

21-7840

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

FILED  
MAY 02 2022

OFFICE OF THE CLERK  
SUPREME COURT

IN THE  
SUPREME COURT OF THE UNITED STATES

ORIGINAL

HAZHAR A. SAYED — PETITIONER  
(Your Name)

vs.

THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayed, #133608

(Your Name)

Sterling Correctional Facility

P.O. Box: 6000

(Address)

Sterling, CO. 80751

(City, State, Zip Code)

Unknown

(Phone Number)

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**QUESTION(S) PRESENTED**

- 1) Mr. Sayed's Plea was not entered Knowingly, intelligently and voluntarily because his plea counsel failed to adequately advise him that he would be pleading guilty to an offense he did not commit.
- 2) This Court should grant certiorari review because this case presents an opportunity to address several interesting legal questions including whether People v. Chavez-Torres, 2019 CO 59, applies to inadequate advise from plea counsel regarding non-immigration matters.

i.

**ORIGINAL**

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

ii.

**ORIGINAL**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

1.

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## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was April 18, 2022. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**U.S. Constitution Amendment V: VI AND XIV**

3.

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## STATEMENT OF THE CASE

On May 17, 2000, Twenty-year old Hazhar A. Sayed drove to pick up his fourteen-year old sister and he saw someone with his arms around her at a bus stop. Mr. Sayed asked the person, fourteen-year old (E.B), what he was doing and if he knew his sister. (E.B) stood up, and Mr. Sayed thought (E.B) wanted to fight him. Mr. Sayed flicked his cigarette at the wall of the bus stop shelter. The cigarette bounced off the wall, got caught in (E.B)'s collar and burned him. The prosecution charged Mr. Sayed with two counts of child abuse: knowingly or recklessly causing serious bodily injury in violation of § 18-6-401 (1), (7)(a) (III) C.R.S., a class 3-felony and knowingly or recklessly causing bodily injury in violation of section 18-6-401 (1), (7)(a)(V) C.R.S., a class 1-misdemeanor. Mr. Sayed pleaded guilty to attempted second degree assault in violation of section 18-3-203 (10(g) C.R.S., and section 18-2-101 (1) C.R.S., a class 5-felony, a count added as a part of a plea bargain. Almost two years later district court permitted Mr. Sayed to withdraw his plea before resentencing him (the court had originally sentenced him to probation when a prison sentence was mandatory) because his plea counsel had not advised him he would have to serve a mandatory prison sentence. The prosecution offered a different deal, and Mr. Sayed pleaded guilty to attempted felony menacing in violation of section 18-3-206; section 18-2-101 (1) C.R.S., a class 6-felony. The prosecution asserted that "there is no factual base for the charge." The district court also found "there's no factual basis for the particular charge, but the particular charge is being pled guilty by the defendant in order to take advantage of the plea opportunity that's been offered to him." On March 21, 2003, the district court sentenced Mr. Sayed to two years of probation. On December 9, 2019, Mr. Sayed pro-se filed the present Crim.P.Rule 35(c) motion. Mr. Sayed contended his plea counsel was ineffective for failing to advise him a cigarette was not a deadly weapon, which highlighted the larger point that his plea counsel did not adequately advised him that he would be pleading guilty to an offense with no factual basis. Mr. Sayed argued that

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Statement of the Case (continued):

justifiable excuse or excusable neglect existed because the delay in filing this claim was the result of the erroneous advise by his plea counsel. The prosecution did not file a response. On December 20, 2019, the postconviction court denied the motion without appointing counsel or holding an evidentiary hearing. The postconviction court ruled the motion was untimely. The court further ruled that "even if Defendant's petition was timely, the Court would deny it on the merits because it states legal grounds for relief that are not meritorious." The division of the Colorado Court of Appeals affirmed the postconviction court's order. See attached Appendix A. The division held the record supported the postconviction court's determination that Mr. Sayed's Crim.P.Rule 35(c) motion was time barred. See id. The division ruled People v. Chavez-Torres, 2019 CO 59, did not apply because Chavez-Torres was limited to ineffective assistance of counsel claims where the defendant alleged plea counsel failed to provide proper advice about the immigration consequences of a plea. See id. The division further ruled Mr. Sayed's Crim.P.Rule 35(c) motion was procedurally barred because he could have included his most recent ineffective assistance of counsel claim in one of his previous Crim.P.Rule 35(c) motions. The division did not address the merits of the underlying Crim.P.Rule 35(c) claim.

