No. 14-631

IN THE

Supreme Court of the United States

JUAN MANZANO,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Indiana

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

When a defendant who pled guilty claims his counsel was constitutionally ineffective for failing to investigate or advise about an available defense, must he show some likelihood the defense would have succeeded at trial to be entitled to relief?

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STATEMENT OF THE CASE

One tragic evening, Petitioner Juan Manzano's now ex-wife entrusted him with the care of their two children while she worked an overnight shift. Pet. App. 1a. After his six-year-old daughter, B.M, and his four-year-old son went to sleep, Manzano left the house, went to several bars with co-workers Daniel Garza and Casimiro Loera, and drank alcohol. *Id.*; *see also* Pet. App. 9a, 11a n.4. When he returned home sometime after midnight, he took B.M. from her bed, stripped her naked, and put her in his bed. Pet. App. 1a. He then raped her. Pet. App. 1a–2a.

The next morning, after his wife returned home, Manzano went to work. Pet. App. 2a. Shortly thereafter, B.M.'s mother discovered the blood on her daughter's legs and called the police. *Id.* She took B.M. to the emergency room, where the child had emergency surgery to repair a tear from the opening of her vagina to the opening of her rectum. *Id.* B.M. was hospitalized for several days. *Id.*

After B.M. identified Manzano as her attacker, police arrested him. *Id.* In his statement to police, he initially claimed he did not remember the attack, but he then said that if B.M. claimed he raped her, he must have done so. *Id.* He later admitted he attempted to penetrate her and remembered her saying "no . . . over and over." *Id.* (quoting Appellant's App. 243–45).

The State charged Manzano with Class A felony child molesting, Class A felony rape, Class B felony

incest, and Class C felony battery. *Id.*; *see also* Ind. Code §§ 35-42-4-3, -42-4-1, -46-1-3, -42-2-1 (1996).

When Manzano committed his offense, in September 1996, Indiana law permitted a defendant to introduce evidence of voluntary intoxication to negate the mens rea element of rape. *See Sanchez v. State*, 749 N.E.2d 509, 512 (Ind. 2001). In 1997, the Indiana General Assembly eliminated voluntary intoxication as a defense to any criminal charge. *See id.* at 513; *see also* Act of May 13, 1997, 1997 Ind. Legis. Serv. P.L. 210-1997 (S.E.A. 244) (West), *codified at* Ind. Code § 35-41-2-5.

Manzano's trial counsel, Douglas Long, at first filed a notice of intent to pursue a defense of voluntary intoxication. Pet. App. 2a, 21a–22a. Yet evidence of Manzano's level of intoxication on the night he raped his daughter was conflicting. Garza told police Manzano drank several alcoholic beverages and was drunk but able to walk without assistance. Pet. App. 9a. The police officers who arrested Manzano the following morning stated he did not appear to be under the influence of alcohol. *Id.* They administered a breathalyzer test, and it showed he had a blood alcohol level of zero. *Id.* Accordingly, "when it became evident that there was no evidence to support intoxication as a viable defense," Long ultimately "abandoned that theory." Pet. App. 27a. And when all other potential defenses fell apart, Manzano agreed to plead guilty to Class A felony rape. Pet. App. 2a, 30a.

At Manzano's guilty plea hearing, Long explained two reasons why he ultimately recommended against

pursuing a voluntary intoxication defense. Guilty Plea Hr'g Tr. 26:13–:19. First, counsel believed jurors were generally not receptive to it. *Id.* Second, counsel felt it would be hard to prove the defense because Manzano's blood alcohol level tested at zero twelve to sixteen hours after the offense. *Id.* He stated he advised Manzano to plead "open"—*i.e.*, without an agreement as to sentence—because the case against him was strong and the court might weigh a guilty plea heavily as a mitigating factor at sentencing. Guilty Plea Hr'g Tr. 29:10–30:2.

Manzano followed this advice and pleaded guilty to one count of Class A felony rape, with the provisions that (1) the remaining counts would be dismissed on double jeopardy grounds and (2) his sentence would be left to the trial court's discretion. Pet. App. 28a. The trial court sentenced Manzano to fifty years. Pet. App. 2a. Manzano appealed, but the Indiana Court of Appeals affirmed. Pet. App. 2a–3a, 36a.

Manzano then filed a petition for post-conviction relief in the Madison Circuit Court, arguing that his trial counsel was constitutionally ineffective. Pet. App. 23a; *see also* Ind. Post-Conviction Rule 1, § 1(a) (permitting a defendant to file a petition for relief if he claims his "conviction or sentence is . . . subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy"). Manzano alleged Long's assistance was ineffective because, among other alleged errors, Long failed to investigate thoroughly the viability of Manzano's voluntary intoxication defense by

interviewing Garza and Loera and having Manzano's blood sample tested for the presence of drugs besides alcohol. Pet. App. 26a, 28a–32a. Manzano also argued Long should have explored a possible defense of *involuntary* intoxication because "[t]he fact Manzano could not remember what happened coupled with the fact his BAC test read 'zero' leads to the logical conclusion he could have been slipped a drug without his knowledge or consent." App. 56–57. The post-conviction court denied his petition. Pet. App. 35a.

Manzano appealed, but the Indiana Court of Appeals affirmed. Pet. App. 17a. The court framed the inquiry as "whether there is a reasonable probability that Manzano would have succeeded at trial" if he had not pled guilty, and concluded there was "little to no probability that Manzano would have prevailed at trial" in light of the evidence against him. Pet. App. 8a–9a. Manzano "did not deny raping his daughter, and B.M. identified him as the perpetrator of the offense. Moreover, given the extensive injury to six-year-old B.M.'s vagina and rectum, Manzano does not dispute the evidence that he penetrated his daughter's vagina with his penis." Pet. App. 9a.

