NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LUIS NOE MIRAMON, Petitioner.	2 CA-CR 2009-0123-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20043568

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

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

The Ferragut Law Firm, P.C.
By Ulises A. Ferragut, Jr. — Phoenix
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Petitioner Luis Miramon was convicted following a jury trial of first-degree murder, two counts of aggravated assault with a deadly weapon or dangerous instrument, and two counts of endangerment. The trial court sentenced Miramon to life imprisonment without the possibility of release for twenty-five years on the first-degree murder conviction and to various presumptive, consecutive and concurrent sentences on the other convictions. We affirmed Miramon's convictions and sentences on appeal. *State v. Miramon*, No. 2 CA-CR 2005-0335 (memorandum decision filed Sept. 21, 2007). Miramon then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging that trial counsel, Eric Larsen, had been ineffective in failing adequately to inform him about the benefits of the state's plea offer for manslaughter that had provided for a sentencing range of seven to fifteen years. Finding that Miramon had stated a colorable claim for relief, the court conducted an evidentiary hearing. This petition for review follows the court's denial of Miramon's petition for post-conviction relief and his motion for rehearing. Miramon asks that we vacate his convictions and sentences and remand "for processing at the pretrial stage of criminal proceedings." We will not disturb a trial court's denial of post-conviction relief absent a clear abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Miramon's attorney summarized his claim as follows:

> [Larsen] painted an unrealistic and unreasonably optimistic picture of [Miramon's] trial prospects, with no advice regarding strengths of the State's case or weaknesses in the defense theory, and never describing the actual benefits of accepting the plea offer. In short, trial counsel's ineffective assistance of counsel – misadvice regarding the plea decision – directly led to [Miramon's] uninformed and involuntary decision to proceed to trial in lieu of [accepting] the tendered plea offer.

¶3 Miramon essentially contends that, based on his faith in Larsen, who had represented him in another matter, he blindly followed Larsen's advice to reject the state's plea offer. He claims Larsen had told him not to "waffle" about rejecting the plea offer in front of the trial court and asserts that, if Larsen had explained the strength of the state's case and the "realistic chances of [his] success at trial," he would have accepted the plea offer. He also contends he would have accepted a plea offer that involved a prison term, despite Larsen's assertion to the contrary at the evidentiary hearing.

¶4 Before trial, the trial court conducted a *Donald* hearing to assure that Miramon had understood the consequences of his decision to reject the plea offer. *See State v. Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d 1193, 1200 (App. 2000) (attorney's failure to give accurate advice or information necessary to allow defendant to make informed decision whether to accept plea agreement constitutes deficient performance). On the second day of the *Donald* hearing, after the state clarified that one of its key witnesses would not be testifying at trial, Miramon decided to reject the state's plea offer; Larsen told the court that he had explained

the consequences of that decision to his client. The court then questioned Miramon in detail about his decision not to plead guilty and required a verbal response to every question it asked to verify Miramon understood the consequences of his decision. The court later described the *Donald* hearing as having been "as thorough as would seem possible."

¶5 Miramon nonetheless contends the trial court should not have relied on his representations at the *Donald* hearing, asserting that his responses had been "hindered" by counsel's ill-placed advice that he reject the plea offer and proceed to trial. He argues the court should have relied instead on Larsen's "unrecorded advice to [Miramon] in private," as set forth in Miramon's affidavit and the affidavits of his brother, Alberto, and Miramon's girlfriend, Carla. In the affidavits that were attached to Miramon's petition for post-conviction relief, the affiants asserted: Miramon trusted Larsen, Larsen insisted Miramon reject the state's plea offer, and Larsen assured Miramon and his family that the case would be "easy" to win.

