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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT MAY 18 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 06CA13 From the District Court of Weld County Honorable J. Robert Lowenbach, Judge District Court Case No. 02CR457	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ALLEN CHARLES BERGERUD, Respondent.	▲ **COURT USE ONLY** ▲ Case No.: 08SC936
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PEOPLE'S OPENING BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

ISSUES PRESENTED

Whether criminal defendants have a fundamental constitutional right to direct their counsel to present an "innocence-based defense," irrespective of counsel's professional judgment ?

Whether, if there is such a constitutional right, what procedures should this Court devise to ensure that defendants are aware of said right, any waiver of it is done in a knowing, voluntary, and intelligent manner, and that counsel is acting pursuant to the defendant's directions and not on the basis of his own professional judgment ?

STATEMENT OF THE CASE AND FACTS

Bergerud ambushed the victims. Allen Bergerud was angered when his mistreatment of his girlfriend, Linda Cooper, caused her to leave him and start a relationship with Lon Yeaman (see v. 77, pp. 211-15). On the night of April 7, 2002, Bergerud telephoned Ms. Cooper and told her that her horses had escaped from their pasture and were running loose in a nearby field (see People's Exh. 180). Ms. Cooper and Mr. Yeaman went to care for the animals (see id.). Bergerud was waiting for them in the field wearing dark clothing and carrying a loaded pistol, two extra loaded ammunition magazines for the weapon, and two boxes of ammunition (see, e.g., v. 75, p. 132-33; v. 76, pp. 17, 209-10, 233-34; v. 77, pp. 107; v. 78, pp. 26-27, 32, 58, 71).

Bergerud went up to the unarmed Lon Yeaman and shot him (see People's Exh. 180). Mr. Yeaman gave his cellphone to Ms. Cooper and told her to call 911 (id.). She ran off and hid in the field in the dark and called the emergency number (id.). Bergerud then shot Lon Yeaman six more times, killing him (id.; v. 76, p. 144; v. 77, pp. 75-76).

Bergerud shot Yeaman in the back of the head once, in the left shoulder once (with the bullet ending up in his abdomen), and in the left side of his body five times in a plate-sized area (v. 76, pp. 145-50). Linda Cooper hid in the field until she thought Bergerud had left, and then went to try to help Mr. Yeaman (People's Exh. 180). Bergerud had not left, though. Instead, he had used his pickup truck to block the access road to the pasture about a half a mile away (v. 75, p. 111). Over the cellphone, the emergency operator could hear Ms. Cooper scream that Bergerud had returned, and then the operator heard Bergerud curse at Ms. Cooper for having left him (People's Exh. 180).

Bergerud attacked the responding law enforcement officers. Sheriff's deputies summoned by the 911 operator arrived at this time. They made their way past Bergerud's truck (disabling it while doing so) and came upon him and Ms. Cooper with the floodlights of the front end loader Bergerud had driven to the field illuminating the area (v. 75, pp. 108-20, 171-76). The deputies identified

themselves and told Bergerud to drop his weapon (v. 75, pp. 120, 176). Instead, Bergerud shot Linda Cooper at least three, and maybe four, times, hitting her liver, bowels, and one kidney. Ms. Cooper's wounds indicated that Bergerud had pressed the muzzle of his weapon into Ms. Cooper's body as he shot her (v. 75, pp. 121-22, 177-78; v. 76, p. 89, 159-63; v. 82, p. 126). After shooting Ms. Cooper, Bergerud fired on the deputies (v. 75, pp. 124-25, 177-82).

One of the deputies returned Bergerud's fire (v. 75, pp. 179-82). Bergerud was hit by a single bullet in his hand, either by the deputy who had returned his fire or by Bergerud shooting himself as he was attempting to reload his pistol (see, e.g., v. 75, pp. 126, 130, 132, 136, 182). On the way to the hospital, Bergerud said, "They fucked with the wrong guy," and "This night is finally over. Nobody will ever fuck with Allen Bergerud again" (v. 77, pp. 81, 98). Linda Cooper died in the field before medical personnel could reach her (v. 75, pp. 134; v. 77, pp. 57-58, 77, 91-93).