As to Manzano's specific claims, the panel agreed with trial counsel that Manzano would not likely have succeeded at trial with a defense of voluntary intoxication because the breath test showed no alcohol in his system. Pet. App. 9a–10a. The court also rejected Manzano's claim that his trial counsel should have pursued a defense of involuntary intoxication, noting that although Manzano had

claimed he did not remember raping his daughter, he had also admitted he remembered trying to penetrate her while she said "no . . . over and over." Pet. App. 10a (quoting Appellant's App. 243–45).

The Indiana Supreme Court denied Manzano's petition for discretionary review. Pet. App. 18a.

REASONS FOR DENYING THE PETITION

Manzano argues that Indiana Courts engage in some wild aberration by asking whether a defendant claiming ineffective assistance at the guilty plea stage would have been reasonably likely to succeed at trial. But where, as here, a defendant alleges—but has never established—that counsel insufficiently investigated or advised him concerning an available defense, there is no other meaningful way to measure prejudice; the only reason to go to trial is to obtain acquittal. Perhaps that is why this Court has encouraged, and the vast majority of jurisdictions have used, a likelihood-of-success test to determine prejudice in available-defense cases.

To portray Indiana as an outlier, Manzano includes in his analysis cases from other states where counsel allegedly was deficient in other respects—for example, at the guilty plea stage by failing to provide sufficient advice about the consequences of a plea. Yet Indiana courts do not require a likelihood of success in such plea-consequences cases or in other ineffective assistance of counsel cases; rather, available-defense cases constitute an analytically distinct category. And in that respect, Indiana is well within not only the

Court's Sixth Amendment doctrine but the mainstream of state and lower federal court decisions as well. Accordingly, there is no reason for the Court to take this case.

I. Based on *Hill*, Indiana Courts Require Reasonable Likelihood of Success at Trial only in Available-Defense Cases

A defendant wishing to obtain reversal of a conviction based upon ineffective assistance of counsel must show not only "that counsel's performance was deficient," but also "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When the defendant seeks relief from a guilty plea, the prejudice inquiry requires a showing of "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *Hill* tackled a claim that counsel failed to provide complete and correct advice about the adverse consequences of a guilty plea. *Id.* at 53. But the Court also addressed the standard to apply when "the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged." *Id.* at 59. In such available-defense cases, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.*

The Indiana Supreme Court has reasonably read that statement to mean that, in available-defense cases, "*Hill* . . . requires a showing of a reasonable

probability of success at trial." *Segura v. State*, 749 N.E.2d 496, 503 (Ind. 2001). *Segura*, like *Hill*, was a plea-consequences case, so it was decided according to whether the petitioner had shown, "by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead" (he had not). *Id.* at 507. But the *Segura* court—again, like the *Hill* court—also set forth a standard for available-defense cases: "a reasonable probability of success at trial." *Id.* at 503.

Accordingly, in subsequent cases addressing whether trial counsel was constitutionally deficient for failing to investigate or advise concerning an available defense, Indiana courts have required the defendant to prove likelihood of success at trial. *See, e.g.*, *Helton v. State*, 907 N.E.2d 1020, 1025 (Ind. 2009) (rejecting defendant's claim of ineffective assistance of counsel for failure to move to suppress evidence when defendant failed to show his insufficient evidence defense would have been reasonably likely to succeed at trial if the motion had been granted); *Smith v. State*, 770 N.E.2d 290, 296 (Ind. 2002) (granting post-conviction relief when defendant "would have had a more favorable outcome at trial" had his attorney advised him to use the "single larceny rule" defense); *Soucy v. State*, 22 N.E.3d 683, 686 (Ind. Ct. App. 2014) (granting post-conviction relief when defendant would have been likely to succeed at trial had his attorney advised him he had a "defense of actual innocence"); *McCullough v. State*, 987 N.E.2d 1173, 1177 (Ind. Ct. App. 2013) (rejecting defendant's claim of ineffective assistance of counsel for failure to raise various

defenses when defendant failed "to show a reasonable probability of success at trial"); *Ivester v. State*, No. 33A04–1209–PC–491, 2013 WL 4727536, at *3 (Ind. Ct. App. Sept. 3, 2013) (unpublished opinion) (concluding, where defendant claimed he had received ineffective assistance of counsel because his attorney did not investigate a possible entrapment defense, that the defendant failed to show prejudice because "a number of specific facts in [the defendant's] case negated the possibility of entrapment as a defense"); *Williams v. State*, No. 43A04–1206–PC–322, 2013 WL 2368310, at *4 (Ind. Ct. App. May 29, 2013) (unpublished opinion) (denying post-conviction relief on a claim of ineffective assistance of counsel for failure to raise an intoxication defense because he "failed to demonstrate that he would not have been convicted had he gone to trial").

But as *Segura* demonstrates, Indiana courts do not require such a showing in *all* guilty-plea ineffective-assistance cases, much less ineffective-assistance cases *in toto*. *Segura*, 749 N.E.2d at 507. In the plea-consequences cases that Manzano cites, Indiana courts did not apply a likelihood-of-success test. *See Honaker v. State*, No. 39A01–1306–PC–291, 2014 WL 2202760, at *8 (Ind. Ct. App. May 28, 2014) (unpublished opinion) (stating petitioner must show the decision to plead was "influenced by counsel's error" (quoting *Segura*, 794 N.E.2d at 504–05)); *Fields v. State*, No. 15A01–1301–PC–3, 2013 WL 5968810, at *3 (Ind. Ct. App. Nov. 7, 2013) (unpublished opinion) (holding petitioner "must allege special circumstances or objective facts supporting the conclusion that the decision to plead

guilty was driven by the erroneous advice" (quoting *Segura*, 794 N.E.2d at 507 (internal quotation marks omitted))).

