FILED BY CLERK
MAR 24 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JORGE ALCANTAR, Petitioner.	)	2 CA-CR 2008-0108-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT
OF SANTA CRUZ COUNTY

Cause No. OC-98239

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED;
RELIEF DENIED IN PART AND GRANTED IN PART

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena and Stephan McCaffery
Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 Jorge Alcantar petitions this court for review of the trial court's denial of post-conviction relief and the court's denial of his motion to amend his original petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the reasons explained below, grant relief in this matter with instructions to the trial court to determine whether Alcantar has established good cause to permit him to file an amendment to his petition for post-conviction relief. We also conclude Alcantar has raised a colorable claim of ineffective assistance of counsel in his supplemental claim and therefore, if the trial court finds good cause to permit the amendment, Alcantar is entitled to an evidentiary hearing. With respect to Alcantar's other claims, we deny relief.

Background

¶2 A recitation of the facts of this case is set forth in this court's memorandum decision on Alcantar's direct appeal. *State v. Alcantar*, No. 2 CA-CR 2001-0064, ¶¶ 2-4 (memorandum decision filed Jan. 14, 2003). We briefly summarize the relevant procedural background here. Alcantar and Sylvia Estrella were charged with first-degree murder for the death of Estrella's husband. Alcantar and Estrella were tried at the same time but separate juries decided their respective charges. David White of the Pima County Attorney's office was the lead prosecutor. He was assisted by co-counsel, Lourdes Lopez. At trial, Alcantar was represented by William Rothstein and Saji Vettiyil. Estrella was represented by appointed counsel Wanda Day for some portion of the case. Estrella later retained Robert Hooker, who represented her at trial. Both Alcantar and Estrella were found guilty. Alcantar

was sentenced to life in prison with the possibility of parole after twenty-five years. This court affirmed Alcantar's conviction and sentence on appeal. *Alcantar*, No. 2 CA-CR 2001-0064. Subsequently, Alcantar petitioned for post-conviction relief. Both William Rothstein and David White died before the post-conviction proceeding began.

¶3 In his petition for post-conviction relief, Alcantar claimed he was denied effective assistance of counsel because his attorneys failed to inform him of a plea offer; his second-chair attorney, Vettiyil, had a conflict of interest; and his attorneys did not inform him of his right to testify. After a two-day evidentiary hearing, the trial court denied relief. Alcantar also filed a supplemental claim arguing his lead attorney, Rothstein, had been ineffective because he had made an unreasonable defense strategy choice. The trial court dismissed the supplemental claim as untimely because Alcantar had not first filed a motion seeking leave to amend. The court nevertheless also addressed the supplemental claim on the merits and denied relief.

Standard of Review

¶4 We review the trial court's decision granting or denying post-conviction relief for an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). At the evidentiary hearing, the petitioner has the "burden of proving the allegations of fact by a preponderance of the evidence." Ariz. R. Crim. P. 32.8(c). We defer to the trial court with respect to any factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993), *rev'd in part on other grounds by Sasak*

v. Copeland, 188 F.3d 514 (9th Cir. 1999). We view the facts in the light most favorable to sustaining the trial court's decision and resolve all reasonable inferences against the petitioner. *Id.*

> It is the duty of the trial court to resolve any conflicts in the evidence, and where the trial court's ruling is based on substantial evidence, this court will affirm. . . . Evidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence.

Id. (citations omitted).

Communication of a Plea Offer

¶5 Alcantar first claims that William Rothstein was ineffective because he failed to inform Alcantar that the state had offered a plea agreement and that, had Alcantar known of such an offer, he would have accepted it. In *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000), the court stated that "a criminal defendant has no constitutional right to plea bargain." However, "once the state engages in plea bargaining, the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer." *Id.*[1] To show ineffective assistance of counsel, the petitioner must show both deficient performance and prejudice. *See State v. Bennett*, 213

[1]Because the analysis in *Donald* does not require us to grant relief in this case, we leave for another day the issue of whether *Donald* was correctly decided. *See State v. Vallejo*, 215 Ariz. 193, ¶ 10, n.4, 158 P.3d 916, 919 & n.4 (App. 2007) (Howard, J., specially concurring).

Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 According to *Donald*, to show deficient performance, the petitioner must prove that his lawyer "failed to give information necessary to allow the petitioner to make an informed decision whether to accept [a] plea." 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. It follows that, under *Donald*, the failure to inform a client that a plea offer existed would constitute deficient performance. This court has declined to extend *Donald* to counsel's alleged "failure to investigate the speculative possibilities of a potential plea offer, the very existence of which is contested." *State v. Jackson*, 209 Ariz. 13, ¶ 11, 97 P.3d 113, 117 (App. 2004).

