising the client to waive a jury trial and submit the case to the trial judge for decision based on the grand jury transcript, because the alternatives did not appear viable. However, this Court did not merely engage in hypotheticals; it pointed to trial counsel's conduct in the aggravation and mitigation arguments and his sentencing advocacy, which was successful on several important points (if not the final result), and it noted that this success was aided by the lack of prosecution evidence in the record. Thus, Nash actually obtained a benefit from his counsel's advice: the State's agreement not to call witnesses.

Even in *Nash*, this Court recognized only limited circumstances where pleading guilty without a clear benefit is not ineffective. 143 Ariz. at 399. This Court used those few examples as a reason not to create a *per se* rule—and *amicus* agrees with that statement. However, in the same paragraph, this Court stated that there should not be a presumption of IAC based on advice to plead guilty without any clear benefit. On this point, *amicus* urges this Court to establish a standard where the lack of any apparent benefit in consideration for a straight-up guilty plea to all charges and sentencing allegations is *prima facie* evidence of ineffectiveness, because the circumstances in which the strategy is reasonable are so rare. Such a *prima facie* case can be rebutted when trial counsel offers a basis for the decision that is objectively reasonable.

The fact that an attorney might think that the client could derive a benefit from pleading straight up does not make the strategy reasonable. The question that must be answered is whether that belief was based on a sound consideration of the factors in the case.

Courts should be cognizant of the fact that lawyers, having sworn an oath to be loyal to their clients, are imperfect human beings. Lawyers are subject to the same pressures and time constraints to accomplish as much work in limited time as those in other professions. In criminal defense, this affects public defenders and retained lawyers alike; a two-week trial where the lawyer sees no prospect of acquittal on any

charges will seem like a waste of the lawyer's scarce time. Whether consciously or unconsciously, the desire to preserve that time bleeds into the lawyer's thinking as the lawyer provides advice to the client. Furthermore, attorneys may not possess the necessary expertise for a particular case, even if they think they do, and then they make decisions based on a lack of experience or knowledge.

Strickland does not endorse the reasonableness of a decision based on an inexperienced attorney's decision; on the contrary, it expressly rejects that proposition: "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688. It is self-evident that no adversarial process exists when a defendant pleads straight up. The fact that a seasoned lawyer may make a reasoned decision to plead straight up based on full investigation and consideration of all the relevant factors in the case does not mean that the decision to plead straight up is reasonable for less experienced lawyers who conduct less than a full investigation. The trial court's ruling in this case evinces a reliance on cases where counsel may have been more experienced and conducted a fuller investigation (such as in *Nash*) to justify counsel's tactical decisions in this case based on no investigation.

C. The evidence in this case establishes a *prima facie* case for IAC.

Trial counsel was retained and filed a motion for substitution of counsel on March 23, 2020. A settlement conference had already occurred; the case was not

only set for trial but the trial date was looming. It would be difficult for any new attorney to get up to speed. For that reason, on December 3, 2020, trial counsel filed a motion for a continuance about forty-five days prior to trial. Only when that motion was denied, and without having conducted any investigation into the guilt or sentencing phases, did trial counsel advise the client to plead straight up; the change of plea occurred 16 days prior to commencement of trial.[3] The PCR petition alleged that during this nine months of representation, counsel conducted no pretrial interviews. At least at the petition stage, under controlling law, this is *prima facie* evidence of ineffectiveness that would require an evidentiary hearing.

Razo's affidavit states that his counsel induced him to plead guilty based on the assurance that a guilty plea would result in concurrent sentences. Under the Supreme Court's decisions in *Hill* and *Lee* and this Court's decisions in *Ysea* and *Nunez-Diaz*, Razo needed nothing more than the magic words "I would have gone to trial" to establish a colorable claim.

Of course, it is easy for Razo to say, with the benefit of hindsight, that he would have gone to trial if he had been appropriately advised. The trial court was correct in recognizing that Razo has a motivation to make this claim. But this does not make the claim incorrect or false. If witnesses' testimony could be discounted

[3] Nor did trial counsel conduct much of a mitigation investigation, as pointed out in Mr. Dupont's declaration. Instead, trial counsel only filed a four-page sentencing memorandum that had letters and certificates attached.

merely because they have a bias, the entire adversarial system (not just criminal law) would be upended. At the petition stage, Razo's motivation must be given no value and his testimony supporting his petition must be given maximal weight. Similarly, Mr. Dupont's declaration that no reasonable strategy supported trial counsel's advice must be credited. *See State v. Speers*, 238 Ariz. 423, 431 ¶ 29 (App. 2015) (explaining weight assigned to expert declaration to determine colorable claim). Whether Razo relied on counsel's incompetent advice in making his decision is factfinding that can only be resolved in an evidentiary hearing.

