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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

Corrected and Adopted
Case No. CR-1993-008116

11 **STATE OF ARIZONA,**

12 Plaintiff,

13 V.

14 **DARREL P. PANDELI,**

15 Defendant

**PETITIONER'S AMENDED
PROPOSED FINDINGS OF FACT
AND CONCLUSION OF LAW**
(Honorable Robert L. Gottsfield)
[DEATH PENALTY CASE]

16 **COMES NOW**, Defendant, Darrel P. Pandeli, who, by and through
17 undersigned counsel, Kenneth S. Countryman, Esq., submits his Amended
18 Proposed Findings of Fact and Conclusion of Law.

19
20 This Request is supported by the following Memorandum of Points and
21 authorities, and the court records and files, all incorporated herein by this
22 reference.

23
24 ///

1 RESPECTFULLY SUBMITTED this 18th day of February 2015.

2 Kenneth S. Countryman
3 Kenneth S. Countryman, Esq.
4 Attorney for Defendant

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. PETITIONER'S REQUESTED FINDINGS OF FACT.**

- 7
- 8 1. The hearing for the determination of effective assistance of counsel took
9 place over the course of four days.
- 10 2. The hearing took place on October 30th and 31st, 2014. The hearing
11 resumed on December 8, 2014 and concluded on December 9, 2014.
- 12 3. Petitioner presented five witnesses during the course of the hearing.
13
14 Petitioner presented three experts, Dr. Carlos Jones; Dr. Ricardo Weinstein
15 and Attorney Michael Reeves. Petitioner also presented trial attorneys
16 Dawn Sinclair and Gary Shriver.
- 17
18 4. The State presented no witnesses during the hearing. They produced no
19 expert witnesses and no attorneys, including attorneys who prosecuted
20 *and* handled the original case. ✓
- 21
22 5. Dawn Sinclair and Gary Shriver were ineffective in their representation of
23 Petitioner Pandeli during his aggravation and sentencing phase of the trial.
- 24
25 6. Mr. Shriver, had done three *or* for four capital cases prior to serving in Mr. ✓

1 Pandeli's trial but operated his legal team as co-equals. Ms. Sinclair, had
2 never tried a felony jury trial prior to this case. Ms. Sinclair had no
3 experience in jury selection and had not received the proper training on
4 picking capital juries.
5

6 7. The defense team failed to object to Dr. Keen testifying due to the fact that
7 he was not the medical examiner, but was standing in for someone absent.
8 The defense failed to object to Dr. Keen providing conclusions and
9 opinions in regards to aggravators which were not his own. ✓
10

11 8. The defense failed to provide an effective mitigation of the materials in this
12 case.
13

14 a. Neither counsel was qualified to interpret the mental health records in
15 this case.
16

17 b. Trial counsel had a mitigation specialist with no experience in criminal
18 cases.
19

20 c. The mitigation specialist was also not supervised by trial counsel. She
21 was supervised by a non-attorney who overrode decisions of counsel.
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23 d. The mitigation specialist refused to do work assigned by trial counsel.
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25 e. The mitigation specialist did not review and interpret records to assist
counsel.

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f. As a result, trial counsel was unprepared to interview or cross-examine the State's expert, Dr. Brad Bayless.

9. During the course of trial, the State attacked the defense's mitigation presentation by arguing that the defense did not perform any tests on Petitioner's brain and using Dr. Bayless testimony. Counsel was not prepared to present any rebuttal to these attacks.

10. Objective testing would have shown that Petitioner had frontal lobe impairment and it was causally connected to his childhood and development issues.

11. The experts retained did not present this information. There were neuropsychological and neurophysiological measures that explain behaviors that are casually related to behaviors ^{that} and trial counsel neither ^{understood} understands nor present ^{ed} to the jury because of the lack of mitigation specialist qualifications and their own inexperience in this area.

12. Trial counsel failed to present the causal relationship between brain impairment and the death penalty. Trial counsel also failed to explain his conclusions.

1 13. The defense failed ^{to} prepare to cross-examine Dr. Bayless or otherwise deal
2 with the unsupportable conclusions that he made. Dr. Bayless did not use
3 any neuropsychological testing or imaging. Dr. Bayless did not give any
4 standardized testing or even a test for malingering.