Even when Indiana courts cite or quote the prejudice standard as articulated in *Segura*, they do not apply the likelihood-of-success test outside the available-defense context. *See Craig v. State*, No. 48A04–1311–PC–568, 2014 WL 4177257, at *7 (Ind. Ct. App. Aug. 22, 2014) (unpublished opinion) (finding defendant was not prejudiced by his trial counsel's failure to notice that one of the charges against him was defectively worded because the defendant did not allege he would not have pled guilty but for counsel's error); *Romero v. State*, No. 02A03–1208–PC–379, 2014 WL 3906199, at *4 (Ind. Ct. App. Aug. 11, 2014) (unpublished opinion) (finding defendant's trial counsel was not ineffective for failing to move to dismiss the charges against him); *see also Jorman v. State*, No. 49A04–1203–PC–163, 2013 WL 4010999, at *4 (Ind. Ct. App. Aug. 7, 2013) (unpublished opinion) (finding, where the basis for pro se petitioner's ineffective assistance claim was unclear, that petitioner could not possibly show prejudice because his sentence pursuant to the plea agreement was the shortest sentence he could have received at trial); *O'Neal v. State*, No. 20A03–1302–PC–58, 2013 WL 5676280, at *3 (Ind. Ct. App. Oct. 18, 2013) (unpublished opinion) (finding defendant's trial counsel was not ineffective for failing to investigate his case because defendant's decision to plead guilty "foreclosed" further investigation); *Vazquez v. State*, No. 79A02–1207–PC–545, 2013 WL 5303731, at *6 (Ind. Ct. App. Sept. 19, 2013) (unpublished opinion) (finding trial counsel

was not ineffective for failing to make various motions and objections).

Indiana courts thus apply the likelihood-of-success test only to available-defense cases, not to *all* claims of guilty-plea-stage ineffective assistance of counsel (much less all ineffective assistance claims generally). This is a reasonable understanding of *Hill*, particularly given that the whole point of requiring counsel to provide investigation and advice concerning available defenses is to afford the defendant a chance at acquittal. If no such chance exists, it is hard to understand how the defendant was injured.

II. By Requiring a Reasonable Likelihood of Success at Trial in Available-Defense Cases, Indiana Courts Remain Well Within the National Mainstream

Indiana is just one of many jurisdictions to inquire whether an un-investigated or un-advised defense would have succeeded at trial before granting relief for ineffective assistance of counsel at the guilty plea stage. Many courts understand that, in available-defense cases, the implicit claim is that absent counsel's errors, the defendant would have gone to trial because the defense would have been reasonably likely to succeed. The consistency between Indiana's doctrine and that of other States refutes the notion that this standard needs review.

A. Indiana's test for available-defense claims squares with the federal circuits and the vast majority of other states that have addressed the issue

The many jurisdictions to have addressed application of *Hill* to available-defense claims almost uniformly frame the prejudice inquiry as the Indiana Supreme Court does: Whether the defense had a reasonable chance of success at trial.

1. Six federal circuits have applied or endorsed a likelihood-of-success test in available-defense cases. *See Riviezzo v. United States*, No. 91–1835, 1992 WL 75142, at *2 (1st Cir. Apr. 13, 1992) (stating prejudice "turn[ed] on whether the defense 'likely would have succeeded at trial'"); *Panuccio v. Kelly*, 927 F.2d 106, 109 (2d Cir. 1991) (rejecting ineffective assistance claim because of "a high likelihood that the intoxication defense would not have succeeded at trial"); *Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984) (finding no prejudice because it was "inconceivable" that defendant would have been acquitted at trial); *Gumangan v. United States*, 254 F.3d 701, 705 (8th Cir. 2001) (rejecting available-defense claim because "duress or coercion and battered women's syndrome" were "not likely to succeed" at trial); *Smith v. Mahoney*, 611 F.3d 978, 990 (9th Cir. 2010) (finding no prejudice where defendant "had little to no chance of prevailing on an affirmative defense that his voluntary intoxication negated the required *mens rea*"); *Long v. United States*, 883 F.2d 966, 968 n.4 (11th Cir. 1989) (citing *Hill* for the proposition that to substantiate an ineffective assistance claim, "appellant would have

to show . . . that the defense was likely to have succeeded at trial").

Contrariwise, Manzano makes much of *Payne v. Brown*, 662 F.3d 825 (7th Cir. 2011), which considered the habeas claims of an Indiana defendant who kidnapped and raped a boy, pled guilty to four felony charges, and got a fifty-year sentence. *Id.* at 827. That habeas petitioner claimed his counsel was ineffective for failing to get his plea agreement in writing and for advising him incorrectly about the sentence he could receive. *Id.* Observing that the Indiana Court of Appeals rejected that argument because the defendant "surely would have been convicted, had he stood trial, so that it just didn't matter what his lawyer said or what he believed," the Seventh Circuit declared, "[t]hat was a mistake." *Id.* at 828. But the state court got Payne's case wrong only because it applied *Segura* incorrectly, not because *Segura* itself was incorrectly decided. Payne sought relief on the basis of alleged incorrect advice about plea consequences, so under *Segura*, he needed only to show that he would have gone to trial if he had been properly advised, not that he would have been likely to prevail. *Payne*, therefore, does not represent a meaningful dispute with Indiana doctrine.

Other Seventh Circuit cases demonstrate that court's acceptance of the likelihood-of-success test in available-defense cases. As noted, in *Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984), the court concluded the defendant was not prejudiced by his lawyer's failure to advise him regarding an intoxication defense because it was "inconceivable"

that he "would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." *Id.* at 375. And just recently that court rejected an available-defense claim because it was not "reasonably probable that the self-defense argument *would have succeeded* or that it would have been objectively reasonable to reject the plea deal." *Warren v. Baenen*, 712 F.3d 1090, 1101–02 (7th Cir. 2013) (emphasis added).

