No. 14-631

In the Supreme Court of the United States

JUAN MANZANO,

Petitioner,

v.

INDIANA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Indiana's Brief in Opposition only underscores how far the state's prejudice standard diverges from the standard established by this Court and used in virtually every other jurisdiction.

Outside of Indiana, the law is clear. "In order to satisfy the 'prejudice' requirement" where a guilty plea was induced by ineffective assistance of counsel, "the defendant must show that there is 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). The Brief in Opposition concedes (BIO at 7-8) that Indiana requires an additional showing—that the defendant would have been *acquitted* at trial. The Brief in Opposition proffers three defenses of this heightened standard, none of which can withstand the slightest scrutiny.

First, Indiana declares (BIO at 8-10) that the state applies its heightened standard only to a category of cases it calls "available-defense cases," and that the state reserves the *Hill* standard for a category it calls "plea-consequences cases." But Indiana is the only jurisdiction in the country that uses these categories. There is no other state, and no federal circuit, that divides ineffective assistance claims into two types and uses a different prejudice standard for each. Every other jurisdiction applies a single prejudice standard to all claims that a guilty plea was induced by ineffective assistance. In every other jurisdiction (except Rhode Island, Pet. at 13 n.1) it is the *Hill* standard, not Indiana's heightened standard.

Second, Indiana asserts (BIO at 10-17) that several other jurisdictions also employ its heightened standard. This assertion is incorrect. It rests in part on unpublished and pre-*Hill* cases, and in part on passages taken out of context from published post-*Hill* cases. No other jurisdiction (again except Rhode Island) requires defendants to show that had they proceeded to trial they would have been acquitted.

Third, Indiana insists (BIO at 6-7, 10, 27-28) that it is actually following *Hill*, on the theory that there is no difference between showing that a defendant would have *proceeded to trial* and showing that the defendant would have been *acquitted at trial*. But this claim is wrong as well. There is an enormous practical difference between Indiana's standard and the *Hill* standard.

Judge Easterbrook's opinion for the Seventh Circuit is exactly right. Indiana's unique prejudice standard is "a mistake" that was committed in cases "in which the Supreme Court of Indiana concluded that the Supreme Court of the United States couldn't have meant what it said in *Hill*." *Payne v. Brown*, 662 F.3d 825, 828 (7th Cir. 2011). This case is a perfect vehicle for correcting Indiana's mistake. The Court should grant certiorari and summarily reverse.

I. Indiana is the only jurisdiction in the nation that divides ineffective assistance claims into two categories and uses a different prejudice standard for each.

Indiana is the only jurisdiction that divides ineffective assistance claims into two categories, "available-defense cases" and "plea-consequences cases." It is the only jurisdiction that uses two different prejudice standards, one for each category. And it is the only jurisdiction except Rhode Island that requires defendants to show that they would have been acquitted at trial.

Indiana's unique bifurcated prejudice standard originated in *Segura v. State*, 749 N.E.2d 496 (Ind. 2001). As we showed in the certiorari petition (at 17-21), the Indiana Supreme Court had adopted its heightened prejudice standard in an earlier case called *Van Cleave*. In *Segura* the Indiana Supreme Court faced the fact that this Court's recent cases had made clear that the *Van Cleave* standard was erroneous. Rather than abandon its heightened prejudice standard, however, the Indiana Supreme Court devised a new rationale for it, one based on the court's view that the heightened standard "seems preferable for several reasons," all of which were policy reasons with only the loosest connection to this Court's precedent. *Segura*, 749 N.E.2d at 503.