6 14. Dr. Bayless is a state's witness who routinely testified for the state in death
7 penalty cases. In most cases, Dr. Bayless testifies that a defendant is
8 psychotic and that there's no saving him. Dr. Bayless frequently doesn't
9 have any scientific basis for his opinion. He used projective tests that are
10 subjective and should not be used in a death penalty case. His testing was
11 subjective and should not be used in a death penalty case. His testing was
12 ~~not~~ appropriate and misleading.

14 15. Petitioner's counsel presented some information about frontal lobe
15 dysfunction but failed to provide any information of its meaning. They also
16 failed to rebut the State's attack through objective testing or a full
17 understanding of brain functioning. Petitioner's counsel also did not do any
18 neurophysiological testing.

21 16. The brain can be looked at from four different perspectives. One, is the
22 psycho-social development history (developmental years). Two, is the
23 neuropsychological testing that allows us to relate brain function to the
24 behavior of the individual. Three, is the neurophysiological and
25

1 neurophysiology that is the science that studies the function of the brain
2 (imaging). Four, is the whole picture (ecological validation), which can tell
3 you how this dysfunction manifests in real life. Petitioner's counsel failed
4 to present this whole picture in this case.
5

6 17. Petitioner's legal expert Michael Reeves provided numerous examples
7 where trial counsel failed to meet the standard of care in a capital case:
8

9 a. Dawn Sinclair had no felony trial experience in picking a jury or
10 handling witnesses and was not able to assist in several trial aspects of
11 the case.
12

13 b. Gary Shriver did not comply with his duties as first chair to manage the
14 day to day activities of the case. He had no authority over the
15 mitigation specialist who he admitted was not qualified. He also did
16 not manage Ms. Sinclair.
17

18 c. The attorneys did not appropriately have issues resolved by the court
19 prior to jury selection, including whether the facts of Petitioner's prior
20 murder was going to be admitted into the trial.
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22 d. Counsel should have cross-examined Dr. Bayless or somehow dealt
23 with the information and testimony he presented. They did not
24 counteract any information presented by Dr. Bayless.
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- e. Petitioner’s counsel did not provide a competent nexus of the mitigation to the offense committed.
 - f. Petitioner’s counsel failed to present numerous mitigating factors to the jury.
 - g. Petitioner’s counsel was ineffective during jury selection due to inexperience, training and questioning.
18. Dr. Carlos Jones testified as an expert for Petitioner in this case. Dr. Jones testified:
- a. Petitioner had a traumatic childhood with sexual abuse, instability, physical abuse, low intellectual functioning and family instability. He also had mental health issues and prior head trauma.
 - b. He testified that Petitioner is absolutely a product of his environment and upbringing and made him the person he was at the time of the offense. Petitioner doesn’t grow out of his upbringing and psychological issues.
 - c. This is also impacted by sexual abuse, physical abuse, mental health issues and his intelligence limitations.

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d. Dr. Jones testified that Dr. Bayless used two projective tests (TAT and Sentence Completion Test) that were inappropriate for use in a capital case.

e. Projective tests are subjective and do not have any protocol or guidelines.

f. Dr. Bayless misused the projective tests to measure Petitioner in a way the tests were not designed to measure.

g. Dr. Bayless' evaluation ^{should not have been admitted} ~~was not only unprofessional but unethical.~~ In ^{or severely cross-examined by counsel.} addition his methodology was inappropriate. ✓

h. Dr. Bayless also made conclusions about Petitioner's expert, Dr. Mark Walter regarding frontal lobe disorder. Those conclusions were also inappropriate and unchallenged by Petitioner's counsel.

i. There is no science or research to support the conclusions Dr. Bayless made and his testimony misled the jury.

j. Dr. Bayless also made ^{an} inappropriate diagnosis of Petitioner with antisocial personality disorder. This also misled the jury because he described a different disorder. Dr. Jones classified this testimony as "extremely misleading." ✓