The defense Bergerud's counsel set forth in opening statement. In opening statement, Bergerud's appointed counsel told the jury that Bergerud was not guilty of either first degree murder count because he had not acted intentionally or after deliberation in shooting Ms. Cooper or Mr. Yeaman (v. 74, pp. 246-56).

This was the same defense raised in Bergerud's first trial, which resulted in a hung jury (see v. 54, pp. 50-92).

Bergerud demanded that the trial court dismiss his counsel. At the close of this opening statement, Bergerud's counsel informed the trial court that Bergerud wanted to address the court (v. 74, pp. 256-57). Bergerud told the trial court that he wanted to dismiss his appointed attorneys because he did not want them to present that defense, but he instead wanted to argue self-defense because that is the defense that his counsel from his first trial had wished he had presented (see v. 74, pp. 257, 258-59, 263-64; v. 75, pp. 15-18). Bergerud explained that he wanted his counsel at his second trial to act as his "mouthpiece" (v. 75, p. 5).

Bergerud told the trial court that he did not like his counsel's opening statement because he thought it would hurt his chances of having them argue self-defense in his closing statement (v. 75, p. 17). The trial court explained to Bergerud that opening statements are not evidence—they are what counsel expects the evidence to be—and what counsel said during an opening statement would not prevent a jury from considering other evidence that "comes out" during trial (v. 75, p. 18, ll. 6-9, pp. 18, l. 25-p. 19, l. 7). Bergerud said that his attorneys told him they would not "go with" a self-defense argument (v. 75, pp. 19, 21).

The trial court conducted a full Arguello advisement. The trial court advised Bergerud on his right to testify (v. 75, pp. 4-5). It then asked Bergerud all the questions set forth in People v. Arguello, 772 P.2d 87, 98 (Colo. 1989) (v. 75, pp. 6-12). Bergerud asked the court to appoint advisory counsel, but the trial court did not know how advisory counsel would be able to help him without knowing anything about the case (v. 75, p. 11). Bergerud asked about procuring witnesses, and the trial court had his counsel inform him of the witnesses already under subpoena, and ordered the prosecution to subpoena the additional witnesses Bergerud wanted (see v. 75, pp. 12, 13-14, 42, 56-57). The trial court advised Bergerud that self-representation is "a very, very risky business," and that there are "huge pitfalls" to proceeding pro se (v. 75, pp. 4-5, 18).

The trial court found that Bergerud was not entitled to the appointment of new counsel. After its advisements, the trial court found that Bergerud's dissatisfaction with his counsel was a dispute over trial strategy, that dispute did not constitute a conflict of interest, it had not resulted in a complete breakdown in communications, it would likely reoccur if it appointed new counsel, and it did not justify the appointment of new counsel (see v. 75, pp. 20, 23-26, 34). It repeatedly re-advised Bergerud of the dangers he faced in representing himself (v. 75, pp. 20, 32, 38-39). After conferring again with his counsel, Bergerud told the trial court

he wanted to argue self-defense and proceed pro se (v. 75, pp. 21-22, 23). The trial court found that there was no way that it could appoint advisory counsel without further delaying the trial for weeks (v. 75, p. 28).[1]

The trial court excused Bergerud's counsel. The trial court again gave Bergerud the choice of proceeding with the attorneys who had prepared his defense, or proceeding pro se (v. 75, pp 30-32). Bergerud reiterated that he wanted to proceed pro se (v. 75, p. 44).

The trial court excused Bergerud's counsel and allowed him to proceed pro se (v. 75, p. 44). In doing so, it found that Bergerud understood its advisements to him and was competent (v. 75, p. 45). The trial court then instructed the jury that Bergerud had taken over his defense and would be making a new opening statement (v. 75, pp. 59-60).