In order to distinguish the actual holdings of this Court's cases, the Indiana Supreme Court invented a distinction between "available-defense" cases and "plea-consequences" cases. The Indiana Supreme Court determined that this Court's cases required

Indiana to change its prejudice standard only for the latter category. "We hold today," the Indiana Supreme Court explained, "that the United States Supreme Court's recent decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), does not affect the *Van Cleave* standard for evaluating ineffective assistance of counsel claims as to errors or omissions of counsel that overlook or impair a defense." *Segura*, 749 N.E.2d at 499. For such claims, the defendant would still have to show that "the defense would likely have changed the outcome of the proceeding." *Id.* But for claims "that counsel's incorrect advice as to the penal consequences led the petitioner to plead guilty," the Indiana Supreme Court held, the proper prejudice standard was the one from *Hill*: "a reasonable probability that the erroneous or omitted advice materially affected the decision to plead guilty." *Id.*

As the Brief in Opposition correctly points out (BIO at 8-10), Indiana has adhered to this bifurcated prejudice standard ever since. But that only makes Indiana even more of an outlier. No other jurisdiction has adopted two different prejudice standards. This Court has certainly never suggested that different prejudice standards should govern different sorts of ineffective assistance claims. Indiana's bifurcated standard was invented by the Indiana Supreme Court precisely to avoid conforming its idiosyncratic prejudice standard to the one used everywhere else.

II. Indiana errs in claiming that other jurisdictions use its heightened prejudice standard.

Indiana purports to have found cases from several other jurisdictions in which courts have used its heightened prejudice standard. Many are unpublished, non-precedential opinions. One, *Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984), predates *Hill*, and has in any event been superseded by *Payne v. Brown*, 662 F.3d at 828, in which the Seventh Circuit found that Indiana's heightened prejudice standard is contrary to clearly established federal law. The remaining cases actually apply the *Hill* standard correctly. The Brief in Opposition quotes language from these cases out of context, to make them seem as if they are applying Indiana's standard instead.

In *Hill*, the Court explained that a defendant's likelihood of success at trial does play a role in the determination of prejudice. A defendant must *show*—not merely claim—a reasonable probability that he would have gone to trial had he been properly advised by counsel. *Hill*, 474 U.S. at 59. The projected outcome of a trial is obviously relevant to the credibility of a defendant's claim that he would have proceeded to trial rather than pleading guilty. *Hill* thus recognized that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend *largely*"—but not entirely—"on whether the affirmative defense likely would have succeeded at trial." *Id.* (emphasis added). Indiana's mistake is, in effect, the

substitution of "entirely" for "largely" in that sentence.

The likelihood of acquittal at trial is hardly the only factor that bears on the credibility of a defendant's claim that he would have gone to trial had he been properly advised. Equally important are the terms of the plea bargain offered by the prosecutor as an alternative to trial. The more stringent those terms, the more likely the defendant would have been to insist on a trial instead. Also important are the existence and number of lesser included offenses. The more that intermediate options would have been presented to the jury, the more likely a defendant would have been to reject a plea agreement and proceed to trial. And of course the possible range of sentences, after both a plea and a trial, will be very important to a defendant's decision to choose one or the other. This was no doubt why *Hill* made very clear that prejudice consists in showing that the defendant would have gone to trial, and that speculation as to the outcome of a trial is relevant only to the credibility of a defendant's claim that he actually *would* have gone to trial. As the Tenth Circuit concluded, after a thorough analysis of this issue, the likelihood of an acquittal at trial "is relevant only because it offers circumstantial evidence of what the petitioner would have done had his counsel not proved to be ineffective." *Miller v. Champion*, 262 F.3d 1066, 1074 (10th Cir. 2001), cert. denied, 534 U.S. 1140 (2002).

Because the likely outcome of a trial is a component of *Hill*'s prejudice inquiry, courts evaluating prejudice naturally discuss the likelihood of acquittal—not as a requirement to prove prejudice, as in

Indiana, but as a factor bearing on whether a defendant should be believed when he says that he would have proceeded to trial. The Brief in Opposition quotes these discussions in isolation, as if the courts involved are applying Indiana's heightened standard. They are not.