~~k. Dr. Bayless also misled the jury regarding Petitioner's medications.~~ ✓

- 1 19. The State did not oppose Petitioner's experts or present any qualified
2 person to counter the conclusions presented.
- 3
4 20. Gary Shriver testified that Barb Bumpus was the mitigation specialist and
5 had never done mitigation on a capital case prior to Pandeli. She was not
6 qualified to work on this case and he should have objected to her
7 appointment. He testified that he and Sinclair were co-equals.
- 8
9 21. Shriver testified that the decision not to cross-examine Dr. Bayless was a
10 spur of the moment decision and they did not do anything to counteract his
11 testimony and they should have done so. He described the decision as
12 "wrongheadedness."
13
- 14 22. Dawn Sinclair testified on December 9, 2014. She testified that:
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- 16 a. She had no training for jury selection prior to the Pandeli case. She did
17 not have the skill to pick a capital jury in the Pandeli case.
 - 18 b. Mitigation specialist Barb Bumpus did not have the experience in
19 mitigation for this case and did not understand what the job entailed.
 - 20 c. Barb Bumpus could not help the team guide the attorneys in mitigation
21 on the case. She did not understand mitigation or how to do it.
 - 22 d. The attorneys got no assistance on Dr. Bayless' report. The attorneys
23 did not know what to ask.
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- e. The attorneys did not get any assistance in obtaining the correct experts in this case.
- f. Ms. Bumpus was asked to assist in a case map program and refused calling it "case crap."
- g. Ms. Bumpus was eventually terminated or resigned in lieu of termination.
- h. The Office of Legal Defender limited the attorney's ability to perform mitigation in the case and they had no supervisory authority over mitigation personnel.
- i. This affected the preparation of the case and the preparation of Dr. Bayless' cross-examination.
- j. They were not fully prepared to deal with Dr. Bayless.
- k. She is now fully aware that a lot of Dr. Bayless' testimony was misleading but was unprepared to deal with it at the time of trial.
- l. They were not fully up to speed on the projective tests and how they applied to Dr. Bayless' conclusions.
- m. She had never done a trial, not even a misdemeanor.
- n. She was not qualified to perform jury selection.

1 o. They did not handle the court's failure to rule on pre-trial rulings prior
2 to trial.

3
4 23. The defense waived cross-examination of Dr. Bayless because it wasn't
5 something that they planned on doing. The defense described the
6 sentencing segment of the trial as something they ^{do} ~~doing~~ on the fly. ^{They} ~~it~~ made
7 a last second decision at trial to waive cross-examination. The defense
8 concluded that his testimony was not "as bad as it usually is" and decided to
9 not cross exam. However, they did not deal with the information presented
10 by Dr. Bayless and both attorneys agreed that the decision was not strategic
11 and a failure of counsel to adequately defend Petitioner.

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14 24. The decision to not ~~to~~ cross examine Dr. Bayless cannot be rationally
15 classified as a reasonable tactical decision because he used projective tests
16 which is subject to the interpretation of the test giver without a scientific
17 basis.

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20 25. Dr. Bayless testified that Mr. Pandeli was malingering in the absence of any
21 testing for malingering. Dr. Bayless told the jury in layman's terms that Mr.
22 Pandeli was faking his responses. However, Dr. Bayless used parts of some
23 tests administered by other doctors, but the interpretation of those results
24 were twofold, either, he could have been faking or the severity of his mental
25

1 illness was such that he wasn't faking and he was simply expressing a
2 closely held personal opinion based on his mental illness. The defense
3 failed to cross-examine Dr. Bayless on this issue. In contract, the state
4 heavily cross- examined the defense expert witnesses attacking their
5 conclusion.
6

7
8 26. The defense permitted Dr. Bayless to interview ~~the~~ Mr. Pandeli without ✓
9 requesting to be present or at least filing a motion seeking to limit the scope
10 of the questions that Dr. Bayless was allowed to ask. This permitted Dr.
11 Bayless to go into the facts of the case and receive confessions from Mr.
12 Pandeli, regarding his guilt which was presented to the jury and used
13 against Mr. Pandeli.
14

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16 27. The defense failed to file a Motion to Strike part of the report and preclude
17 him from testifying into those areas where he violated the defendant's 5th
18 Amendment Rights.
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21 28. The Defense failed to question Dr. Bayless regarding the reports the ✓
22 defense ~~that were~~ provided. This allowed Dr. Bayless to undermine and
23 attack the other experts and their findings in this case without challenge.
24 This includes the conclusion given by Dr. Cunningham and Dr. Walters.
25