Pro se, Bergerud argued self-defense. Bergerud's subsequent defense was that he was the victim of two separate conspiracies (see v. 82, pp. 150-52). In the first conspiracy, Ms. Cooper and Mr. Yeaman fired two shots at him and then tried to run him down with Yeaman's pickup truck (v. 79, pp. 78-79; v. 82, p. 143).

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[1] The prosecution noted that because this was a homicide case, had begun as a death penalty case, and there had been the previous trial, advisory counsel would need a substantial amount of preparation time in order to review the case file prior to trial (v. 75, p. 29).

Bergerud testified that he found their pistol lying on the ground, and, when Yeaman tried to run him down a second time, he shot at Yeaman three times in self-defense (v. 76, p. 118; v. 79, p. 79; v. 82, p. 142-44). However, the only pistol found at the scene was Bergerud's (see, e.g., v. 77, p. 52; v. 78, p. 157).

In the second conspiracy, the sheriff's deputies accidentally shot Ms. Cooper when they got to the field, and then they shot Yeaman several additional times in order to cover-up their killing of Ms. Cooper (v. 79, pp. 79-80; v. 82, pp. 146).

In sentencing Bergerud, the trial court described Bergerud's pro se theory of defense as "incredible" and "preposterous" (v. 82, 11/17/05, pp. 24-25).

Verdicts and sentence. The jury convicted Bergerud of one count of first degree murder for killing Mr. Yeaman, one count of second degree murder for killing Ms. Cooper, and two counts of first degree assault on a peace officer for shooting at the sheriff's deputies (v. 82, 11/16/05, pp. 5-6).

The trial court sentenced Bergerud to life in prison for first degree murder, forty-eight years in prison for second degree murder, and thirty-two years in prison on each peace officer assault count, with all the sentences to be served consecutively (v. 82, 11/17/05, pp. 27-28).

The court of appeals' reversed. The court of appeals held that the trial court presented Bergerud with an "impermissible choice" by finding that if he

wanted to argue to the jury that he acted in self-defense, and appointed counsel did not want to present that defense, then Bergerud would have to present that defense pro se. People v. Bergerud, 203 P.3d 579, 582 (Colo. App. 2008) (copy attached). In doing so, it found that Bergerud had a "fundamental" constitutional right to insist that his counsel present an "innocence-based defense" no matter what defense counsel's professional judgment might be. Id. at 582-87. In doing so, the court of appeals held that the determination of what technical defense to present at trial is akin to determining whether to plead guilty or testify, and thus is not an issue of strategy entrusted to defense counsel. Id. at 583-83. The court of appeals also determined that the choice whether to present such a defense is not one entrusted to the strategic judgment of defense counsel. Id. at 12-24.

ARGUMENTS

This case addresses two significant issues of Colorado law. First, whether the determination of what technical defense to use at trial is tantamount to a defendant's determination as to whether to plead guilty, such that defense counsel is required to comply with the defendant's directions. Second, if so, should this Court devise procedures to ensure that defendants exercise that right in a knowing, voluntary, and intelligent manner.

I. The court of appeals erred by holding that criminal defendants have a fundamental constitutional right to require counsel to present an "innocence-based defense," irrespective of the advice of counsel.

A. Standards of review.

The determination of the existence of fundamental constitutional right is an issue of law subject to de novo review. See People v. Curtis, 681 P.2d 504 (Colo. 1984). De novo is the standard of review for a trial court's decision to deny an indigent defendant's request for substitution of counsel. See People v. Abdu, __ P.3d __, No. 05CA1083, slip op. at pp. 3-5 (Colo. App. May 14, 2009).

B. Indigent defendants have a right to the appointment of competent and ethical representation.

Indigent defendants are entitled to the appointment of reasonably effective counsel. See Arguello, 772 P.2d at 92; People v. Collie, 995 P.2d 765, 771 (Colo. App. 1999). That does not mean, though, that indigent defendants have the right to demand particular attorneys, have "meaningful" relationships with their appointed counsel, or direct the actions of counsel such that they achieve "hybrid" or "mixed" representation. See Arguello, 772 P.2d at 92.

