SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT JUL 20 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 06CA13 THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ALLEN BERGERUD, Respondent.	▲ COURT USE ONLY ▲ Case No.: 08SC936
JOHN W. SUTHERS, Attorney General PAUL KOEHLER, First Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5547 FAX: (303) 866-3955 E-Mail: paul.koehler@state.co.us Registration Number: 19210 *Counsel of Record	
PEOPLE'S REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of CAR. 28 and CAR 32 concerning reply briefs, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that the brief complies with CAR 28(g) because it contains 993 words.

The primary dispute between the parties concerns whether criminal defendants have a fundamental constitutional right to direct their counsel to present specific defenses once they have pled not guilty.

The acknowledged fundamental constitutional rights over which mentally competent criminal defendants have complete control—whether to plead guilty, waive a jury trial, testify, and take an appeal—share two primary attributes. See Florida v. Nixon, 543 U.S. 175, 187 (2004) (setting forth the already recognized fundamental constitutional rights over which defendants have complete control); Arko v. People, 183 P.3d 555, 558 (Colo. 2008) (same).

First, the defendant's choice is of the "yes or no" variety: plead guilty or not guilty, have a jury or the trial court be the factfinder, testify or remain silent, take an appeal or accept the trial's result. None of the fundamental constitutional rights allow defendants to make one or more choices from multi-choice menus of options, or result in defendants being given the ability to micromanage details about their defense.

Second, the fundamental constitutional rights over which the defendant has complete control by definition give defendants complete control over what decision to make: again, whether to plead guilty or not guilty, have a jury or not,

testify or remain silent, appeal or not appeal. In all of these situations, the defendant has the final say in what course to take.

The choice of what defense to make to a criminal charges does not share either attribute. There is an ample number of defenses—both traditional and statutory affirmative ones—that can be made to criminal charges. See § 18-1-701, C.R.S. (2008), et seq. (setting forth the various affirmative defenses available in criminal trials). A defense strategy does not need to avail itself of only one; theoretically, more than one can be presented. Forcing counsel to present defenses that counsel's professional judgment deems unwarranted, unwise, or unethical would necessarily result in giving defendants the ability to exert detailed control over the actions of professionally trained and experienced advocates, advocates who are expected to practice their profession to the highest level of their abilities.

Furthermore, the presentation of defenses to criminal charges is subject to numerous limitations, the violation of which can prevent assertion of the defenses and preclude the admission of evidence in support of them. For instance, defendants are subject to notice and proof requirements before they can present defenses such as alibi and identifying another person as the one who committed the crime in question. E.g. § 16-6-102, C.R.S. (2008) (alibi defense notice requirements); People v. Ornelas, 937 P.2d 867, 872 (Colo. App. 1996) (alternate

suspect defense proof requirements). Defendants must present competent evidence as to each element of an affirmative defense before they can receive instructions on them. See People v. Grant, 174 P.3d 798, 804 (Colo. App. 2007). Defendants' own statements or testimony can prevent their assertion of otherwise available defenses. See People v. Garcia, 826 P.2d 1259, 1263-64 (Colo. 1992). Ethical duties likewise can prevent attorneys from presenting defenses that their clients want them to present. See Nix v. Whiteside, 475 U.S. 157 (1986) (concerning assertion of defenses based on perjured testimony).

These factors suggest that the decision over which defenses to present at trial is not a fundamental constitutional right over which defendants have absolute control. That is because defendants have no absolute right—constitutional or otherwise—to demand the affirmative presentation of any particular traditional or statutory affirmative defense. Rather, as opposed to being a fundamental right over which the defendant has complete control, the determination of what defense to present is ultimately a decision for counsel to make, much like the decisions counsel must make when determining whether and how to cross-examine witnesses. See New York v. Hill, 528 U.S. 110, 114 (2000) ("[D]ecisions by counsel are generally given effect as to what arguments to pursue, ... Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.")

Bergerud argues that there is no reason to create a detailed structure for advising defendants that they have a right to exclusive control over the defense or defenses their counsel will present, and that courts should only intervene if the issue arises during trial as evidenced by an active dispute between counsel and client. But if the right to choose which defense or defenses to present at trial is a fundamental constitutional right over which defendants have final decision-making authority, then defendants—and many criminal defense practitioners—need to be advised that right exists so that defendants do not waive it by inaction, or that counsel do not usurp it through ignorance. See People v. Curtis, 681 P.2d 504, 514 (Colo. 1984) (holding that because "courts do not presume acquiescence in the loss of fundamental constitutional rights, and . . . indulge every reasonable presumption against waiver," formal proceedings to advise defendants of the right to testify are necessary).

Further, if this Court is going to determine that either constitution requires attorneys to take direction from their clients as to what defense or defenses to present to a charge once a not guilty plea is entered—no matter counsel's professional training and experience—then this Court must devise proceedings that affirmatively set forth in the appellate record why counsel is presenting a defense that otherwise appears the result of ineffective assistance of counsel or plain error.

See Kimmelman v. Morrison, 477 U.S. 365, 382 (1986) (defendants are entitled to new trials if their convictions were the result of their counsel's "gross incompetence"); United States v. Frady, 456 U.S. 152, 163 (1982) (trial occurrences constitute plain error where the "trial judge and prosecutor were derelict in countenancing" them).

This Court should therefore hold that criminal defendants do not have a fundamental constitutional right to direct their counsel to present an "innocence-based defense," irrespective of counsel's professional judgment.

CONCLUSION

For these reasons, this Court should reverse the court of appeals' opinion and remand the case to that court for further proceedings.

JOHN W. SUTHERS
Attorney General

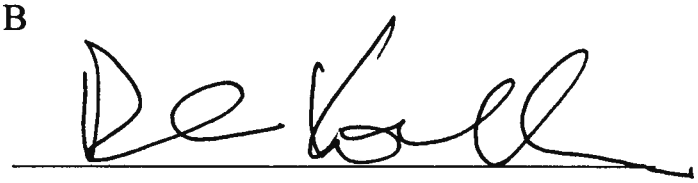
PAUL KOEHLER, 19210*
First Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Petitioner

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PEOPLE'S REPLY BRIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 20th day of July, 2009, addressed as follows:

Hollis A. Whitson
Eric A. Samler
Samler and Whitson, PC
1127 Auraria Parkway, Suite 201B
Denver, CO 80204



AG ALPHA: DA SS QGEE
AG File: \\S_DOL_2\DATA\AP\APKOEHPE\BERGERUD2009REPLY.DOC