For example, the Brief in Opposition cites (BIO at 11) a snippet from *Gumangan v. United States*, 254 F.3d 701, 705 (8th Cir. 2001), in which the Eighth Circuit observes that a duress defense would not have been likely to succeed had the defendant proceeded to trial. The Brief in Opposition neglects to mention that this snippet comes immediately after the Eighth Circuit states the *Hill* standard correctly, and that in context the Eighth Circuit is properly considering the strength of the duress defense as just one factor in a determination of whether the defendant "would have insisted on going to trial." *Id.* (quoting *Hill*, 474 U.S. at 59). *See also United States v. Frausto*, 754 F.3d 640, 644 (8th Cir. 2014) (finding no prejudice under the *Hill* standard from counsel's failure to inform the defendant of a DEA report, because the report would have made little difference had there been a trial, and thus "even if Frausto had known about the DEA report, there is not a substantial probability that he would have insisted on proceeding to trial").

The same is true of all the published post-*Hill* opinions quoted at pages 11-16 of the Brief in Opposition that discuss the issue for more than a single sentence. In each case, the court considers the likely outcome of a trial, but only as relevant to whether the defendant actually would have gone to trial. *See*

Panuccio v. Kelly, 927 F.2d 106, 109 (2d Cir. 1991) (properly considering the likelihood of success of an intoxication defense as relevant to whether the defendant would have gone to trial); *Smith v. Mahoney*, 611 F.3d 978, 989-90 (9th Cir. 2010) (same), cert. denied, 131 S. Ct. 461 (2010); *Long v. United States*, 883 F.2d 966, 968 n.4 (11th Cir. 1989) (discussion consists of a single sentence in a footnote; for the same court using the proper standard when the issue is considered at more length, *see, e.g.*, *Lynch v. Secretary*, 776 F.3d 1209, 1218-19 (11th Cir. 2015); *Gordon v. United States*, 518 F.3d 1291, 1297 (11th Cir. 2008)); *Key v. State*, 891 So. 2d 353, 374-77 (Ala. Ct. Crim. App. 2002) (properly considering weakness of defenses as relevant to whether defendant would have insisted on going to trial), aff'd, 891 So. 2d 384 (Ala. 2004), cert. denied, 543 U.S. 1005 (2004); *Cranford v. State*, 797 S.W.2d 442, 444 (Ark. 1990) (properly noting that defendants had not shown prejudice because they had not alleged that "had counsel correctly informed them about all the evidence against them, they would have pleaded not guilty and insisted on a trial"); *Johnson v. United States*, 613 A.2d 888, 894 (D.C. 1992) (discussion consists of a single sentence; for the same court using the proper standard when the issue is considered at more length, *see, e.g.*, *Joseph v. United States*, 878 A.2d 1204, 1211 (D.C. 2005); *Goodall v. United States*, 759 A.2d 1077, 1084 (D.C. 2000)); *People v. Jones*, 579 N.E.2d 829, 836-37 (Ill. 1991) (properly considering strength of insanity defense as relevant to whether more diligent counsel would still have recommended pleading guilty and whether defendant would have taken this advice), cert. denied, 505

U.S. 1223 (1992); *State v. Szczygiel*, 279 P.3d 700, 703 (Kan. 2012) (properly noting lack of prejudice where defendant could not establish that but for counsel's errors he "would have insisted on going to trial"); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (properly considering strength of state's case as relevant to whether there is a reasonable probability that defendant would have pleaded guilty); *Anderson v. State*, 747 S.W.2d 281, 284-85 (Mo. Ct. App. 1988) (properly considering likelihood of success of intoxication defense as relevant to whether counsel would have recommended not pleading guilty and whether defendant would have proceeded to trial); *State v. O'Donnell*, 89 A.3d 193, 208 (N.J. App. Div. 2014) (finding prejudice where defendant's "readiness to go to trial is plausible, because she had a plausible defense"); *People v. Qi*, 822 N.Y.S.2d 355, 356 (N.Y. App. Term 2006) (properly defining prejudice as whether defendant "would not have pled guilty but rather proceeded to trial"); *Jeter v. State*, 417 S.E.2d 594, 596 (S.C. 1992) (discussion consists of a single sentence; for the same court using the proper standard when the issue is considered at more length, *see, e.g.*, *Stalk v. State*, 681 S.E.2d 592, 594-95 (S.C. 2009); *Shirley v. State*, 411 S.E.2d 215, 216 (S.C. 1991)); *McDonough v. Weber*, 859 N.W.2d 26, 41 (S.D. 2015) (properly considering weakness of self-defense claim as relevant to whether defendant "would have insisted on going to trial"); *Howell v. State*, 185 S.W.3d 319, 329-30 (Tenn. 2006) (properly considering weakness of mental illness defense as relevant to whether defendant would have insisted on going to trial); *State v. Garcia*, 791 P.2d 244, 248 (Wash. Ct. App. 1990) (properly considering weak-