¶7 At the evidentiary hearing, Alcantar presented the following evidence: Wanda Day, who had represented Estrella for some portion of time, testified about a conversation she had with prosecutor David White during which he stated that he had offered Alcantar a plea. Lourdes Lopez, White's co-counsel, testified that White had offered Alcantar a plea and that Alcantar had turned it down because it would require him to testify against Estrella. Sergio Murueta, an investigator for Estrella's defense team, testified that he was aware a plea had been offered but he did not know who had told him about it. He also described a conversation with Alcantar during which Alcantar had told him the state wanted him to testify against Estrella. The lead investigating detective, Octavillo Gradillas, testified he was not aware of any plea offer. Saji Vettiyil, co-counsel to Rothstein, also testified he was never

aware of any plea negotiations during the prosecution of the case. In its ruling on this issue, the court noted that none of the witnesses had ever seen a written plea offer, nor had they witnessed firsthand any oral plea offer being made. As the court observed in its ruling, both Day and Lopez acknowledged that "there might have been only plea discussions, rather than an official offer." Moreover, no witness knew the precise terms of the alleged offer.

¶8 The trial court stated that "[o]ne source of considerable confusion in this matter is the fact that both the lead prosecutor and defense attorney have passed away since the trial, and are unable to testify as to whether a plea was actually offered or merely discussed." The court then found insufficient evidence that an "official offer" had actually been made. The court concluded that, therefore, Alcantar had not shown deficient performance.

¶9 Alcantar argues the trial court erred in finding that no "official offer" had been made, asserting it is not necessary for a plea agreement to be in writing to trigger *Donald* and that the trial court applied an "illegal standard of proof" when it found Alcantar had not presented "definitive evidence" that a plea offer had been made. But we need not address these arguments because, in order to obtain relief under *Donald*, Alcantar had to show that his attorney had in fact failed to inform him that any alleged plea offer existed. 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. In the introduction to its written ruling, the trial court stated Alcantar had "failed to establish with sufficient evidence . . . that his attorney neglected to inform him of the plea offer." Although the trial court did not explicitly address this point

in its subsequent analysis, it did make relevant findings in its analysis for prejudice; that is, in its inquiry as to whether Alcantar would have accepted a plea had he been aware of one.

¶10 The court accepted the following evidence as true: Rothstein sent a letter to White stating that he had discussed the possibility of a plea with Alcantar and that even after "some heavy duty arm-twisting," Alcantar refused to plead. Lopez testified that White had told her Alcantar had rejected the plea because one of its terms was that he would testify against Estrella, which he would not do. Murueta testified that he had had a conversation with Alcantar during which they had discussed the possibility of an agreement that would require Alcantar to testify against Estrella. Murueta stated that Alcantar had said he could not testify because "he didn't have any information to provide. He didn't want to lie." All of this evidence supports the court's implicit finding that Alcantar was aware of any plea negotiations that took place. Although Alcantar presented other evidence that suggested he had not been aware of such negotiations, we defer to the trial court's resolution of any conflict in this evidence. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733. In light of the court's findings, which are supported by the record, *see id.*, Alcantar has not established the trial court erred when it concluded that Alcantar failed to show Rothstein's performance had been deficient.

¶11 Because Alcantar failed to establish the first prong of this ineffective assistance of counsel claim, we need not reach the issue of whether he established prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (failure to establish either prong is fatal to

ineffective assistance claim). Further, it is not necessary for us to consider what an appropriate remedy would be had he shown ineffective assistance of counsel and we therefore do not address Alcantar's argument on this issue.

Conflict of Interest

¶12 Alcantar next claims that one of his attorneys, Saji Vettiyil, had formerly represented Estrella in the same matter and that this created a conflict of interest. Alcantar further argues that he did not give the informed consent required to waive the conflict. In order to prevail on an ineffective assistance of counsel claim based on a conflict of interest, the "defendant must show first that there was an actual conflict, and second that the conflict had an adverse effect." *State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986). The Arizona Rules of Professional Conduct may provide a starting point in determining whether an actual conflict exists. *See State v. Padilla*, 176 Ariz. 81, 83, 859 P.2d 191, 193 (App. 1993). But a conflict under the professional rules does not necessarily constitute ineffective assistance of counsel. *See Jenkins*, 148 Ariz. at 467, 715 P.2d at 720.