¶6 Larsen, Miramon, Alberto, and Carla testified at the two-day evidentiary hearing, after which the trial court denied relief as follows:

> Mr. Larsen's testimony was credible. This Court concludes that Mr. Miramon had been advised of the relative risks versus benefits concerned with proceeding to trial as opposed to the acceptance of the State's plea offer to plead to [m]anslaughter. Those risks were discussed at length by the Court and Counsel on April 28, 2005 and May 5, 2005 [the *Donald* hearing].
>
> While counsel for Petiti[on]er has rightfully focused on trial counsel's extremely confident remarks in Court on April

> 28, 2005, it was the very same exuberance which caused this Court to carefully explain to the defendant how quickly fortunes could reverse at trial. . . .
>
> Notwithstanding Mr. Larsen's "puffing" with the prosecutor on those occasions he finished those discussions by making it clear that he had, indeed, made Mr. Miramon bluntly aware of the worst case scenario at trial.
>
> Additionally, testimony adduced at the hearing made it clear that Mr. Miramon had ample family resources available to discuss his options. Clearly, a strong resource was available to defendant in the person of his older brother. Oftentimes, Defendants have no such sounding board available. Mr. Miramon was not isolated and overborne.
>
> Trial counsel's testimony at the hearing was corroborated by the record. The defendant was informed that it was his life at stake and his ultimate decision to make.
>
> **THE COURT FINDS** that Mr. Miramon had all of the tools and all of the information necessary to make that difficult decision. Hindsight is 20-20 and all humans wish we had the benefit of it. Unfortunately, we do not.

¶7 Based on the record, the trial court had the right to rely on Miramon's assurances at the *Donald* hearing that he understood the consequences of rejecting the plea offer. Merely contradicting what the record clearly shows does not entitle Miramon to relief. Indeed, the court in *Donald* recognized that "[i]t is easy to claim but hard to secure" evidence to establish prejudice in the rejection of a plea offer. *Id*. ¶¶ 20-21. Moreover, after the evidentiary hearing, the court expressly found Larsen to be a credible witness, as it was empowered to do. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995) (trial court resolves factual disputes underlying ineffective assistance of counsel

claim); *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbitrator of witness credibility in post-conviction proceeding).

¶8 At the evidentiary hearing, Larsen testified he had explained the sentencing ranges to Miramon for "all levels of homicide," the likelihood of success at trial, the "pros and cons" of proceeding to trial, and the strengths and weaknesses of the state's case and he had not instructed Miramon to reject the state's plea offer. Larsen also testified Miramon had told him he did not want to go to prison. Although Larsen had been confident he could succeed at trial, he did not guarantee Miramon an acquittal. Larsen met with Miramon's family to discuss the case but did not speak as freely with them as he had with Miramon. Larsen also testified that he believed Alberto was referring to a potential plea offer for second-degree murder rather than the actual plea offer for manslaughter when he stated in his affidavit that Larsen had said "it would be ridiculous to accept the States's plea offer."

¶9 Miramon testified that he had fully trusted Larsen, he had never told Larsen he would not go to prison, and he believed the mistaken identity theory Larsen asserted at trial was unsupported by the evidence. He also testified Larsen had forced him to reject the plea offer and he would have signed the plea agreement if Larsen had explained to him the evidence Larsen anticipated would be presented at trial. Although Miramon acknowledged knowing before trial that a particular witness would testify Miramon was "the guy with the gun" at the murder scene, he claimed he "didn't know exactly . . . the other things [the witness was] going to say."

¶10 Not surprisingly, the trial court told defense counsel at the evidentiary hearing that, "when we went over this in court [at the *Donald* hearing], I put it in pretty strong terms with Mr. Miramon that even if you think you have a slam dunk winner here, things can reverse at trial very quickly. [W]e put this pretty bluntly to Mr. Miramon at the time of the hearing." The court added that it was concerned it might "be dealing with Monday morning quarterbacking . . . by Mr. Miramon." Alberto testified Miramon had trusted Larsen and Larsen had not adequately explained the plea offer to the family. Carla testified Miramon was willing to follow Larsen's advice because he trusted him. Notably, Carla acknowledged she had never been present when Miramon met with Larsen.

¶11 The trial court's finding that Larsen's performance did not fall below prevailing professional standards is fully supported by the record. Therefore, we find no abuse of discretion in its denial of post-conviction relief. Accordingly, we grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge