

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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REGIS BLAKE ROSS,

*Petitioner;*

v.

STATE OF ARIZONA,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The Arizona Court Of Appeals**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

This Court has jurisdiction to determine federal constitutional issues that have been incorrectly decided by State courts of last resort. Mr. Ross raised three constitutional issues in Post-Conviction Relief proceedings, yet the Arizona courts failed to even consider or note the appropriate constitutional standard of review for two of the issues and the third was actually considered in the context of an actual innocence claim requiring Mr. Ross to prove his innocence when this Court's precedence clearly establishes no such burden should be placed on the Petitioner. The three issues are interrelated and all have clearly established United States Supreme Court authority that specifically addresses the appropriate standard of review.

1. Did the Arizona courts err when they failed to recognize or apply the proper federal standard of review per United States Supreme Court precedence to a question of denial of effective assistance of counsel resulting in the unconstitutional acceptance of a plea in a criminal proceeding?
2. Did the Arizona courts err when they failed to apply the proper federal standard of review per United States Supreme Court precedence to a question of whether a plea was knowingly, intelligently, and voluntarily entered where the defendant could not have been informed of critically important video evidence as his attorney did not have the material at the time of the plea?

**QUESTIONS PRESENTED – Continued**

3. Did the Arizona courts err when they failed to recognize or apply the proper federal standard of review per United States Supreme Court precedence to a question of whether to grant an evidentiary hearing regarding colorable claims for relief in Post-Conviction Relief?

## **PARTIES TO THE PROCEEDING**

All parties are listed in the caption.

## **RULE 29.6 STATEMENT**

The Petitioner is an individual and not a nongovernmental corporation. The Petitioner does not have a parent corporation or shares held by a publicly traded company.

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## **OPINIONS BELOW**

The Arizona Supreme Court Order Denying Mr. Ross' Petition for Review Post-Conviction Relief is unreported, and is found at App. 9. The Arizona Court of Appeals' Decision Granting Review, but Denying Relief is unreported, and is found at App. 1. The trial court's Minute Entry Order of April 25, 2016, denying Mr. Ross' timely of-right Rule 32 Petition for Post-Conviction Relief, is found at App. 7.

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## **JURISDICTION**

Petitioner seeks review of the denial of Post-Conviction Relief and the denial of an evidentiary hearing as decided by the Arizona appellate and trial courts in timely of-right proceedings through the State court of last resort and involving the denial of clearly established federal constitutional rights. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution is part of the Bill of Rights applying to criminal prosecutions and has been applied to the States through the Due Process Clause of the Fourteenth Amendment:

**The Sixth Amendment:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**The Fourteenth Amendment, Section 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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**STATEMENT OF THE CASE**

The underlying basis for the charges at issue in this matter arose from an incident at Regis Ross' home alleged to have occurred on May 10, 2013. Police responded to a call regarding an argument between

Mr. Ross and his mother which became heated. Police reported that, when they responded, Mr. Ross kicked one of the officers while he was being arrested and taken out of his residence to the police car. Mr. Ross hired an attorney and proceeded to prepare for trial, before finally entering a plea on September 9, 2014. App. 24.

After the plea was entered, previously unknown video evidence emerged that provided exculpatory evidence regarding the aggravated assault on a police officer charge, and which could and would have been used by the defense at trial. App. 36. The videos provided Mr. Ross with a reasonable basis to defend against the aggravated assault as the events did not proceed in the manner detailed by police and do not establish any assault. App. 39, 42. The recordings were from a neighbor's surveillance and were discovered after the plea but before sentencing, so that an issue was raised at the sentencing hearing where Mr. Ross argued that he should be withdrawn from the plea. App. 36, 42. The request to withdraw from the plea was denied. App. 40.