Similarly, the purpose of defense counsel is not to function as the defendant's alter-ego or mouthpiece, but to act as a trained advocate who provides

the defendant with representation that is both competent and ethical. See People v. Schultheis, 638 P.2d 8, 12 (Colo. 1981); Colo. RPC 1.1 (counsel "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

If a defendant voices objections to court-appointed counsel and can establish good cause for the appointment of new counsel—such as a conflict of interest, a complete breakdown in communications, or an irreconcilable conflict which leads to an apparently unjust verdict—the trial court must appoint substitute counsel. Arguello, 772 P.2d at 94. However, if the defendant does not demonstrate good cause for the appointment of new counsel, then the trial court can insist that the defendant choose between continued representation by existing counsel or going pro se. Id.

C. Defendants are entitled to exclusive control over four core issues.

The Supreme Court and this Court have delineated the fundamental constitutional rights over which defendants have exclusive control. The Supreme Court says that the decisions over which the defendant has personal control are whether to plead guilty, waive a jury trial, testify, and take an appeal. Florida v.

Nixon, 543 U.S. 175, 187 (2004). This Court has identified the decisions over which the defendant has exclusive personal control to be the "plea to be entered, whether to waive a jury trial, and whether the client will testify." Arko v. People, 183 P.3d 555, 558 (Colo. 2008).[2]

D. Defense attorneys are entitled to control issues of trial strategy and tactics.

As to other decisions—"including questions of overarching trial strategy"—counsel is required to consult with the defendant but is entrusted with making binding decision as to what to do. Nixon, 543 U.S. at 187; see Arko, 183 P.3d at 588 ("Other decisions are regarded as strategic or tactical in nature, and final authority to make such decisions is reserved to defense counsel."); Curtis, 681 P.2d at 511 ("as to other rights defense counsel stands as captain of the ship, with

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[2] The rules of professional conduct state that "counsel shall abide by the client's decision . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify." Colo. RPC 1.2(a). See Simeon v. State, 90 P.3d 181, 184 (Alaska App. 2004) ("Since the rule limits the client's authority to those decisions [set forth in Rule 1.2(a)], it follows that the lawyer has the ultimate authority to make other decisions governing trial tactics-including whether to request lesser included offenses.") (construing identical language in Alaska Rule of Professional Conduct 1.2(a)). The ABA Standards for Criminal Justice § 4-5.2(a) (3d ed. 1993) provide that the decisions reserved to the defendant are: what plea to enter; whether to accept a plea agreement; whether to waive jury trial; whether to testify in his own behalf; and whether to appeal.

authority to make binding decisions," even concerning issues which have constitutional bases).

E. Determination of which defense to pursue is a tactical or strategic decision reserved for counsel.

Selection of a defendant's theory of defense is a matter of tactics, based on counsel's specialized training and experience. See Mobley v. State, 626 S.E.2d 248, 274 (Ga. App. 2006) ("Trial counsel's decisions with regard to the choice of defenses and theories to be advanced at trial . . . are deemed matters of tactic and strategy . . . .") (internal quotation marks omitted); People v. Cundiff, 749 N.E.2d 1090, 1098 (Ill. App. 2001) ("Trial strategy includes an attorney's choice of one theory of defense over another."); Schrier v. State, 347 N.W.2d 657, 663 (Iowa 1984) ("Selection of the primary theory or theories of defense is a tactical matter.").