2. Eleven state courts and the District of Columbia have also used a likelihood-of-success test for prejudice in available-defense cases.

For instance, the D.C. Court of Appeals has "required [a showing of] prejudice" in available-defense cases based on "how the assumed 'affirmative defense[s] likely would have succeeded at trial.'" *Johnson v. United States*, 613 A.2d 888, 894 (D.C. 1992) (alteration in original) (quoting *Hill*, 474 U.S. at 59). The Wyoming Supreme Court found no prejudice in a case featuring "absolutely no argument that the outcome of a trial would have produced a more advantageous result than the plea agreement." *Rutti v. State*, 100 P.3d 394, 408 (Wyo. 2004). And the Michigan Court of Appeals recently rejected an available-defense claim because "[the defendant] was required to show that the defense would have been successful if she had gone to trial in that she would have received a better outcome than she received after pleading guilty." *People v. Shimel*, No. 312375, 2013 WL 4006549, at *9 (Mich. Ct. App.

Aug. 6, 2013) (unpublished opinion), *appeal denied*, 840 N.W.2d 312 (Mich. 2013).

Other courts have undertaken similar analyses in available-defense cases. *See Galbraith v. State*, No. 37824, 2011 WL 11038958, at *4 (Idaho Ct. App. May 17, 2011) (unpublished opinion) (finding no prejudice where defense "would not have [been] successful"); *People v. Jones*, 579 N.E.2d 829, 837 (Ill. 1991) (finding no prejudice because defendant "would not have succeeded in establishing the affirmative defense of insanity at trial"); *Commonwealth v. Calderon*, No. 11–P–188, 2013 WL 1435151, at *1 (Mass. App. Ct. 2013) (unpublished opinion) (finding no prejudice where "there was sufficient other evidence to convict" and counsel's error was "not alone enough to establish a substantial ground of defense at trial"); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (finding no prejudice where state "had a very strong case"); *Anderson v. State*, 747 S.W.2d 281, 284 (Mo. Ct. App. 1988) (finding no prejudice because defendant's "ability to recall details of the assault would have negated a defense of intoxication"); *Jeter v. State*, 417 S.E.2d 594, 596 (S.C. 1992) (finding no prejudice without "evidence of insanity or a showing that with the exercise of due diligence, an insanity defense could have been developed"); *McDonough v. Weber*, 859 N.W.2d 26, 42 (S.D. 2015) (finding no prejudice "[g]iven the relative weakness of [the] self-defense claim"); *Howell v. State*, 185 S.W.3d 319, 330 (Tenn. 2006) (conducting a likelihood-of-success analysis to determine prejudice from failure to pursue mental health defense); *State v. Garcia*, 791 P.2d 244, 248 (Wash. Ct. App. 1990) ("In order to show that he was

prejudiced by counsel's allegedly deficient performance, Garcia must, as a threshold matter, make some showing that he did in fact have such viable defenses.").

Five more state courts, though they have not expressly adopted a likelihood-of-success test, have implicitly used that analysis when *rejecting* available-defense claims. *See, e.g.*, *Key v. State*, 891 So. 2d 353, 376–77 (Ala. 2002) (holding that counsel's failure to present defenses was neither deficient nor prejudicial because the defendant "did not have a valid insanity defense"); *Cranford v. State*, 797 S.W.2d 442, 444 (Ark. 1990) (requiring facts indicating "whether they had a successful defense . . . available"); *People v. Hamilton*, No. D039970, 2003 WL 22664210, at *7 n.6 (Cal. Ct. App. Nov. 12, 2003) (unpublished opinion) (concluding that "consideration of the probable outcome of a trial had Hamilton's counsel not performed deficiently was proper under *Hill*"); *State v. Szczygiel*, 279 P.3d 700, 703 (Kan. 2012) (finding no prejudice where newly discovered evidence did not support defendant's claim of innocence); *Adkins v. State*, No. 62173, 2013 WL 5719104, at *2 (Nev. Oct. 16, 2013) (finding neither deficiency nor prejudice because Adkins "failed to demonstrate a reasonable probability of a different outcome had counsel sought to present an insanity defense").

Two others have implicitly evaluated likelihood of success when *granting* (or permitting to proceed) available-defense claims. *State v. O'Donnell*, 89 A.3d 193, 208 (N.J. Super. Ct. App. Div. 2014) ("[The defendant's] readiness to go to trial is plausible,

because she had a plausible defense that she could present through her expert's and perhaps her own testimony."); *People v. Qi*, 822 N.Y.S.2d 355, 356 (N.Y. App. Term 2006) (remanding for hearing on whether a potential constitutional defense "likely would have succeeded at trial").

3. Finally, two other states that apply a likelihood-of-success test in available-defense cases, Connecticut and Mississippi, warrant special mention because Manzano incorrectly asserts that their courts have eschewed that standard.