Mr. Ross proceeded to file a timely of-right Rule 32, Petition for Post-Conviction Relief ("PCR") in the Maricopa County Superior Court. Mr. Ross did not claim that he is actually innocent in this matter, which is how the matter was discussed at sentencing in relation to the newly discovered video evidence and the Motion to Withdraw from the plea. Instead, in PCR proceedings Mr. Ross specifically argued that, had he known that the videos existed, and had he been properly

informed by his attorney of the contents of the videos *when he was considering whether to accept or reject the plea*, he would have rejected the plea and proceeded to trial, as the videos cast a doubt upon his guilt of the more serious crime and provided a legitimate basis for proceeding to trial. Mr. Ross further provided the court with Exhibits of supporting evidence regarding the fact that he would have rejected the plea and proceeded to trial if he had been properly and constitutionally informed by his attorney. App. 11-52.

Following full briefing, on April 25, 2016, the trial court entered its Order denying PCR and dismissing the matter without an evidentiary hearing, based, not on the appropriate constitutional considerations and analysis, but on the idea that Mr. Ross failed to establish his innocence. App. 7-8.

A timely Petition for Review was then filed in the Arizona Court of Appeals arguing the issues as detailed herein. Mr. Ross pointed out the failure of the trial court judge to consider and utilize the proper standard of review as established in United States Supreme Court precedence regarding each of his three issues, but the appellate court, like the trial court, failed to properly analyze the claims pursuant to the constitutional standards. Review was granted by the Arizona Court of Appeals, but relief denied on August 22, 2017. App. 1-6. The Arizona Court of Appeals noted where the record was lacking in evidence, but failed to even address the propriety of an evidentiary hearing and the trial court's refusal to allow such hearing.

A timely Petition for Review was then filed in the Arizona Supreme Court. The Arizona Supreme Court denied the Petition in an unreported Order issued on April 11, 2018. App. 9. This timely Petition for Writ of Certiorari followed.

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### **REASONS FOR GRANTING THE WRIT**

This Petition for Writ of Certiorari should be granted as the Arizona courts have not only incorrectly decided the constitutional issues presented, but the Arizona courts have completely failed to even recognize the proper standard of review as clearly established by this Court for the resolution of the ineffective assistance of counsel and evidentiary hearing issues.

Arizona's view of the arguments and the *legal standard* utilized is incorrect for consideration of Mr. Ross' PCR claims. The law is clear that Mr. Ross need not establish actual innocence. It is manifestly unjust for Mr. Ross to be held to proving actual innocence, when such is not at issue in these proceedings. The proper constitutional discussion includes that the videos do not capture any assault, and therefore, *provide a defense at trial* that Mr. Ross would have utilized. Mr. Ross was made aware of the video evidence *only after he pled*, and he would not have pled if he had seen the videos prior to the plea. He presented at a minimum a colorable claim of Ineffective Assistance and newly discovered evidence affecting the voluntariness of the plea both requiring an evidentiary hearing. Instead of

addressing the correct standard of constitutional review and analysis, both the trial court and Court of Appeals conducted an analysis of whether Mr. Ross is *actually innocent*, which is legally incorrect. This incorrect logic was then implicitly affirmed when the Arizona Supreme Court issued its Order. App. 9.

To be clear, Mr. Ross did not raise an actual innocence claim in PCR but rather he requested the remedy for ineffective assistance and newly discovered evidence affecting his plea, which would have altered the proceedings by causing Mr. Ross to *proceed to trial* instead of entering into a plea agreement. Finally, the appellate courts failed to even address the third legal issue involving denial of an evidentiary hearing while at the same time citing to the need for further factual development of the issues. The law clearly establishes that, at a minimum, Mr. Ross should have been granted an evidentiary hearing to further develop the factual basis for his colorable claims. The Arizona courts did not even recognize the clearly established Supreme Court law establishing the proper standard of review and further establishing, at a minimum, that Mr. Ross should have been granted an evidentiary hearing to further develop his factual basis for his colorable claims. These are legal constitutional issues that the Arizona courts failed to even properly acknowledge as the Arizona courts instead focused only on whether or not Mr. Ross had established actual innocence, which was irrelevant to the legal constitutional issues presented per this Court's clearly established authority.