¶13 Ethical Rule 1.7(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of

the lawyer." *Id.* Under certain circumstances, the affected clients may waive the conflict if they give informed consent. E.R. 1.7(b), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

¶14 When determining whether an attorney-client relationship exists, from which responsibilities arise, our supreme court has adopted the rule in the Restatement (Third) of the Law Governing Lawyers § 14 (2000). *See Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, ¶ 10, 24 P.3d 593, 595-96 (2001). "'A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and . . . (a) the lawyer manifests to the person consent to do so.'" *Id.*, *quoting* Restatement § 14; *see also Foulke v. Knuck*, 162 Ariz. 517, 520, 784 P.2d 723, 726 (App. 1989) (attorney-client relationship proved by showing party sought and received legal advice).

¶15 At the evidentiary hearing, Vettiyil testified that after the murder was committed Estrella called him because police investigators were questioning her about her husband's death. Vettiyil told her not to make any statements. Vettiyil then spoke with an officer who was with Estrella and said, "I'm representing her in this matter for the time being. My client wish[es] to invoke her right. I would like to pick up my client." Vettiyil then drove to the police station, picked up Estrella and drove her back to his office. He informed Estrella that he could not take her case because he was leaving the country for a vacation. He then assisted her in contacting another attorney. Vettiyil testified that he did not discuss the case with Estrella at all. Alcantar presented telephone records at the

evidentiary hearing indicating Estrella had called Vettiyil's office several times after this meeting. Vettiyil did not recall these telephone calls or what they were about. After Estrella was later arrested, Vettiyil and his legal assistant visited Estrella in jail and assisted her in setting up a custody arrangement for her children. Vettiyil also responded to a later request from Estrella to again help her find another lawyer and apparently he gave her some names and contacted one attorney personally regarding taking her case.

¶16 Meanwhile, after Alcantar was charged with the murder of Estrella's husband, William Rothstein began representing Alcantar. At some point, Rothstein approached Vettiyil and asked if he would serve as co-counsel on Alcantar's defense team. Vettiyil testified that a hearing was held in open court during which Estrella waived any conflict of interest with respect to Vettiyil's representation of Alcantar. Vettiyil also testified that he had not received any privileged information from Estrella at any point.

¶17 Based on the foregoing facts, an attorney-client relationship did exist, at least briefly, between Vettiyil and Estrella. *See Foulke*, 162 Ariz. at 520, 784 P.2d at 726 (brevity of consultation does not negate establishment of attorney-client relationship). By calling Vettiyil for assistance at the time she was being questioned, Estrella manifested an intent that Vettiyil provide legal services for her. *See Paradigm Ins.*, 200 Ariz. 146, ¶ 10, 24 P.3d at 595-96. And when Vettiyil advised Estrella not to make any statements and asserted to the authorities that she was his client and was invoking her right to remain silent, he was manifesting his consent by actually performing legal services for her. *See id.* This

constitutes representation in the same matter for which Vettiyil later represented Alcantar, that is, the prosecution for the murder of Estrella's husband.

¶18 But Vettiyil's representation of Estrella ended almost as soon as it began in that Vettiyil promptly informed Estrella he could not take her case. Apart from the instructions to stop talking to the investigators, no evidence exists to show Vettiyil offered Estrella any legal advice with respect to this matter.[2] Nor does any evidence exist to show that Estrella disclosed any confidential information to Vettiyil regarding the case. Moreover, evidence does exist to show Estrella waived any conflict.

¶19 In sum, Alcantar has not demonstrated that Vettiyil had any responsibilities to Estrella that "materially limited" his representation of Alcantar and therefore has not shown that a conflict of interest existed. E.R. 1.7(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. Because no conflict of interest existed, Vettiyil did not have to obtain any waiver from Alcantar. Accordingly, the trial court did not abuse its discretion in denying relief on this claim.

Right to Testify

¶20 Alcantar next claims his counsel was ineffective for failing to inform him of his right to testify. Although disagreements in trial strategy will not support a claim of

[2]We do not believe that Vettiyil's subsequent assistance in referring Estrella to other attorneys constituted legal advice or by itself established an attorney-client relationship. And, we agree with the trial court's finding that Vettiyil's representation with respect to the child custody matter was "factually unrelated to the murder charge."

ineffective assistance of counsel, "certain basic decisions transcend the label 'trial strategy' and are exclusively the province of the accused: namely, the ultimate decisions on whether to plead guilty, whether to waive a jury trial and whether to testify." *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987), *quoting State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). When the trial court determines the petitioner has failed to sustain his burden to prove that counsel denied him his right to testify, we will not reverse when sufficient evidence exists to support that finding. *See State v. Shedd*, 146 Ariz. 5, 8, 703 P.2d 552, 555 (App. 1985).