Regarding Connecticut, in *Copas v. Commissioner of Correction*, 662 A.2d 718 (Conn. 1995), the court stated that in an available-defense case, "[t]o satisfy the *Hill* standard, a defendant must prove that, but for defense counsel's deficient performance, there is a reasonable probability that he would have pleaded not guilty and proceeded to trial *on the basis of the likelihood that his defenses would succeed* in providing a more favorable outcome." *Id.* at 731 n.10 (emphasis added). Even so, Manzano cites *Johnson v. Commissioner of Correction*, 941 A.2d 248 (Conn. 2008), *Washington v. Commissioner of Correction*, 950 A.2d 1220 (Conn. 2008), and *Crawford v. Commissioner of Correction*, 982 A.2d 620 (Conn. 2009) as rejecting the likelihood-of-success standard. But *Johnson* and *Washington* are both plea-consequences cases, and the *Crawford* defendant did not make any ineffective assistance claim whatever, so it is hardly significant that the court decided those cases "without even mentioning *Copas*." Pet. 25; *see also Johnson*, 941 A.2d at 254; *Washington*,

950 A.2d at 1247; *Crawford*, 982 A.2d at 635–36. Hence, *Copas* remains good law.[1]

Regarding Mississippi, in *Mowdy v. State*, 638 So. 2d 738 (Miss. 1994), the court rejected an available-defense claim because "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial," and the petitioners failed to allege facts which "would show the likelihood of success at trial." *Id.* at 742 (quoting *Hill*, 474 U.S. at 60). Manzano cites three subsequent Mississippi cases that supposedly reject *Mowdy*, but two are not available-defense cases. *See Burrough v. State*, 9 So. 3d 368, 375 (Miss. 2009) (alleging ineffective assistance of counsel for failure to object to a sentence longer than that recommended in the plea agreement); *Reeder v. State*, 783 So. 2d 711, 718–19 (Miss. 2001) (alleging deficient counsel for incorrect penal-consequences advice). And the third was inexplicably analyzed under deferential review with no mention of any substantive legal standard. *State v. Pittman*, 744 So. 2d 781, 788 (Miss. 1999). Notably, the Mississippi Court of Appeals recently reaffirmed *Mowdy*'s likelihood-of-success standard in an available-defense case. *Kelly v. State*, 55 So. 3d 1147, 1150 (Miss. Ct. App. 2011) (concluding an available-defense "claim fails on its face due to its failure to delineate facts that, if proven, would show the likelihood of success at trial").

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[1] A lower Connecticut appellate court recently called *Copas* into question, but the Connecticut Supreme Court has granted review in that case. *Carraway v. Comm'r of Corr.*, 72 A.3d 426 (Conn. App. Ct. 2013), *cert. granted*, 95 A.3d 521 (Conn. 2014).

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As these cases show, many jurisdictions use likelihood of success at trial to gauge prejudice in available-defense cases. Indiana's use of this test is neither anomalous nor unreasonable.

B. Cases Manzano describes as contrary to the decision below either address dissimilar claims or ultimately turn on likelihood of success at trial

Notwithstanding the above list of cases that are consistent with Indiana's approach to available-defense claims, Manzano cites cases from each state and federal circuit that supposedly demonstrate that Indiana and Rhode Island alone require that such claims be substantiated with some likelihood of success at trial. But most of those cases are not available-defense cases and thus not instructive here. The few cases that are on point demonstrate that, as a practical matter, even when courts frame the inquiry as whether the defendant would have chosen to go to trial rather than plead guilty, they routinely answer that question by considering whether the defense would have been successful at trial.

1. Most of the cases Manzano cites are not on point because they are not available-defense cases; rather, they are either plea-consequences cases or they concern claims of deficient performance otherwise unrelated to available defenses.

a. For example, several of Manzano's cases concern claims of inadequate or incorrect advice

regarding a potential sentence. *See Payne v. Brown*, 662 F.3d 825, 827, 831 (7th Cir. 2011) (rejecting defendant's claim of ineffective assistance of counsel for failure to advise of maximum sentence); *State v. Ysea*, 956 P.2d 499, 503 (Ariz. 1998) (en banc) (concluding counsel was deficient for incorrectly advising defendant that he could face the death penalty if he went to trial); *State v. Tate*, 710 N.W.2d 237, 241 (Iowa 2006) (declining on direct review to consider defendant's claim that counsel was ineffective for failing to explain correctly the sentence provision of his plea agreement); *Roberts v. State*, 276 S.W.3d 833, 836–37 (Mo. 2009) (en banc) (remanding claim that counsel incorrectly advised that prosecution would not oppose institutional treatment in exchange for guilty plea); *State v. Cobell*, 86 P.3d 20, 23 (Mont. 2004) (rejecting defendant's claim of ineffective assistance of counsel for failure to advise of mandatory minimum sentence); *Moen v. Peterson*, 824 P.2d 404, 409–10 (Or. 1991) (en banc) (remanding defendant's claim of ineffective assistance of counsel for failure to advise of the minimum sentence to the post-conviction court to give defendant the opportunity to present additional evidence of prejudice).

Others address counsel's failure to advise that a guilty plea could lead to deportation. *See Chhabra v. United States*, 720 F.3d 395, 407 (2d Cir. 2013); *United States v. Orocio*, 645 F.3d 630, 644 (3d Cir. 2011); *In re Resendiz*, 19 P.3d 1171, 1186 (Cal. 2001); *Aldus v. State*, 748 A.2d 463, 468 (Me. 2000); *Denisyuk v. State*, 30 A.3d 914, 919 (Md. 2011); *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012); *State v. Gaitan*, 37 A.3d 1089, 1092–93 (N.J. 2012);

People v. Hernandez, 1 N.E.3d 785, 786 (N.Y. 2013); *Bahtiraj v. State*, 840 N.W.2d 605, 609–10 (N.D. 2013); *State v. Sandoval*, 249 P.3d 1015, 1020 (Wash. 2011) (en banc).