**A. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS AND RECTIFY THE INCORRECT LEGAL ANALYSIS CONDUCTED BY THE ARIZONA COURTS REGARDING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.**

The Arizona Court of Appeals acknowledged the general applicability of federal ineffective assistance of counsel law by noting *Strickland v. Washington*, 466 U.S. 668, 686 (1984) in its decision in this case. App. 3. However, the court went on to discuss the factual basis of the ineffective assistance of counsel claim as if it were an actual innocence claim instead of in terms of whether or not the more specifically applicable Supreme Court standard as established in *Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S. Ct. 366 (1985), was met. This is legally incorrect as a matter of federal constitutional law and must be rectified.

As this Court is well aware, “[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system” as secured by the Sixth and Fourteenth Amendments. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1321 (2012); *see also Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972). A two-pronged test is applied to determine whether a conviction should be reversed on grounds of ineffective assistance of counsel. A petitioner must affirmatively show that (1) counsel’s performance fell below an objective standard of reasonableness, as defined by prevailing professional norms, and (2) the deficient performance resulted in

prejudice to the defense. *Strickland*, 466 U.S. at 687. The Arizona courts recognized this general law, but failed to recognize any further United States Supreme Court precedent and failed to utilize the constitutional standard for the specific issue before the courts as further detailed.

Plea negotiations are a critical stage of criminal proceedings, and *Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S. Ct. 366 (1985), established that *Strickland*'s two-part test applies to an analysis of ineffective assistance during the plea advice stage. *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193, 1200, ¶14 (App. 2000) (the right to effective assistance of counsel extends to the decision to reject (or accept) a plea offer, even if the defendant subsequently received a fair trial); *see generally Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy must "neutralize the taint" of a constitutional violation and the court should convene an evidentiary hearing to determine whether the defendant would have accepted the plea). Furthermore, *Hill v. Lockhart* clarified that in order to satisfy *Strickland*'s "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

Here, Mr. Ross could not have been informed of the critically important video evidence prior to entering his plea as the defense attorney *did not have the*

*material* prior to the plea. This factual basis is uncontested. In PCR, Mr. Ross specifically pointed out in his Affidavit and through reference to other evidence that he did not know about the videos although they certainly should have been shown to him and discussed prior to the plea and that *he would have determined not to take the plea had he known about the videos*. App. 48-50.

The reasons for the attorney's failure to timely obtain the videos and discuss them with Mr. Ross could and should have been addressed during an evidentiary hearing in PCR at which time the court and Mr. Ross would have been able to question the attorney on the stand, but instead, the trial court summarily denied the PCR without allowing for any hearing and based instead on its incorrect reasoning that Mr. Ross had not established his actual innocence in the matter.

The legal error that the trial court as well as the appellate courts in Arizona all made in considering Mr. Ross' matter as it progressed, was the complete failure to acknowledge *Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S. Ct. 366 (1985), and the proper constitutional inquiry into whether or not Mr. Ross received ineffective assistance during the plea negotiation and acceptance stage and whether he would have rejected the plea and proceeded to trial, not whether or not he had established his actual innocence. Mr. Ross did not ever have to establish his actual innocence and such analysis and rulings by the Arizona courts are incorrect as a matter of law.

Mr. Ross was forced to make a decision and ultimately accepted a plea, based on less than all the necessary information. The contents of the video were later disclosed and discussed at length at sentencing in relation to a Motion to Withdraw. App. 37-39. The trial court relied on the representations of the prosecutor and defense attorney regarding the content of the videos, and the prosecutor misrepresented the missing evidence and its import, compounding the ineffectiveness as the court never saw the videos. Moreover, the court only discussed the videos in relation to whether they established the defendant's innocence, and the court chastised Mr. Ross for what the court considered an attempt to make an actual innocence allegation despite having recently stated that the underlying facts occurred in the plea colloquy. The court's consideration and ruling at that time did not take into account the failure of the attorney to have informed or shown Mr. Ross the videos prior to Mr. Ross taking a plea or the fact that Mr. Ross would have proceeded to trial if he had known about the videos.