In Arko, this Court held that the decision whether to request jury instructions on lesser offenses—whether included or non-included—is a tactical or strategic one for counsel to make, based on the "sophisticated training and skill which attorneys possess and defendants do not." Arko, 183 P.3d at 558-59. In doing so, this Court wrote, "The decision to submit lesser offenses instructions 'is often based on legal complexities only the most sophisticated client could comprehend,

not unlike the tactical decisions involved regarding the assertion of technical defenses.'" Id. at 559 (quoting Van Alstine v. State, 426 S.E.2d 360, 363 (Ga. 1993)); see Jones v. Barnes, 463 U.S. 745, 753 (1983) (competent defendant does not have the right to force appellate counsel to present every colorable issue—which issues to present on appeal is for counsel to decide); Vega v. Johnson, 149 F.3d 354, 361 (5th Cir. 1998) ("neither this court nor the Supreme Court has held that a defendant may force his attorney to present a defense with which the attorney does not agree or acquire new court-appointed counsel until he finds an attorney who agrees with him."); People v. Avila, 770 P.2d 1330, 1335 (Colo. App. 1988) ("there is no right for a defendant to be represented by counsel and simultaneously conduct his own defense").

F. An indigent defendant who disagrees with the strategic decisionmaking of his counsel may be required to proceed pro se.

Decisions relating to issues of strategy and tactics are reserved for counsel, United States v. Jerome, 933 F.Supp. 989, 996 (D. Nev. 1996) ("The choice of defense theories is a tactical decision. Tactical decisions in aid of trial strategy are at the core of a lawyer's exercise of professional judgment."), rev'd on other grounds, U.S. v. Jerome, 124 F.3d 214 (9th Cir. 1997) (Table, Text in Westlaw, No. 96-16290), unless the defendant chooses to proceed pro se. See State v.

Mathieu, 960 So.2d 296, 303 (La. App. 2007) ("A defendant performs the core functions of an attorney's traditional role when he formulates his own trial strategy, [and] determines his own theory of defense . . . .").

When there is a dispute between counsel as to what defense to present, counsel's choice should be controlling. United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983) ("A defendant is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to trial preparation and trial tactics . . . . [H]e has no right to an attorney who will docilely do as he is told."). If counsel has been retained by the defendant, the defendant is then free to discharge counsel and attempt to hire counsel who is willing to comply with the defendant's directions. In the case of appointed counsel, the trial court should inform the defendant, as the trial court did here, that he has the choice between: (1) going ahead with the strategy his counsel devised, or (2) electing to proceed pro se and getting to present his own strategy. See Vega, 149 F.3d at 361 ("[N]either this court nor the Supreme Court has held that a defendant may force his attorney to present a defense with which the attorney does not agree or acquire new court-appointed counsel until he finds an attorney who agrees with him."); State v. Carter, 14 P.3d 1138, 1148 (Kan. 2000) ("If counsel could not accept [the defendant's] rejection of such a defense, then he should have

either proceeded with a defense acceptable to [the defendant] or sought permission to withdraw as defense counsel.").

G. The decision to argue that the defendant did not act with the required mental state—but did act with the mental state applicable to a lesser offense—is not the equivalent of a guilty plea to the lesser offense.

In its opinion, the court of appeals reasoned that where defense counsel argues that the defendant should be convicted of a lesser offense—instead of arguing as the defendant wanted that he was not guilty of any offense at all—is the equivalent of forcing the defendant to plead guilty to the lesser offense. Bergerud, 203 P.3d 583-84 (citing Carter, 14 P.3d at 1148 (counsel's theory of defense "was the equivalent to entering a plea of guilty")).

In Nixon, though, the Supreme Court rejected a similar argument, holding that counsel's concession in a death penalty case that the defendant was guilty of the offenses charged had not been, as the Florida Supreme Court had held, the functional equivalent of a guilty plea. Instead, the U.S. Supreme Court held that defense counsel's choice of that theory of defense did not take away from the defendant his various trial rights, including his right to have the prosecution prove its case beyond a reasonable doubt on the basis of admissible evidence, and to cross-examine the prosecution witnesses, object to the presentation of unfairly

prejudicial evidence, and appeal any errors that may have occurred. See Nixon, 543 U.S. at 188.[3] This Court arrived at a similar conclusion in Arko, 183 P.3d at 558, where it held that the decision whether to request an instruction on lesser offenses is distinguishable from the decision to plead guilty, because the "defendant retains all of his trial rights."