- 1 29. The defense failed to cross-examine Dr. Bayless regarding his testimony
2 that the Shipley Institute of Living Scale was an IQ test; even though it is a
3 projective test.
4
- 5 30. The defense allowed Dr. Bayless to classify the test that he did as normative ^d
6 valid test, even though they were projected tests. ^ ✓
- 7
8 31. The defense permitted Dr. Bayless to use definitions in the DSM that were
9 inapplicable to the testing they gave.
- 10 32. Dr. Walters diagnosed Mr. Pandeli with frontal lobe impairment.
- 11
12 33. The defense failed to cross-examine Dr. Bayless' testimony that Darrell
13 Pandeli had minimal cerebral dysfunction and his testimony about the
14 frontal lobes. They failed to cross-examine Dr. Bayless' testimony
15 minimizing the extent of the ~~the~~ Darrell Pandeli's frontage lobe dysfunction and ✓
16 brain dysfunction in his testimony. This was critical because Dr. Bayless
17 did not perform any tests that were aimed at making a determination,
18 whether or not there was any frontal lobe damage. The defense failed to
19 object to Dr. Bayless giving opinions about the doctor who did that test.
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22 34. Dr. Bayless testified without cross-examination about where morality
23 comes from; discounting the scientific or actual neurological examinations
24 of Mr. Pandeli, by saying basically hyperactive kids can ^{operate} ~~reuse~~ just like ✓
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1 anybody else and can do things just like anybody else; without having
2 tested or having done any testing.

3
4 35. The defense failed to have psychological or neuropsychological evaluation
5 done. The defense lawyers failed to use their experts properly to help them
6 prepare for cross-examination of Dr. Bayless.

7
8 36. The defense permitted Dr. Bayless ^{use of} using a MMPI of Dr. Stonefeld earlier in ✓
9 the case that was actually done wrong. The test hadn't been scored and then
10 it was later scored and found to have been administered improperly.
11 Despite this, Dr. Bayless was permitted to use the test to show that Mr.
12 Pandeli was malingering. Although the defense knew, before Dr. Bayless
13 took the stand that the MMPI had been scored improperly, they failed to
14 cross-examination him on it.

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17 37. It was inappropriate for Dr. Bayless to use projective tests to make some of
18 the conclusions that he made, regarding Mr. Pandeli. Dr. Bayles offered
19 conclusion ^s regarding Mr. Pandeli ^{his} self-destructive behavior and some ✓
20 other things [^] without doing any normative testing. Thus, ~~the~~ Dr. Bayless ✓
21 conclusion lacked a scientific basis and were not the opinion of a scientist.

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24 38. The defense failed to hire a psychologist or neuropsychologist to explore
25 the various different aspects of how Mr. Pandeli's childhood was destructive

1 of his entire personality. Mr. Pandeli was physically, sexually abused from
2 a very early age. The sexual abuse started as a very young child and that
3 sexualization continued right up through adulthood. Mr. Pandeli ^{was} sexually
4 abused by adults and then he continued with very hypersexual behavior. ✓

6 39. The defense failed to develop a nexus between the psychologist's reports
7 and Mr. Pandeli's crimes. Moreover, by not cross-examining Dr. Bayless,
8 he was permitted ^{to} negate any attempt to establish a bridge. ✓

10 40. The defense failed ^{to} to present individual mitigating factors for Mr. Pandeli.
11 Instead they submitted general categories of mitigators to the jury. Thus,
12 Mr. Pandeli was denied the opportunity for a juror to show leniency for
13 any reason found to be sufficiently substantial to call for mitigation. This
14 failure to list them individually deprived Mr. Pandeli of the opportunity for
15 a jury to consider them and vote for life.