The trial court had an opportunity to consider the further constitutional issue involving ineffective assistance during PCR, but the court defaulted to the same actual innocence analysis it had engaged in previously, and never even cited to the correct constitutional standard as established in *Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S. Ct. 366 (1985), when the issue was properly and timely presented in PCR proceedings.

“It is the attorney, not the client, who is particularly qualified to make an informed evaluation of a

proffered plea bargain.” *Donald*, 10 P.3d at 1199, ¶12 (quoting *In re Alvernaz*, 830 P.2d 747, 753 (Cal. 1992)). Here, trial counsel failed to advise Petitioner of the strength (or lack thereof) of the evidence against him when he recommended Petitioner take the plea. Mr. Ross could not have been fully informed or have received effective assistance regarding the plea, because his attorney, Mr. LaBoy, did not have or convey the critical information that would have caused Mr. Ross to decide to proceed differently. Had Petitioner understood that there was video evidence that supported a defense at trial and did not show any assault as well as which would have impeached the officer assertions regarding the events, Petitioner would have rejected the plea offer and proceeded to trial. This is what Mr. Ross had to assert to establish a colorable claim and to proceed in PCR, but instead, the trial court, and then the appellate courts, ruled that he could receive no relief as he failed to instead establish actual innocence through the videos.

Supplemental case law is clear-cut that plea bargains should be honored by both parties, and withdrawal will be allowed only when it may fairly be said that the deal was not voluntary because defendant lacked information of true importance to the decision-making process. Therefore to state a colorable claim, the allegation that a petitioner would not have pleaded guilty but for counsel’s deficient performance must be accompanied by an allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision. *State v.*

*Bowers*, 966 P.2d 1023, 192 Ariz. 419 (Ariz. App. Div.1 1998). Mr. Ross provided his evidence including e-mail communication with his attorney establishing his concern over the evidence and his need for more information about the evidence in order to determine whether to take a plea, and his Affidavit explicitly detailing that he would not have accepted a plea if he had known about the video evidence prior to the plea. App. 11-17, 48-50.

While the Arizona courts focused on actual innocence review and consideration only of whether the videos established actual innocence, the videos should have been considered instead only for the effect on Mr. Ross' decision to accept or reject a plea. Whether or not they would actually establish his innocence or a reasonable doubt regarding guilt, they also are impeaching regarding many of the assertions by the police and Mr. Ross *would have proceeded to trial if he knew about them*. Mr. Ross is not stating they conclusively establish his innocence, *and that is not the standard for review*. The standard established by this Court involves a determination of whether the material was necessary for the defendant to determine whether to accept or reject a plea, and here the videos were certainly of such import. Mr. Ross does not have to establish he would have won at trial, he does not have to establish he is innocent, he only has to establish a colorable claim that he would have proceeded to trial had he had the information about the videos when making that critical determination. Because trial counsel could not have provided Mr. Ross with any information

regarding the videos, trial counsel's advice to take the plea constituted deficient performance in the plea advisement process. The trial court erred as a matter of law when it rejected this claim utilizing the wrong standard of review as did the Arizona appellate courts in affirming the trial court order.

Petitioner meets his burden of proof by establishing a serious negative consequence: he did not proceed to trial because he did not have the critical evidence that provided exculpatory material that would have supported his defense at trial. This is not speculation. The e-mail, Affidavit, and record that exists regarding Mr. Ross' intention to proceed to trial and his quandary regarding whether to enter a plea immediately prior to the plea proceeding, as well as the discussion that occurred at sentencing after the plea and once he was aware of the videos, all establish that Mr. Ross clearly would have determined to proceed to trial had he been apprised of all relevant information. *See Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S. Ct. 366 (1985); *Strickland*, 466 U.S. at 694 (to establish prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

The failure to inform the defendant about the videos prior to the plea was material to a plea decision as, with the video evidence, Mr. Ross would have had support for his version of events where before he had no support other than his own recollection regarding what had occurred. The State's case was worse once the disclosure was available and Mr. Ross certainly

needed to be informed, and any competent attorney should have informed the defendant of the evidence prior to the plea. *See State v. Donald*, 198 Ariz. 406, ¶10, 10 P.3d 1193 (App. 2000); *State v. Ysea*, 191 Ariz. 372, 379, ¶¶23-24, 956 P.2d 499, 506 (1998) (post-conviction relief appropriate where counsel's ineffectiveness induced guilty plea); *State v. Anderson*, 147 Ariz. 346, 351-352, 710 P.2d 456, 461-462 (1985) (same).