Still more involve counsel's failure to advise of other collateral consequences of pleading guilty. *Ex parte Coleman*, 71 So. 3d 627, 632–33 (Ala. 2010) (remanding for an evidentiary hearing on whether the defendant would have gone to trial had counsel properly advised him regarding his eligibility for work release or parole); *State ex rel. Clement v. Whitley*, 678 So. 2d 538, 538 (La. 1996) (remanding for an evidentiary hearing on whether counsel's incorrect statement that defendant could still appeal the denial of his suppression motion even if he pled guilty constituted ineffective assistance); *In re Fisher*, 594 A.2d 889, 896 (Vt. 1991) (upholding as not clearly erroneous the trial court's finding that counsel's failure to advise the petitioner of when he would be eligible for parole was not prejudicial); *People v. Fonville*, 804 N.W.2d 878, 896 (Mich. Ct. App. 2011) (granting relief because counsel's failure to advise defendant of sex offender registration requirement was deficient and prejudicial); *Commonwealth v. Hickman*, 799 A.2d 136, 141–42 (Pa. Super. Ct. 2002) (granting relief because counsel's failure to tell defendant how his plea would impact his eligibility for boot camp was deficient and prejudicial); *Calvert v. State*, 342 S.W.3d 477, 490–91 (Tenn. 2011) (granting relief because counsel's failure to advise of mandatory lifetime community supervision requirement was deficient and prejudicial); *People v. Garcia*, 815 P.2d 937, 938 (Colo. 1991) (en banc) (remanding for an evidentiary

hearing on whether defendant would have gone to trial had counsel properly advised him that a guilty plea would bar his civil claims).

b. Many of Manzano's cases concern various other allegations of deficient performance unrelated to available defenses or plea consequences. Two involved alleged errors during sentencing—*after* the defendant had already pleaded guilty. *See Burrough v. State*, 9 So. 3d 368, 375 (Miss. 2009) (holding that counsel's failure to object to sentence greater than recommendation was not prejudicial because the alleged error took place after the defendant had pleaded guilty); *Gonder v. State*, 382 S.W.3d 674, 678 (Ark. 2011) (holding that the defendant did not allege prejudice by claiming that he would have gotten a lower sentence but for counsel's failure to tell the judge that the murder victim had a gun).

And a handful addressed other miscellaneous alleged errors. *See McKeeth v. State*, 103 P.3d 460, 463–64 (Idaho 2004) (granting relief because counsel's clerical error was deficient performance that prejudiced the defendant); *People v. Rissley*, 795 N.E.2d 174, 205 (Ill. 2003) (holding that counsel's failure to advise of bench trial option was not prejudicial because, among other reasons, the defendant did not allege that he was innocent or that he had any viable defenses); *State v. Tinney*, 748 S.E.2d 730, 737–38 (N.C. Ct. App. 2013) (holding that counsel's incorrect advice regarding the chance that a venue transfer decision would be reviewed on appeal was not prejudicial because the trial judge subsequently gave the defendant the correct information); *Braun v. State*, 909 P.2d 783, 794

(Okla. Crim. App. 1995) (finding no prejudice from failure to move for change of venue because it likely would "not have been successful" and if it had been, defendant likely would have received the same sentence); *Stalk v. State*, 681 S.E.2d 592, 594 (S.C. 2009) (finding no prejudice when defendant alleged his attorney's lack of preparation made him feel pressured to plead guilty because defendant failed to present specific evidence of what counsel should have done differently); *Floyd v. State*, 144 P.3d 1233, 1239 (Wyo. 2006) (finding no prejudice when defendant alternately complained his attorney spent not enough and then too much time preparing for trial because defendant failed to show "that the outcome of trial would not have been more advantageous than the benefits of his plea bargain").

c. The remaining cases do not meaningfully address the issue of what constitutes prejudice in available-defense cases.

One resolved the available defense claim by holding that counsel was not deficient and thus conducted no prejudice analysis at all. *See Gordon v. United States*, 518 F.3d 1291, 1299, 1302 (11th Cir. 2008) (concluding that counsel was not ineffective for failing to object to a Rule 11 violation and the denial of the defendant's right to allocute, without reaching the issue of prejudice). Others addressed prejudice only in dicta. *State v. Hunter*, 143 P.3d 168, 176 (N.M. 2006) (rejecting defendant's claim that his counsel was ineffective for failing to pursue a lack of intent defense because defendant failed to show "a reasonably competent attorney would have pursued it"); *State v. Ketterer*, 855 N.E.2d 48, 63 (Ohio 2006)

(holding that counsel's decision to recommend an open plea rather than try to negotiate a sentence was not deficient performance); *Owens v. Russell*, 726 N.W.2d 610, 617 (S.D. 2007) (holding that counsel was not deficient for failing to move to suppress the defendant's confession or to advise defendant she was unlikely to receive the death penalty); *Benvenuto v. State*, 165 P.3d 1195, 1201–02 (Utah 2007) (holding that counsel's failure to advise of petitioner's rights under the Vienna Convention was not deficient).

A few did not involve ineffective assistance claims at all. *Crawford v. Comm'r of Corr.*, 982 A.2d 620, 635 (Conn. 2009) (observing that petitioner had "expressly disavowed" ineffective assistance claim); *Wilkins v. United States*, 754 F.3d 24, 26 (1st Cir. 2014) (denying defendant's request to withdraw his guilty plea based on newly discovered evidence); *Commonwealth v. Rodriguez*, 5 N.E.3d 519, 521 (Mass. 2014) (remanding for a hearing on whether newly discovered evidence entitled the defendant to withdraw his guilty plea).

And two were decided based on other standards entirely. *Hibbler v. Benedetti*, 693 F.3d 1140, 1150 (9th Cir. 2012) (addressing claim using habeas standard); *State v. Sharkey*, 927 A.2d 519, 521–22 (N.H. 2007) (deciding claim under state law).