ness of defenses as relevant to whether defendant "would have insisted on going to trial"); *Rutti v. State*, 100 P.3d 394, 406-08 (Wyo. 2004) (properly considering weakness of defenses as relevant to whether defendant would have insisted on going to trial), cert. denied, 544 U.S. 1019 (2005).

Indiana really does have a prejudice standard all its own. Other jurisdictions properly consider the strength of the prosecution's case as relevant to whether a well-counseled defendant would sincerely have proceeded to trial rather than pleading guilty. Only Indiana requires defendants to show they would have been acquitted.

III. Indiana errs in suggesting there is no difference between its heightened prejudice standard and the *Hill* standard.

Indiana suggests that its heightened prejudice standard is "a reasonable understanding of *Hill*." BIO at 10. In Indiana's view there is no practical difference between the two standards, because "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." BIO at 27. Indiana perceives no difference "between treating likelihood of success as a *relevant* factor and treating it as the *deciding* factor." BIO at 27. Indiana is mistaken.

Consider a defendant who must choose between two options. The first option would be to accept a plea agreement with a sentence of ten years. The second option would be to proceed to trial, where the

maximum sentence in the event of conviction would likewise be ten years, but where he could present a defense that would give him a 40% chance of acquittal. A competently advised defendant would go to trial, because he could fare no worse than under the guilty plea, and he would have a substantial chance of faring better. But if defense counsel was so incompetent that he failed to investigate the defense, he would incorrectly advise the defendant that the outcome would be identical under either option, and the defendant might well plead guilty.

Under the *Hill* standard of prejudice, this defendant could establish prejudice from counsel's incompetence, because he could show that had he been properly advised, he would have rejected the guilty plea and insisted on a trial. But under Indiana's heightened standard, this defendant could not establish prejudice, because he could not show that he would have been acquitted at trial. That is the difference between treating likelihood of success as a relevant factor and treating it as the deciding factor. This is not merely a semantic difference. It is a real difference with real consequences.

It bears remembering, moreover, that when a defendant is incompetently counseled to plead guilty, his loss cannot be measured in years of prison alone. As the First Circuit put it, "the potential prejudice" to such a defendant "is easy to identify: the lost opportunity to … exercise his constitutional right to a trial." *United States v. Colón-Torres*, 382 F.3d 76, 90 (1st Cir. 2004). The *Hill* standard protects the defendant's right to trial in a manner consistent with the community's countervailing interest in the finali-

ty of guilty pleas. Indiana's heightened standard does not.

This case is an appropriate vehicle for bringing Indiana back into line. Juan Manzano's lawyer never investigated a possible intoxication defense. Instead, he advised Manzano to enter an open plea that was virtually certain to lead to the maximum possible sentence. Under Indiana's heightened prejudice standard, Manzano cannot show prejudice, because he cannot prove that he would have been acquitted at trial. But under the *Hill* standard, Manzano *can* show prejudice, because he can show that a rational, well-advised defendant under the circumstances would have insisted on a trial.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for the Indiana courts to apply the correct standard of prejudice. In the alternative, the petition for a writ of certiorari should be granted and the case set for argument.

Respectfully submitted,

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