¶21 The trial court found that Alcantar's claim was not credible based on evidence that his attorneys had discussed with him the option of testifying. Alcantar acknowledges a discussion occurred but claims his attorneys did not explain to him that it was his choice, as opposed to theirs, whether to testify. But Vettiyil testified at the evidentiary hearing that he and Rothstein had talked to Alcantar about his right to testify and then advised him not to because they were concerned that it would be detrimental to his case. We defer to the trial court's resolution of any conflict between Alcantar and Vettiyil's testimony. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733. Because the record contains substantial evidence supporting the trial court's finding that Alcantar was aware he had a right to testify, the court did not abuse its discretion in denying relief on this issue. *See id.*; *Shedd*, 146 Ariz. at 8, 703 P.2d at 555.

Supplemental Claim of Ineffective Assistance of Counsel

¶22 Alcantar last argues that the court erred in dismissing his supplemental claim as untimely and erred in concluding he had not raised a colorable claim of ineffective assistance of counsel. We review a court's decision to dismiss a claim of post-conviction relief as untimely for an abuse of discretion. *See State v. Viramontes*, 211 Ariz. 115, ¶ 10, 118 P.3d 630, 632 (App. 2005). Rule 32.6(d), Ariz. R. Crim. P., provides that "[a]fter the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause." Our supreme court has recognized "a liberal policy toward amendment of [post-conviction relief] pleadings." *Canion v. Cole*, 210 Ariz. 598, ¶ 16, 115 P.3d 1261, 1264 (2005). But amendments must be made "prior to the trial court's ruling dismissing the petition or prior to the trial court's order granting or denying relief on the merits after a hearing on the petition." *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also State v. Rogers*, 113 Ariz. 6, 8, 545 P.2d 930, 932 (1976).

¶23 Alcantar filed a supplemental claim on September 24, 2007. He stated on the caption page of his claim that he was simultaneously filing a "Motion to Amend Rule 32." However, no motion to amend was filed at that time. The state filed a response to the supplemental claim on October 17, 2007, arguing summary dismissal was appropriate because Alcantar had failed to show "why he should be allowed to amend his petition at such a late date." On October 23, 2007, Alcantar filed his motion to amend noting that due to an oversight the motion had mistakenly not been filed with his supplemental claim in

September. The court then issued its ruling, in which it determined that because Alcantar had filed his supplemental claim "without first filing a motion to amend," the claim was untimely and therefore summarily dismissed.

¶24 The record shows Alcantar clearly intended to file his motion to amend at the same time as he filed his supplemental claim. And both the supplemental claim and the motion to amend were filed before the trial court had ruled on the original petition. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928. We cannot find authority for the proposition that a motion to amend must be filed before the proposed amendment. We conclude that, in light of the liberal policy favoring amendment of post-conviction relief pleadings, *see Canion*, 210 Ariz. 598, ¶ 16, 115 P.3d at 1264, the trial court abused its discretion in determining that Alcantar's supplemental claim was untimely solely on the ground that the motion to amend had not been filed before the supplemental claim.

¶25 After dismissing the supplemental claim as procedurally barred, the trial court stated that even if the claim had been timely filed, it would have been denied on the merits. If we determine that the trial court properly denied the claim summarily with regard to the merits, any error concerning the amendment would be harmless. Therefore, we review that decision.

¶26 The trial court found that Alcantar had failed to raise a colorable claim of ineffective assistance of counsel in his supplemental claim. Like the determination of timeliness, we review the trial court's decision on this issue for an abuse of discretion. *See*

Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d at 948. "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). If the trial court determines that the claims do not present a "material issue of fact or law which would entitle the defendant to relief," the court may summarily dismiss the claim without an evidentiary hearing. Ariz. R. Crim. P. 32.6(c); *State v. Andersen*, 177 Ariz. 381, 385, 868 P.2d 964, 968 (App. 1993).

¶27 To state a colorable claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficiency caused prejudice. *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. A disagreement about "trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis." *Nirschel*, 155 Ariz. at 208, 745 P.2d at 955. The defendant must "show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

¶28 The substance of Alcantar's supplemental claim is that his lead counsel, Rothstein, was deficient in pursuing a "unified defense" strategy, linking Alcantar with Estrella and attempting to prove neither committed the murder. Alcantar argues his counsel should have attempted to show that Estrella had committed the murder alone. Alcantar offered a transcript of the interview between Alcantar's post-conviction counsel and his

second chair trial counsel, Saji Vettiyil, in which Vettiyil asserted that Rothstein always considered the prosecutions against Alcantar and Estrella as "one case." Vettiyil also stated that Rothstein was so sure he could win Alcantar's case that he was not interested in a plea or settlement. Vettiyil recounts Rothstein as saying "we can win this case" and "[l]et's see if we can't even get [Estrella] off." Vettiyil described an incident during trial when Vettiyil was cross-examining a witness and, afterward, Rothstein criticized Vettiyil for "hurting [Estrella's] defense" by showing that the murder could have been committed by one person.