Issues regarding where the evidence was and why Mr. LaBoy did not discuss it with Mr. Ross prior to the plea are evidentiary issues that Mr. Ross was deprived from examining Mr. Laboy about, when the trial court denied any hearing on the matter based on its incorrect analysis of actual innocence. The point here is that Mr. Ross *would have proceeded to trial*, had he had all the necessary information regarding the evidence in his case. Mr. Ross set forth a colorable claim for ineffective assistance of counsel by describing how and why Mr. LaBoy's failure to give him accurate information about a material issue in his decision-making process was a breach of his duty and affected whether or not he accepted the plea agreement. *See Hill*, 474 U.S. at 59-60, 106 S. Ct. at 370-371.

Counsel's acts are to be judged as of the time counsel was required to act. *Strickland*, 466 U.S. at 690. Counsel failed to investigate the case and obtain all of the discovery before advising Mr. Ross to enter a plea. Mr. Ross was prejudiced by his acceptance of a plea based on not all relevant and necessary information regarding the status of the evidence. If this is all true (the standard for establishing a colorable claim), which

(to the extent it was questionable) could have been determined by an evidentiary hearing, then, but for counsel's deficient representation, the result of the proceeding would have been different. It was clearly constitutional error for the Arizona courts to decide otherwise.

**B. THE PLEA COULD NOT BE ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY, WHERE MR. ROSS WAS LACKING IMPORTANT INFORMATION PRIOR TO ENTERING THE PLEA.**

Before a defendant may be deemed to have waived a constitutional right such as the right to a jury trial, it must be clear that the defendant knowingly, voluntarily, and intelligently relinquished that right. *See Boykin v. Alabama*, 395 U.S. 238, 243 n. 5, 89 S. Ct. 1709, 1712 n. 5, 23 L.Ed.2d 274, 280 n. 5 (1969).

Here, Mr. Ross could not knowingly, intelligently, and voluntarily waive his right to a jury trial and enter a plea where he was not even informed regarding the critical video evidence in his case that would have been admissible at trial and which was exculpatory.

In *Boykin v. Alabama*, this Court held that:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States

by reason of the Fourteenth. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923.

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought (*Garner v. Louisiana*, 368 U.S. 157, 173, 82 S. Ct. 248, 256, 7 L.Ed.2d 207; *Specht v. Patterson*, 386 U.S. 605, 610, 87 S. Ct. 1209, 1212, 18 L.Ed.2d 326), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

*Id.* at 242-244.

The above quote embodies the essence of the constitutional issues upon which a valid guilty plea is conditional and when combined with the facts at hand, exemplifies why Mr. Ross' plea was not entered knowingly, intelligently and voluntarily, and is therefore invalid. The Arizona courts did not apply this standard to the discussion and resolution of the issue, even though the Arizona Court of Appeals did cite to *Boykin* generally. App. 4. Instead of analyzing the claim pursuant to *Boykin*, however, the court noted that Mr. Ross

never recanted the factual basis for the plea in his Affidavit, which, again, is an analysis of whether Mr. Ross was innocent, as opposed to an analysis of whether or not the plea was knowing, intelligent, and voluntary. App. 5-6. Like the ineffective assistance of counsel claim, here, Mr. Ross did not have to establish actual innocence. The evidence needed to be considered for its effect on Mr. Ross and his ability to enter a plea without having known about certain evidence beforehand. The evidence was not supposed to be considered for purposes of establishing whether Mr. Ross was actually innocent.