The upshot is that none of these cases directly turned on the appropriate standard for demonstrating prejudice in the available-defense context. Even so, several cited likely success at trial as an important or even sole factor in determining

prejudice. *See Wilkins*, 754 F.3d at 29 (rejecting claim because "the evidence of the [defendant's] guilt was 'overwhelming'"); *In re Resendiz*, 19 P.3d at 1187 (deeming defendant's lack of defenses relevant), *Rissley*, 795 N.E.2d at 205 (stating defendant must "allege that he is innocent [or] claim to have [a] plausible defense that he could have raised had he chosen a bench trial"); *Ketterer*, 855 N.E.2d at 80 ("Ketterer has failed to establish a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." (internal quotation marks omitted)); *In re Fisher*, 594 A.2d at 896 (stating that likelihood of success at trial was relevant to ineffective assistance claim); *Floyd*, 144 P.3d at 1237–38 ("[A]n objective showing of a reasonable probability that, but for the errors made by counsel, a defendant would not have accepted a plea bargain, ultimately rests on whether there is an objectively reasonable probability that the outcome at trial would have been more advantageous to the defendant."); *Benvenuto*, 165 P.3d. at 1203 (stating in dicta that counsel's failure to advise defendant of his Vienna Convention rights was not prejudicial because of "the overwhelming evidence of guilt").

2. Of the dozens of allegedly conflicting cases Manzano cites, only twenty are available-defense cases, and only *two* of those are even arguably in tension with Indiana's doctrine. But in the end, no cases present such a conflict with the decision below as to justify attention from the Court.

a. First, some of Manzano's twenty available-defense cases do not address prejudice at all, *State ex*

rel. Vernatter v. Warden, 528 S.E.2d 207, 214 (W. Va. 1999) (finding counsel's performance not deficient), or do not articulate a specific prejudice standard. *State v. Burton*, 832 N.W.2d 611, 630 (Wis. 2013) (rejecting petition for not even making bare allegations that counsel failed to advise of alternative plea options or that petitioner would have chosen another option if given the opportunity); *Hilliard v. United States*, 879 A.2d 669, 670–71 (D.C. 2005) (remanding claim that counsel failed to explain elements of the crime, government's evidence, or burden of proof, and deferring government's argument that petitioner would have pled guilty regardless, but not addressing whether petitioner must show likelihood of success at trial).

Next, most of the others, while they nominally assert that the proper test for prejudice is whether the defendant would have chosen to go to trial, applied that test only by addressing whether the defendant would have *succeeded* there. *See United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (stating likelihood of success not *required*, but still finding no prejudice because "[t]he evidence . . . was overwhelming"); *United States v. Juarez*, 672 F.3d 381, 389–90 (5th Cir. 2012) (finding prejudice because "[b]ased on the evidence, a reasonable juror could have found that the government did not prove" its case); *Dando v. Yukins*, 461 F.3d 791, 802 (6th Cir. 2006) ("[W]e need only find a likelihood of a favorable outcome at trial such that [defendant's] counsel would not have given the same recommendation and she likely would have rejected the guilty plea."); *Gingras v. Weber*, 543 F.3d 1001, 1004 (8th Cir. 2008) (finding, where counsel advised

defendant to plead guilty before ruling on motion to suppress, that defendant could not show prejudice because "there [was] no reasonable probability that the motion . . . would have been granted" and no "reasonable probability that the outcome of the proceeding would have been different"); *Miller v. Champion*, 262 F.3d 1066, 1074–76 (10th Cir. 2001) (stating likelihood of success at trial not required, yet rejecting claim because intoxication defense was unlikely to succeed); *United States v. Berkeley*, 567 F.3d 703, 710 (D.C. Cir. 2009) (finding no prejudice because "[a]ny competent attorney would have advised [defendant] that he stood little chance of obtaining an acquittal if he went to trial on the indictment filed against him"); *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska Ct. App. 1988) (rejecting claim because defendant did not "demonstrat[e] the existence of alibi witnesses capable of exculpating him"); *Grosvenor v. State*, 849 A.2d 33, 36 (Del. 2004) (rejecting claim because "if [defendant] had not pled guilty . . . the overwhelming evidence of his guilt would have led to his convictions and likely a more severe sentence"); *State v. Adams*, 304 P.3d 311, 316 (Kan. 2013) (finding no "reasonable probability" claimant would have gone to trial considering "overwhelming evidence of guilt"); *Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009) (concluding defendant would not have gone to trial because "the record offer[ed] little indication that a defense of intoxication would have succeeded"); *Garrett v. State*, 663 S.E.2d 153, 154 (Ga. 2008) (granting relief because counsel failed to advise defendant of a sufficiency of evidence defense that likely would have been successful); *Avery v. State*, 129 P.3d 664, 670 (Nev. 2006) (finding counsel not deficient for

failing to move to suppress defendant's statements because motion would have been denied); *Ex parte Imoudu*, 284 S.W.3d 866, 871 (Tex. Crim. App. 2009) (granting petition because expert testimony "may have raised reasonable doubt . . ."); *Lewis v. Warden*, 645 S.E.2d 492, 507 (Va. 2007) (rejecting claim on strength of state's evidence).

b. As noted, in only *two* available-defense cases cited by Manzano did a state supreme court hold it improper to require proof of likelihood of success at trial. *Grosvenor v. State*, 874 So. 2d 1176, 1180 (Fla. 2004); *State v. Yos-Chiguil*, 798 N.W.2d 832, 843 (Neb. 2011). Both courts concluded that the merits of the available defense were "relevant," but not "the only consideration" for evaluating prejudice. *Yos-Chiguil*, 798 N.W.2d at 843; *see also Grosvenor*, 874 So. 2d at 1182. Yet in *neither* of those cases, apparently, did the claimant ultimately obtain relief. *Grosvenor v. State*, 119 So. 3d 513 (Fla. Dist. Ct. App. Aug. 13, 2013) (appeal from remand; summarily affirming denial of relief below (citing *Panuccio v. Kelly*, 927 F.2d 106 (2d Cir. 1991))); Neb. Dep't of Corr. Servs., http://dcs-inmatesearch.ne.gov/Corrections/InmateDisplayServlet?DcsId=67768 (noting defendant Yos-Chiguil is still serving original sentence). The outcomes of these cases demonstrate that, for practical purposes, a petitioner who cannot show he would probably have *succeeded* at trial is highly unlikely to be able to show he would nonetheless have *gone* to trial.