18 41. There were approximately 83 mitigating factors that were delineated in the
19 petition that were not listed. The listing of mitigators individually should
20 have been done. Instead the defense listed five overly broad categories of
21 mitigators. For instance, the defense listed a category for physical abuse
22 but did not list the individual incidents of physical abuse.
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1 42. In Mr. Pandeli's case there was 21 or 22 different abusers. The defense
2 should have submitted each mitigating factors to the jury for individual
3 consideration. The abusers didn't include his mother, who was the enabler
4 for the vast majority of the sexual abuse. She failed to seek proper
5 attention for Mr. Pandeli who was a much damaged child. Psychologists
6 told Mr. Pandeli's Mother that he needed to be on Ritalin from the time he
7 started school, but she always refused to put him on it.
8

9
10 43. The defense was also inept in jury selection. The defense did not voir dire
11 the jury to ask about the prejudices and to ask specific questions, such as
12 would you automatically give the death penalty to somebody, who has
13 been convicted of a murder, such as in this case of a sexually charged
14 murder?
15

16
17 44. There were two phases of the trial, the aggravation phase and the penalty
18 phase. During the aggravation phase, the defense failed to object to
19 hearsay. It failed to challenge evidence of child molestation presented by
20 the State. The defense failed to cross-examine a former friend of Mr.
21 Pandeli's who testified that Mr. Pandeli had molested her daughter.
22

23
24 45. The defense also failed to cross-examine Chris Pandeli, the defendant's
25 half-brother to bring out his biases. Chris Pandeli and the defendant share

1 a mutual father. Chris Pandeli had some bias against Mr. Pandeli,
2 regarding his issues with his father. Chris Pandeli testified that he basically
3 wanted his brother, Mr. Pandeli, to get death. The failure to cross-examine
4 Chris Pandeli was extremely prejudicial.
5

6 46. The defense failed to challenge the aggravators offered by the state. This
7 includes aggravators in regards to infliction of gratuitous violence,
8 senselessness of the crime and the helplessness of the victim. ✓
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11 **II. PETITIONER'S REQUESTED CONCLUSIONS OF LAW.**

12 47. The United States Supreme Court has identified the modern concept that
13 "the punishment should fit the offender and not merely the crime." *Williams*
14 *v. New York*, 337 U.S. 241, 247 (1949); see *United States v. Grayson*, 438
15 U.S. 41, 45-50, (1978). That Court has long recognized that the
16 "fundamental sentencing principle" that the "[sentencer] may appropriately
17 conduct an inquiry broad in scope, largely unlimited either as to the kind of
18 information [they] may consider, or the source from which it may come."
19 *United States v. Tucker*, 404 U.S. 443, 446 (1972); see also *Pennsylvania v.*
20 *Ashe*, 302 U.S. 51, 55 (1937). The Court in *Tucker* held that
21 "misinformation of constitutional magnitude" requires a resentencing.
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1 United States v. Tucker, at 447; *Townsend v. Burke*, 334 U.S. 736, 740–741
2 (1948). The Court did not define the term “constitutional magnitude.”

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4 48. In *State v. Grier*, 146 Ariz. 511, 516 (1985), the Arizona Supreme Court
5 explained its view of a due process violation under Tucker: Convicted
6 defendants have a due process right to a fair sentencing procedure which
7 includes the right to be sentenced on the basis of accurate information.
8

9 49. “To perform effectively in the penalty phase of a capital case, counsel must
10 conduct sufficient investigation and engage in sufficient preparation to be
11 able to present and explain the significance of all the available mitigating
12 evidence.” *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir.2008) (internal
13 quotation marks and alterations omitted) citing *Williams v. Taylor*, 529
14 U.S. 362, 396, (2000). Counsel has “an obligation to present and explain
15 to the jury all available mitigating evidence.” *Hamilton v. Ayers*, 583 F.3d
16 1100, 1113 (9th Cir., 2009).
17
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19 50. Petitioner’s representation ~~defense~~ fell “below an objective standard of
20 reasonableness” in light of “prevailing professional norms.” See *Strickland*
21 *v. Washington*, 466 U.S. 668, 686, 688 (1984). “The proper measure of
22 attorney performance remains simply reasonableness under prevailing
23 professional norms.” *Id.* at 688. “In certain Sixth Amendment contexts,
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25

1 prejudice is presumed.” *Id.* at 692. Thus, expert testimony is relevant on
2 the issue of the professional norms prevailing when the representation took
3 place.
4