Mr. Ross did not have all the necessary information to make a knowing, intelligent, and voluntary plea. Again, unlike the arguments presented at sentencing, this is not a claim of actual innocence, it is rather a claim that Mr. Ross would have exercised his constitutional right to proceed to trial had he been informed of the videos/actual state of the evidence prior to entering the plea. As such, his plea agreement should be vacated. And, again, the trial court and appellate courts clearly erred by considering the post-conviction relief arguments within the context of the wrong standard. The videos did not have to establish Mr. Ross' innocence. Mr. Ross only needed to establish that his plea was not knowingly, intelligently, and voluntarily entered. The Arizona courts have failed to properly apply the correct federal constitutional standard, and certiorari should be granted to correct the Arizona courts' incorrect constitutional analysis.

**C. PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING AS HE HAS PRESENTED COLORABLE CLAIMS FOR RELIEF, THAT, IF TRUE, WOULD REQUIRE RELIEF.**

The goal of post-conviction relief is the elimination of confusion and avoidance of repetitious applications for relief while protecting a defendant's rights. Post-conviction relief provides a simple and efficient means of inquiry into a defendant's claim that the conviction or sentence was obtained in disregard of fundamental fairness, which is essential to our concept of justice. 24 C.J.S. Criminal Law § 1612 (1989). One of the purposes of Arizona's Rule 32 proceeding is specifically to allow constitutional claims such as ineffective assistance of counsel to be considered and "to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record." *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982); *see also State v. Cabrera*, 114 Ariz. 233, 236, 560 P.2d 417, 420 (1977); *State v. Bell*, 23 Ariz. App. 169, 171, 531 P.2d 545, 547 (1975). Here, the trial court reversibly erred by failing to provide Mr. Ross with an evidentiary hearing in his of-right Rule 32 proceeding and failing to even acknowledge or address the constitutional propriety of such a hearing.

A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *State v. Watton*, 164 Ariz. 323, 328,

793 P.2d 80, 85 (1990); *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). When doubts exist, “a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.” *Id.*

Here, the defendant raised colorable claims as to ineffective assistance of counsel and a plea that was therefore also entered into involuntarily and unknowingly. The trial court should, at a minimum, have granted an evidentiary hearing, so that Mr. Ross could provide foundation and other evidence and testimony aside from his exhibits attached to the PCR in further support of his claims. Instead, the court summarily denied review, and then the Arizona Court of Appeals and Arizona Supreme Court compounded the trial court’s constitutional errors by noting the need for the videos to be reviewed and the potential for more evidence to be provided for a proper appellate decision, which Mr. Ross was denied the ability to present at the trial level as constitutionally necessary, because he was denied any hearing. At a minimum, a *Cooper* hearing was warranted. *Cooper*, 132 S. Ct. at 1384 (an evidentiary hearing should convene where a defendant shows ineffective assistance caused the rejection of a plea leading to a more severe sentence at trial and the sole advantage is that the defendant would have received a lesser sentence under the plea).

Mr. Ross’ affidavit and the videos establish that he raised colorable claims that needed to be further discussed to the extent they were not immediately reversible. There was no basis to dismiss the matter

without an evidentiary hearing. The notes by the Arizona Court of Appeals indicating that further information and evidence should have been developed as part of the record for review only highlights why it was such an important error of constitutional magnitude for the trial court to have denied an evidentiary hearing.

Reversal and remand for further evidentiary proceedings on Mr. Ross' colorable/reversible claims is at least minimally necessary. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). The Arizona courts, again, completely failed to even acknowledge the law or the need for the evidentiary hearing. This Court should accept certiorari to correct this devastating constitutional error.

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## **CONCLUSION**

For all the foregoing reasons, and in accordance with Mr. Ross' federal constitutional rights, Mr. Ross requests this Court to grant his Petition for Writ of Certiorari and grant him relief by reversing his conviction and sentence. Mr. Ross should, at a minimum, have the opportunity to consider the plea in light of the evidence disclosed thereafter and to have the chance to proceed to trial or even to further negotiate with the State based on the newly disclosed material that followed his plea. To the extent such reversal is not immediately necessarily, Mr. Ross should be provided with an evidentiary forum to further develop his

colorable constitutional claims for relief, and this Court should remand for such evidentiary hearing.

Respectfully submitted,  
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