Likewise in this case, defense counsel's decision to assert in her opening statement that Bergerud lacked the mental ability to commit first degree murder did not relieve the prosecution of any of its trial burdens, or take from Bergerud his trial or appellate rights. Thus, his counsel's decision not to claim that Bergerud acted in self-defense was not the same as forcing him to plead guilty.

H. Assertion of a technical defense is not a fundamental constitutional right over which the defendant has control.

The court of appeals' opinion holds that criminal defendants have a fundamental constitutional right to determine whether to present an "innocence-based defense." The term is so broad that it covers technical defenses that operate

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[3] In deciding this case, the court of appeals relied in part on Jones v. State, 877 P.2d 1052 (Nev. 1994) and State v. Anaya, 592 A.2d 1142 (N.H. 1991), both of which hold that counsel is ineffective if he concedes the defendant's guilt to lesser charges. The holding in both cases is contrary to the Supreme Court's holding in Nixon.

like pleas of confession and avoidance: self-defense, defense of others, defense of property, duress, execution of public duty, choice of evils, entrapment, consent, etc. But there can be no fundamental constitutional right of a defendant to present technical defenses because, unlike the four issues over which defendants are given complete control, the ability to present a technical defense to a jury is subject to various limitations. See People v. Anderson, 70 P.3d 485, 487 (Colo. App. 2002) ("the right to present . . . a particular defense or plea is not absolute").

For instance, the ability to present a technical defense is limited by whether it is based on evidence that is untrue, see Nix v. Whiteside, 475 U.S. 157 (1986); contradicted by the defendant's own testimony, see People v. Garcia, 826 P.2d 1259, 1263-64 (Colo. 1992); Colo. RPC 3.3; or frivolous, Colo. RPC 3.1. In such cases, counsel may not present it. Colo. RPC 1.16(a)(1) & (2) (requiring counsel to withdraw from representing the defendant in such situations).

More significantly, though, giving criminal defendants the ability to control the presentation of defenses impacts the right of the defendant to receive—and the duty of counsel to provide—effective assistance of counsel. Competent presentation of a defense requires that it be minimally believable. See United States v. Cronic, 466 U.S. 648, 656 n.19 (1984) ("If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client

by attempting a useless charade."). In this case, the trial court found Bergerud's self-defense claim "incredible" and "preposterous" (v. 82, 11/17/05, pp. 24-25). The presentation of such defenses—in lieu of seeking verdicts on lesser offenses—will likely result in appellate records erroneously reflecting the basis for numerous ineffective assistance of counsel claims.

Indeed, a routine means of attacking the effectiveness of counsel is to assert that counsel presented an incompetent defense. E.g. United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990) ("We have repeatedly refused to second-guess counsel's strategic decision to present or to forego a particular theory of defense when such decision was reasonable under the circumstances.") (citation omitted). Giving defendants final authority as to what defense or defenses to present at trial would necessarily give them effective control over how to investigate cases, what evidence to present, how to cross-examine witnesses, the instructions to request, and many other decisions that have always been left to the strategic and tactical decision of counsel. See Dunlap v. People, 173 P.3d 1054, 1065 (Colo. 2007) ("counsel has a duty to make reasonable investigations") (emphasis added) (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)).

A rule of law that forces competent attorneys to present incompetent defenses and practice their profession in substandard manners will give rise not

only to more postconviction proceedings concerning spurious ineffective assistance of counsel claims, see Miles v. Dorsey, 61 F.3d 1459, 1478 (10th Cir. 1995) ("we are troubled by how often we must confront meritless ineffective assistance of counsel cases."), but cause unwarranted damage to professional reputations. See Paters v. United States, 159 F.3d 1043, 1051 (7th Cir. 1998) (Coffey, J., dissenting in part and concurring in part) (recognizing "the disastrous effects that charges of incompetence" have). It could also force good attorneys from the criminal defense rolls and increase the difficulty trial courts have finding competent representation for indigent defendants. See Strickland, 466 U.S. at 690 (where the Supreme Court rejects a standard of review that will "discourage the acceptance of assigned cases").