5 51. The Court finds that not only did Petitioner’s counsel fail to conduct
6 sufficient investigation to present and explain the significant of all
7 mitigating factors; they failed to prepare to cross-examine the state’s expert
8 in regards to his dubious conclusion or alternatively explain his misleading
9 testimony. ✓
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11 52. Petitioner’s counsel also had “a duty to conduct ‘a thorough investigation of
12 the defendant's background.” *Williams v. Taylor*, 529 U.S. at 396. “It is
13 imperative that all relevant mitigating information be unearthed for
14 consideration at the capital sentencing phase.” *Caro v. Calderon* (“Caro I”),
15 165 F.3d 1223, 1227 (9th Cir.1999). “To that end, trial counsel must
16 inquire into a defendant's social background, family abuse, mental
17 impairment, physical health history, and substance abuse history; obtain and
18 examine mental and physical health records, school records, and criminal
19 records; consult with appropriate medical experts; and pursue relevant
20 leads.” *Hamilton v Ayers*, 583 F.3d 1100, 1113 (9th Cir. 2009) (internal
21 citations omitted).
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1 53. The Court finds that Petitioner's counsel did an insufficient investigation
2 into Petitioner's background, ~~To~~ understand how it related to the offense. ✓

3 Petitioner's counsel did not have a qualified mitigation specialist and was
4 not qualified to interpret the information themselves. The lack of
5 understanding led to the lack of presentation of ~~Nexus~~ testimony and ✓
6 allowed misleading testimony to be to be presented by the state through Dr.
7 Bayless.
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10 54. The Court finds that Petitioner's counsel's actions were not the product of
11 strategic choices. The strategic choices were not reasonable because they
12 were not made after thorough investigation of law and facts relevant to
13 plausible options and strategic choices made after less than complete
14 investigation were not reasonable to the extent that reasonable professional
15 judgments support the limitations on investigation. See *Strickland v.*
16 *Washington*, 466 U.S. 668, 690-91 (1984).
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20 55. The Court finds that deficits in the Petitioner's defense cited herein were
21 not strategic decisions, but were the result of inexperience counsel and
22 unprofessional judgment. Petitioner's counsel lacked the fundamental
23 requisite understanding of the requirements for conducting a capital
24 defense.
25

1 56. The Court finds that the decisions made by Petitioner's counsel not to
2 cross-examine witnesses and not to present mitigation to the jury resulted
3 simply from lack of understanding that the testimony being presented was
4 misleading and false. It was also not planned.
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6 57. The Court further finds that Petitioner's counsel conducted an insufficient
7 mitigation investigation that fell short of prevailing professional norms.
8 The Court further finds that failure to connect the mitigation to Pandeli
9 circumstance^s is not reasonable. ✓
10

11 58. The Court finds that the Petitioner has established prejudice, by
12 demonstrating that there is a reasonable probability that, but for counsel's
13 unprofessional errors, the result of the proceeding would have been
14 different.
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16 59. The Court finds that comparing the totality of the evidence that actually was
17 presented to the jury with the totality of the evidence that might have been
18 presented had counsel acted differently, makes it highly probable that the
19 outcome of the proceedings might have been different.
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21 60. The Court finds that Petitioner's attorneys failed to prepare and present the
22 necessary information for trying a complex death penalty case such the
23 instant one. They failed to prepare witnesses, failed to list mitigators
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property, failed to object to improper evidence, failed to prepare and cross-examine expert's witness, failed to properly voir dire prospective jurors.

61. The Court finds that the actions of Petitioner's attorneys constitute a breach of professional standards for handling a death penalty case, rather than trial strategy. Thus, the Court finds that Petitioner was denied due process.

III. ORDERS REQUESTED

62. ~~That this~~ ^{The} ~~Honorable~~ ^{now} Court ^S set aside the sentence of death and order ^{an} a new ² trial on the penalty and sentencing phase for the Petitioner. ¹

RESPECTFULLY SUBMITTED this 18th day of February 2015.

deposited
R.L. Pottefeld Kenneth S. Countryman
2/27/15 Kenneth S. Countryman, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015, I filed the Petitioner's Amended Proposed Findings of Fact and Conclusion of Law with the Clerk of the Court for the Maricopa County Superior Court.

A courtesy copy of the foregoing is being delivered through electronic means or deposited for mailing to:

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15 By: /s/ Kenneth S. Countryman

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