The trial court's denial of an evidentiary hearing as to the advice for Razo to plead guilty was plainly wrong. Razo's affidavit states that trial counsel's reason for the advice was a belief that pleading guilty would result in concurrent sentences. Even if counsel's actual advice was different but counsel advised that pleading straight up would result in some other benefit, that advice is also ineffective given counsel's inept mitigation investigation. Given the rare circumstances in which pleading straight up may be objectively reasonable, counsel's bare assertion of a strategy cannot be accepted without assessing its objective reasonableness; it depends on the investigation and legal research that supported the strategy. This Court should grant review of Razo's petition to clarify that a trial attorney's advice must be assessed for reasonableness and that the presumption of reasonableness falls when a petitioner shows counsel's performance fell below prevailing norms.

II. Some of this Court's cases defining what constitutes a "colorable claim" are imprecise and have led to confusion in the court of appeals.

Razo correctly cites this Court's opinion in *State v. D'Ambrosio*, 156 Ariz 71, 73 (1988), for the proposition that "[c]olorable claims require the opportunity for factual development at an evidentiary hearing when a petition's allegations, if true, would have changed the outcome." Petition ep 21. The problem with *D'Ambrosio* is the sentence that immediately follows: "A decision as to whether a petition for post-conviction relief presents a colorable claim is, to some extent, a discretionary decision for the trial court." 156 Ariz. at 73. This is an incorrect statement of law, and it has resulted in lower court decisions (at both the trial and appellate levels) that deny evidentiary hearings even where a colorable claim is presented—such as in this case. *See Decision* ¶ 1.

D'Ambrosio does not explain what part of reviewing a petition is discretionary. This Court recently repeated the standard without explanation. *State v. Pandeli*, 242 Ariz. 175, 180 ¶ 4 (2017). This standard violates *Strickland*, which states that "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." 466 U.S. at 698. With mixed questions of fact and law, this Court "give[s] deference to the trial court's factual findings…but [ ] review[s] de novo the trial court's ultimate legal determination." *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996) (citing *Ornelas v. United States*, 517

U.S. 690, 699 (1996)).

Abuse of discretion is an appropriate standard where the trial court granted an evidentiary hearing and thus had discretion to weigh the evidence and determine the facts. Where the trial court summarily dismisses a notice or a petition for failing to make a colorable claim, however, the trial court is required to assume the truth of every fact alleged by the petitioner. Ariz. R. Crim. P. 32.11(a). Thus, a trial court performs no discretionary act when reviewing a notice or petition.

In civil cases, the standard of review for a grant or denial of motions to dismiss or motions for summary judgment is *de novo*, because the evidence is viewed most favorably to the non-moving party. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56 ¶ 7 (2012); *Brush & Nib v. City of Phoenix*, 247 Ariz. 269, 278 ¶ 28 (2019). This should be the standard applied to PCR petitions. The fact that Criminal Rule 32.11(a) uses similar language to Rule 56(a), Ariz. R. Civ. P., i.e., that there is no "material issue of fact," shows that the summary judgment standard should apply to PCR petitions.

D'Ambrosio is regularly cited for the proposition that the determination of a colorable claim is a discretionary decision but rarely cited for the proposition that factual questions should be determined at an evidentiary hearing. In granting review, this Court should clarify both the legal standard for determining whether a colorable claim exists and the standard of review for appellate courts on that question.

CONCLUSION

This Court should grant review to clarify that trial courts should take care to avoid creating an irrebuttable presumption of reasonableness, and trial courts should recognize that a trial attorney's recommendation for a defendant to plead guilty to the indictment and all allegations, in the absence of the State conferring any benefit is return or any other objectively reasonable—and articulated—tactical reason, is *prima facie* evidence of unreasonable conduct.

RESPECTFULLY SUBMITTED this 8th day of March, 2024.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE
By /s/ David J. Euchner
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Attorney for **Arizona Attorneys for Criminal Justice and the following AACJ Past-Presidents:**

James J. Belanger (2008)
Kathleen E. Brody (2015)
David G. Derickson (1995)
Ralph E. Ellinwood (2003)
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