¶29 The trial court concluded that Alcantar had failed to show the decision to pursue a unified defense strategy was a result of counsel's ineptitude. The court stated that "the evidence that Rothstein was so confident about winning that he even believed he [could] obtain an acquittal for Estrella, reveals that Rothstein made a tactical decision to choose a unified defense strategy." Arguably, Alcantar could state a colorable claim that choosing a strategy because it would benefit Estrella, who was not Rothstein's client, would be improper and would not constitute a "reasoned basis" for the decision to pursue one defense strategy over another. *Nirschel*, 155 Ariz. at 208, 745 P.2d at 955. Rather, if guilt for the murder could have been shifted from Alcantar to Estrella entirely, then Rothstein was "under an ethical and moral obligation to do so." *State v. Rodriguez*, 129 Ariz. 67, 70, 628 P.2d 950, 953 (1981); *cf. Larson v. State*, 766 P.2d 261, 263 (Nev. 1988) (counsel rendered ineffective assistance in basing tactical decisions and recommendations on "factors that would further his personal ambitions as opposed to client's best interests"). And unfounded

overconfidence about winning could also indicate ineptitude, thus supporting a colorable claim. *See Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (counsel rendered incompetent assistance in advising defendant to reject plea and "[i]t was incredibly naive for counsel to get so caught up in [defendant's] case that he was unable to evaluate it objectively).

¶30 We conclude Vettiyil's statements established a "material issue of fact" with respect to what Rothstein's motive had been for choosing the unified defense strategy. Ariz. R. Crim. P. 32.6(c). If Rothstein's motive was to assist Estrella, then his performance was deficient.

¶31 In order to demonstrate a colorable claim, Alcantar must also show that Rothstein's arguably deficient performance resulted in prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. A defendant shows prejudice by demonstrating a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* ¶ 25, *quoting Strickland*, 466 U.S. at 694. Thus, Alcantar had to show a reasonable probability that the jury's verdict would have been different had Rothstein elected not to pursue a unified defense, and had he instead attempted to show Estrella was solely responsible for the murder.

¶32 In his supplemental claim, Alcantar points out that the state presented no physical evidence tying him to the crime. He then argues that the state did present evidence

that supported the theory that Estrella had killed her husband in their home as a crime of passion. Alcantar maintains that had Rothstein pursued such a theory, the defense team would not have attempted to show the victim had been killed somewhere other than the Estrella residence. In his original petition, relevant portions of which Alcantar incorporated by reference into his supplemental claim, Alcantar argued that the forensic evidence that the victim had been murdered in the Estrella residence was so strong, that the attempt to challenge it was futile. He argued the crime of passion theory "was far more plausible than the state's theory of a planned murder" and would have shown that Alcantar's involvement in the crime "was only . . . after the fact" and that Estrella only sought his assistance to cover up her crime. Alcantar maintains that his defense team chose "a theory that required the jury to reject the physical evidence and reach the unlikely conclusion that neither defendant was involved in the murder. No conceivable reason, other than the protection of Mrs. Estrella, can explain the . . . defense team's decisions."

¶33 The trial court ruled that there was "insufficient evidence to suggest the outcome would have been any different had the 'finger-pointing strategy' been used." The court reasoned that because Alcantar and Estrella were involved romantically, "Alcantar would appear to the jury to have been the most likely person to have been Estrella's accomplice." But according to Alcantar, had Rothstein not been trying to protect Estrella, he would have presented the jury with a theory that Estrella had committed the murder without an accomplice. And because this alternative theory was arguably consistent with,

rather than in conflict with, the forensic evidence presented at trial, the jury may well have found it a more viable explanation of the crime. We conclude that Alcantar has raised a colorable claim of ineffective assistance of counsel and therefore, the trial court abused its discretion in summarily denying relief on this claim. *See Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d at 114 (colorable claim stated when allegations, assumed to be true, may have changed outcome).

Conclusion

¶34 In light of the foregoing, we grant review but deny relief on those claims Alcantar presented in his original petition for post-conviction relief that he also raises in his petition for review. With respect to his supplemental claim for relief, the trial court did not determine whether Alcantar had shown good cause for the motion to amend, so we grant relief to permit it to do so. If the trial court finds that good cause was shown, Alcantar has established a colorable claim of ineffective assistance of counsel and is entitled to an evidentiary hearing.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PHILIP G. ESPINOSA, Judge