Regardless, any inter-jurisdictional tension between treating likelihood of success as a *relevant* factor and treating it as the *deciding* factor does not

rise to the level of a "conflict" worthy of Supreme Court review. Given the fact sensitivity of ineffective assistance claims, any abstract difference between the two approaches is unlikely to be outcome-determinative. *See Grosvenor*, 119 So. 3d at 514.

Manzano does not point to any cases where claimants would have been awarded relief in another state, but not in Indiana. He does not even assert that *he* would have been awarded relief in any other state. Nor, given that the *Grosvenor* and *Yos-Chiguil* courts merely remanded for further proceedings, does Manzano cite *any* available-defense cases where a petitioner's claim ultimately prevailed *without* some likelihood of success at trial. In light of how they seem to wash out in the end, any abstract differences in how courts articulate the *Hill* standard for available-defense cases do not justify this Court's attention.

III. Even If this Court Wished to Address this Issue, Manzano's Case Is a Poor Vehicle

Manzano's case is a poor vehicle through which to provide any clarification to this area of the law. A different standard would not change the result: Manzano is simply not entitled to relief from pleading guilty to raping his daughter.

1. First, of course, a defendant seeking relief on the basis of ineffective assistance of counsel must show *both* deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Yet Manzano concedes he has not yet made even the first of those showings: "Because the Court of Appeals found that Manzano could not show prejudice under Indiana's standard,

the court did not separately address whether counsel's performance was deficient." Pet. 8. The unresolved deficient-performance issue not only makes this a poor vehicle for reviewing the prejudice standard, but it also underscores how the two inquiries tend to overlap in available-defense cases. If a foregone defense would have been unlikely to succeed at trial, counsel's decision not to investigate or advise chancing it was *neither* bad strategy *nor* prejudicial.

2. Even if Manzano were able to show deficient performance, changing the prejudice inquiry to require him to prove that he would have *gone* to trial rather than that he would have *succeeded* at trial would not change the final result. To begin, other than probability of success, it is unclear what factors would even conceivably be relevant in considering whether Manzano would have chosen to go to trial. What is more, even if such factors could be identified, it is unlikely they would be as important in any defendant's mind as the likelihood of acquittal.

Manzano concedes that his likelihood of prevailing at trial with an intoxication defense "would probably have been less than fifty percent." Pet. 27. As to voluntary intoxication, as the Court of Appeals correctly pointed out, even if Long had more thoroughly investigated that defense, he likely would still have advised against it because it would have been unlikely to succeed; Garza's and Loera's hypothetical testimony that Manzano was intoxicated would have weighed little against Garza's prior statement that Manzano could walk

without assistance, police testimony that Manzano did not seem drunk when arrested, and Manzano's zero-blood-alcohol test result. Involuntary intoxication (*i.e.*, that someone slipped something into Manzano's drink) would have been similarly unsuccessful, as the only supporting evidence was Manzano's self-serving statement that he did not recall the crime. Even that assertion was contradicted by Manzano's own admission that he remembered attempting to penetrate his daughter while she said "no . . . over and over." Pet. App. 10a (quoting Appellant's App. 243–45). These slim chances of acquittal are even less appealing in light of the fact that if convicted, Manzano would likely have received the maximum sentence; as he says himself, his crime was "frankly horrific." Pet. 28.

Here, as in the Seventh Circuit's *Evans* case, "[i]t just is not believable that [the defendant] did all the things he does not deny having done, involving elaborate negotiations with the police over several hours, in some sort of alcohol-induced trance." 742 F.2d at 375. Consequently, "[i]t is inconceivable . . . that [defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." *Id.* So, too, is Manzano's claim that he would have taken an intoxication defense to trial incredible.

3. Manzano claims prejudice because, if Long had better investigated and advised about an intoxication defense, Manzano "would have had no good alternatives" to going to trial because "[a]n

open plea was almost certain to result in the maximum fifty-year sentence (as indeed it did)." Pet. 28. But that is not so; in fact, trial counsel testified he advised Manzano to plead guilty so that he could "argue remorse as a mitigating factor" at sentencing and thus hopefully obtain a more lenient sentence than Manzano would receive if he were convicted at trial (as counsel believed he was very likely to be). Pet. App. 28a. And as the Court of Appeals noted, in most cases, that strategy would have been effective: "[I]t is generally true that a trial court should not impose a maximum sentence when a defendant pleads guilty." Pet. App. 13a. Indeed, this was the basis for Manzano's direct appeal of his sentence; he argued that his "maximum fifty-year sentence was manifestly unreasonable because he pleaded guilty." Pet. App. 16a. It was only because Manzano's crime was so outrageous that the trial court deviated from this usual rule and sentenced Manzano to the maximum possible penalty. Pet. App. 16a.

A reasonable defendant, facing these odds, would not have chosen to gamble on a slim chance of success at trial at great peril of incurring the maximum sentence; he would instead have pled guilty and counted on the strong likelihood that he would receive a shorter sentence thereby. The fact that Manzano's decision to plead guilty did not actually result in a shorter sentence does not alter this calculus; just because his best option did not turn out as he wished does not mean it would have been reasonable for him to choose the worse option instead.

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In sum, regardless of the standard applied to Manzano's claim, the result would not change. Under no plausible rule does Manzano have a colorable claim of ineffective assistance of counsel at the guilty plea stage. Accordingly, there would seem to be no point in taking this particular case to sort out some tenuous, abstract differences among state courts on how to resolve claims that counsel rendered ineffective assistance at the guilty plea stage by failing to investigate or advise of an available defense.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated: March 25, 2015