Thus, the court of appeals incorrectly determined that there is a fundamental constitutional right for a defendant to determine the nature of his defense, which defense counsel must follow.

I. The trial court did not err in finding that Bergerud waived his right to counsel.

Because Bergerud's trial counsel did not act improperly in determining what theory of defense to put forward in opening statement, there was no legal impediment to the trial court finding that Bergerud's dissatisfaction with his

counsel was a dispute over trial strategy, did not constitute a conflict of interest, and would likely reoccur if it appointed new counsel (see v. 75, pp. 20, 23-26, 34). Thus, the trial court was justified in refusing to appoint new counsel and requiring Bergerud to choose between continued representation by existing counsel and appearing pro se.

Finally, the trial court conducted repeated and full advisements on the pitfalls and the ability of Bergerud to proceed pro se in compliance with Arguello (e.g. v. 75, pp. 6-12). The appellate record thus supports the trial court's decision to allow Bergerud to dismiss his counsel and represent himself.

II. If there is a fundamental constitutional right for criminal defendants to determine the nature of their defense, this Court should devise procedures for effectuating that right.

Should this Court determine that criminal defendants have a fundamental constitutional right to determine whether to present innocence-based defenses, then that is a right that should only be waived in a knowing, voluntary, and intentional manner in a formal in-court proceeding. See Curtis, 681 P.2d at 514-15 ("courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver"). The lack of such hearings in all Colorado criminal cases heretofore suggests that many Colorado

convictions are subject to attack under the holding in this case, and there is nothing in the opinion that would discourage defendants from doing so.

As this Court did in Curtis concerning the right to decide whether to testify, if there is a fundamental constitutional right to choose to present an innocence-based defense, then this Court should exercise its supervisory powers to devise procedures to effectuate that right. See Colo. Const. Art. VI § 2(1) ("The supreme court . . . shall have a general superintending control over all inferior courts . . . ."); § 13-2-109(1), C.R.S. (2008) ("The supreme court has the power to prescribe . . . rules of pleading, practice, and procedure with respect to all proceedings in all criminal cases . . . .").

Because defenses must be provided to the prosecution well in advance of trial, see Crim.P. 16(II)(c) & (d), advisements on the fundamental right of defendants to determine whether to present an innocence-based defense must be made well before then so defense attorneys can meet with their clients and take direction from them as to what defense or defenses should be presented. From the viewpoint of competent defense attorneys and the prosecution, such hearings would be necessary in order to provide defense counsel with protection from ineffective assistance of counsel claims that they devised or presented incompetent defenses, and the prosecution with the means of rebutting such allegations.

CONCLUSION

For these reasons, this Court should reverse the opinion of the court of appeals and remand the case to that court for resolution of an issue the court of appeals did not address.

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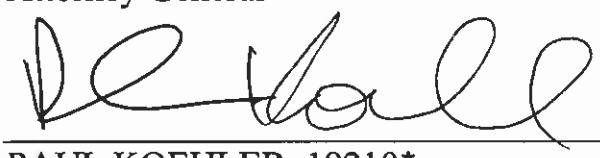

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PEOPLE'S OPENING BRIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 18th day of May, 2009, addressed as follows:

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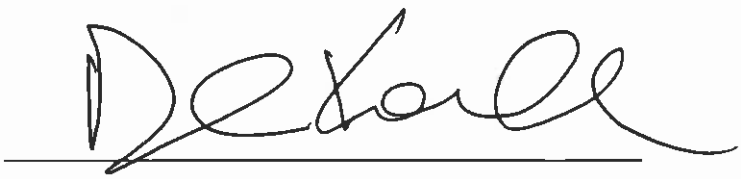

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