## REASONS FOR GRANTING THE PETITION

- 1) Mr. Sayed's plea was not entered knowingly, intelligently and voluntarily because his plea counsel failed to adequately advise him that he would be pleading guilty to an offense he did not commit.

A defendant's guilty plea is constitutionally valid only if he entered the plea knowingly, voluntarily and intelligently. Sanchez-Martinez v. People, 250 P.3d 1248, 1255 (Colo. 2011); see also, U.S. Const. amends. V, VI, XIV. "A guilty plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant,' and must be the product of 'a free and rational choice.' " People v. Kyler, 991 P.2d 810, 816 (Colo. 1999)(quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). "[T]he voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985).

During plea negotiations, a defendant has the right to effective assistance of counsel. People v. Corson, 2016 CO 33, ¶ 32; Padilla v. Kentucky, 559 U.S. at 373; see also U.S. Const. amends. V, VI XIV. A "defendant who pleads guilty upon the advice of counsel" may attack "the voluntary and intelligent character of the guilty plea" by demonstrating the two prongs outlined in Strickland v. Washington, 466 U.S. 668 (1984). Hill, supra, 474 U.S. at 56-58; see also Juarez v. People, 2020 CO 8, \*10 ("[B]efore pleading guilty to a crime, a defendant is entitled to advice from his counsel that falls within the range of competence demanded of attorneys in criminal cases."). A defendant must show: "(1) counsel's representation fell below an objective standard of reasonableness; and (2) a reasonable probability exists that counsel's deficient performance prejudiced the defendant, meaning that but for counsel's errors, he/she would not have pleaded guilty but instead would have proceeded to trial." People v. Morones-Quinonez, 2015 COA 161, \*7.

Claim One (Continued):

In establishing the prejudice, the defendant must prove that rejecting the plea bargain would have been ' "rational under the circumstances.' " People v. Sifuentes, 2017 COA 48M, \*20 (quoting Padilla v. Kentucky, supra 559 U.S. at 372). To make such a determination, the court considers the strength of the prosecution's case and the attractiveness of the plea deal. Id. at \*43. Where plea counsel was constitutionally ineffective and thus, the plea was not knowingly, voluntary and intelligent, the appropriate remedy is to vacate the defendant's guilty plea. See id at \*45.

In the decision denying Mr. Sayed relief, See attached Appendix A, the postconviction court also ruled that Mr. Sayed's Crim.P.Rule 35(c) motion was not meritorious because he entered into the plea agreement to a take advantage of the plea offer. But that did not alter the fact that Mr. Sayed had a right to have his counsel advise him that he was pleading guilty to an offense with no factual basis. As the postconviction court ruled, it is likely immaterial whether a cigarette constituted a deadly weapon, but the more salient point was Mr. Sayed alleged sufficient facts to warrant a hearing as to whether his plea counsel adequately advised him that he was pleading guilty to an offense with no factual basis. Constitutionally adequate counsel would have advised Mr. Sayed that he had a right to the establishment of a factual basis for his plea and that the offense to which he would pleaded guilty did not have a factual basis. Ordinary, there must be a factual basis supporting the crime to which a defendant pleads guilty. Sections 16-7-207 (2)(7) C.R.S., Crim.P.Rule 11 (b)(6). Both statute and rule provide a strict procedure for waiver of a factual basis:

If the plea is entered as a result of a plea agreement, the court shall explain to the defendant and satisfy itself that the defendant understands the basis for the plea agreement, and the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads guilty.

Claim One (continued):

Section 16-7-207 (2)(f) C.R.S.; Crim.P.Rule 11 (b)(6). A defendant may waive the establishment of a factual basis to support the specific charge if the defendant "excuses the establishment of a factual basis for the specific charge after a full explanation of the basis for the plea agreement." People v. Rockwell, 125 P.3d 410, 417 n.8 (Colo. 2005); See also Hon. Joshua B. Lehman, Colorado DUI Benchbook, section 2.4.14 (2019) ("In accepting a guilty plea from a defendant who is unwilling or unable to admit guilt, it is of utmost importance that a factual basis be established for the plea.").

In fact, a factual basis to support a plea is so critical that many jurisdictions do not include a procedure for waiving a factual basis in their rules of criminal procedure, like that in Colorado. Compare Crim.P. 11 (b)(6) (requires factual basis but :the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads") with Fed.R.Civ.P. 11 (b)(3) (requires factual basis for guilty pleas and includes no waiver language); Ariz.R.Crim.P. 17.3(b) (same); Cal. Penal Code section 1192.5 (same); D.C. Super. Ct.R.Crim.P. 11 (b)(3) (same); Miss.R.Crim.P.Rule 15.3(c) (same); N.D.R.Crim.P.11 (b)(3) (same); Tenn.R.Crim.P. 11 (b)(3) (Same); Vt. R. Crim.P. 11 (f) (Same); cf. State v. Urbina, 115 A.3d 261, 272 (N.J. 2015) ("[even if a defendant wished to plead guilty to a crime he/she did not commit, he/she may not do so. No court may accept such a plea.").

The factual basis for a guilty plea is so important that where a factual basis is permitted to be waived, as in Colorado, a reasonably competent attorney must advise his client that he is pleading guilty to an offense with no factual basis. Without such advice, a defendant cannot understand the nature of the charge to which he pleads guilty. See People v. Murdock, 532 P.2d 43, 44 (Colo. 1975) ("It is axiomatic that no plea of guilty is valid unless the defendant understands the nature and the elements of the charge.").

Claim One (continued):

Here, when Mr. Sayed pleaded guilty to attempted felony menacing, the district court found "there's no factual basis for the particular charge, but the particular charge is being pled guilty by the defendant in order to take advantage of the plea opportunity that's been offered to him." The prosecution also said, "there is no factual basis for the charge." While Mr. Sayed agreed the facts the prosecution said were true and that he wanted to enter the guilty plea to take advantage of the plea, he did not waive his right to the establishment of a factual basis during the hearing. During the plea hearing, there was no indication that Mr. Sayed's plea counsel advised Mr. Sayed that he would be pleading guilty to an offense he did not commit. Any reasonably competent attorney would have advised Mr. Sayed that he had a right to a factual basis for his plea and that he was pleading guilty to an offense without a factual basis. See People v. Pozo , 746 P.2d 523, 527 (Colo. 1987) ("the duty of counsel is, in essence, the duty to act as any reasonable attorney would act in the same circumstances."). Indeed, such advice would be necessary because a guilty plea cannot be entered unless the defendant waives his right to a factual basis. See Crim.P. 11 (b)(6). Again, while Mr. Sayed may not have explained this claim in his pro-se motion as an attorney would have been able to, the post-conviction court should have broadly construed his motion and granted him a hearing and appointed counsel. See People v. Bergerud, 223 P.3d at 696-97.

As to the prejudice from the plea counsel's deficient conduct, the prosecution's evidence was weak. Mr. Sayed flicked a cigarette at the wall of a bus stop shelter, which bounced and became stuck in (E.B)'s collar. It would have been rational for Mr. Sayed to choose not to go forward with the plea and request a jury trial on the original charges.

Claim One (Continued):

A hearing was necessary to determine whether there was a reasonable probability that but for his plea attorney's deficient conduct, Mr. Sayed would not have pleaded guilty. See People v. Morones-Quinonez, 2015 COA 161, \*7.

For these reasons, Mr. Sayed respectfully moves this Court to grant certiorari and remand this case for further review to determine whether plea counsel adequately advised Mr. Sayed that he had a right to the establishment of a factual basis for his plea and that the offense to which he pleaded guilty did not have a factual basis.

Claim Two:

2) This Court should grant certiorari review because this case presented an opportunity to address several interesting legal questions including whether People v. Chavez-Torres, 2019 CO 59, applies to inadequate advise from plea counsel regarding non-immigration Matters.

Claim two presents an opportunity to determine whether the holding in People v. Chavez-Torres, 2019 CO 59, is limited to inadequate advice from plea counsel regarding immigration consequences of a plea.

Here, the applicable question pertained to whether erroneous advice from plea counsel--regarding a matter that was not immigration related could allege a sufficient basis for justifiable excuse or excusable neglect to warrant a hearing. Cf. Chavez-Torres, \*15 ("The question here is not whether Chavez-Torres was justifiable excused in filing his Rule 35(c) motion late or whether any neglect in his failure to file a timely motion is excusable. The question is narrower: Is Chavez-Torres entitled to a hearing on the timeliness of his motion?").

In Chavez-Torres, the Colorado Supreme Court held the defendant was entitled to a hearing to determine whether the defendant established justifiable excuse or excusable neglect for his untimely Crim.P.Rule 35(c) motion. Id. The Court applied the People v. Wiedemer, 852 P2d 424, 441 (Colo. 1993), factors, which outlined relevant factors to consider to determine whether a defendant has established justifiable excuse or excusable neglect. Id. The Colorado Supreme Court recognized that ineffective assistance of counsel may constitute justifiable or excusable neglect where the defendant alleged that he had no reason to question or investigate his plea counsel's failure to advise him regarding the immigration consequences of his plea." Id. at \*2, 29.

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Claim Two (continued):

The Colorado Supreme Court considered the Crim.P.Rule 35(c) motion, the plea agreement, and the plea transcript and held based on all of those things, the defendant "had no reason to question the constitutionality of his conviction during the three-year limitations period." Id at \*2, 20-22,24.

Here, Mr. Sayed was entitled to a hearing to determine whether the affirmative and erroneous advice given by plea counsel was a circumstance that caused him not to question his plea on the ground advanced in his Crim.P.Rule 35(c) motion sooner. Cf. People v. Morones -Quinonez, 2015 COA 161, \*18 ("when an individual is represented by an attorney, it is reasonable to expect that he would rely on his attorney's advice!"). Like in Chavez-Torres, Mr. Sayed had no other reason to know of the claim outlined in his Crim.P.Rule 35(c) motion because at the plea hearing, the district court failed to have Mr. Sayed waive the factual basis for his offense. Thus, applying the first and third Wiedemer factors, the outside influence alleged that prevented a timely challenge was the erroneous advice from his plea counsel. The second Wiedemer factor, how quickly Mr. Sayed sought collateral relief once he learned of the basis for his claim is a factual matter that could be explored at a hearing. That is prior postconviction challenges to his conviction did not include this basis, suggests that he did not know about this constitutional challenge prior to his 2019 Crim.P.Rule 35(c) motion. The forth factor, whether the defendant has a present need to challenge the conviction is met. Mr. Sayed is currently incarcerated for another case and his prior criminal history may affects of his current incarceration, such as the parole board granting him parole. White v. People, 866 P.2d 1371, 1373 (Colo. 1994)(holding whether to grant a parole application is within the parole board's discretion).

Claim Two (continued):

Finally, the passage of time does not affect the prosecution's ability to defend the Crim.P.Rule 35(c) motion because the only fact witnesses would likely be Mr. Sayed and Mr. Sayed's plea Counsel. J. Scott McComas, who is still a practicing attorney. See Colorado Supreme Court, Attorney Information, <https://www.coloraosupremecourt.com.Search/Attinfo.asp?Regnum=10599> (last visited February 1, 2022). For the above reasons Mr. Sayed alleged sufficient facts to warrant a hearing on the existence of justifiable excuse or excusable neglect for his untimely motion. Granting certiorari review of this case would provide a vehicle to examine the intersection between the holding in Chavez-Torres and the application of the Wiedemer factors in non-immigration contexts where a defendant received erroneous advice from plea counsel. This case presents an opportunity to analyze whether an incorrect advisement from an attorney can serve as a justification for not bringing a claim in an earlier postconviction proceeding. See CrimP.Rule 35(c)(3)(VII). Indeed, such an exception may fit into subsection (VII), because learning about the incorrect advice may constitute events that occurred after the initiation of the defendant's prior postconviction proceeding or may constitute evidence that could not have been previously discovered. See Crim.P.Rule 35(c)(3)(VII)(a),(b). Or it may constitute an objective factor, external to the defense and not attributable to the defendant, which made raising the claim impracticable. See Crim.P.Rule 35(c)(3)(Vii)(e). While the Colorado Court of Appeals and Colorado Supreme Court did not address the merits of Mr. Sayd's underlying claim this case also presents an opportunity to address when counsel must be appointed and when an evidentiary hearing is warranted based on the merits of a potential claim apparent in a pro-se motion. In sum, this case presents many opportunity to explore the boundaries of what must be

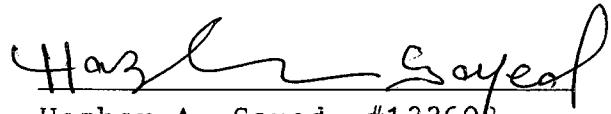
Claim Two continued):

alleged in a pro-se Crim.P.Rule 35(c) motion to warrant the appointment of counsel and an evidentiary hearing. As a result, he respectfully moves this court to grant certorari on this claim with the ultimate relief being sought, vacate the defendant's guilty plea. This and/or any other available relief available respectfully requested.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Hazhar A. Sayed

Hazhar A. Sayed, #133603

Date: May 2, 2022

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