

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

José Jesús Ramirez pro se — PETITIONER
(Your Name)

vs.

Charles Ryan, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

District Court of Arizona
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

José Jesús Ramirez, #141535
(Your Name)

Arizona State Prison - Phoenix West, P.O. Box 18640.
(Address)

Phoenix, Arizona 85005-8640
(City, State, Zip Code)

6
(Phone Number)

QUESTION(S) PRESENTED

GROUND 1.

Did The trial Court violate Mr. Ramirez's constitutional right to a "fair trial in a fair tribunal" in allowing Petitioner to be impeached with four convictions, in light of the fact, the Court had ruled in limine before Petitioner testified that only two convictions would be allowed for impeachment and in light of the fact, The state could not prove the two 1999 prior convictions?

GROUND 2.

Did officer Quintela's denial to contact and consult with an attorney violate Mr. Ramirez's constitutional right to gather independent evidence exculpating him on the issue of intoxication, evidence no longer available?

GROUND 3.

Did the trial Court abuse its' discretion when it ruled Mr. Ramirez waived his right to consult with an attorney when he refuses to take additional testing for Police an "unreasonable - determination," in light of the fact, that Petitioner has a constitutional right under the Sixth and Fourteenth Amendments to pre-Charge counsel during DUI investigation?

QUESTION(S) PRESENTED

GROUND 4.

Did the trial courts denial of an evidential hearing constitute a defect that fundamentally undermine the reliability and fairness of the process that violated Mr. Ramirez's constitutional right to a "fair trial in a fair tribunal" in light of the fact, The Frye test is "contrary to" Supreme Court precedent?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☒ For cases from **state courts**: *(Then after, I proceeded into the federal courts) .*

The opinion of the highest state court to review the merits appears at Appendix F to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Appellate court appears at Appendix GFC to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Sept 25, 2018.

☒ No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

*"Supreme Court Dec 4, 2012
Appellate Court Dec 6, 2016
Appellate Court July 10, 2012".*

The date on which the highest state court decided my case was " ".
A copy of that decision appears at Appendix E, C and 6

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

constitution of the united states, Article 111, section. 2. "Statement of the case:"

U.S. Const. Amendment IV. 9, 19, 21, 24,

U.S. Const. Amendment V. 5, 8, 9, 15, 19, 21, 24,

U.S. Const. Amendment VI. 9, 12, 15, 16, 19, 21, 24, 27, 32,

U.S. Const. Amendment XIV. 2, 5, 8, 9, 15, 16, 19, 21, 32,

28 U.S.C.A. § 2254. 1, 8, 15, 16, 32,

28 U.S.C.A. § 2254 (9). "Statement of the case:"

28 U.S.C.A. § 2254 (b)(1)(A). 7, 14, 25, 33,

28 U.S.C.A. § 2254 (d)(2). 2, 8, 15, 17, 18, 20, 21, 25, 26, 32, 33,

28 U.S.C.A. § 2254 (e)(1). 2, 7, 16, 20, 26,

Ariz. Const. Article 2 section 4. 6, 8, 9, 21, 24,

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Ariz. Const. Article 2 section 24. 27,

A.D.S. Sections: 28-1383(A)(1), 28-1381(A)(1), 28-1444, 13-701, 13-702, 13-801. "Appendix H"

A.D.S. Sections: 28-1383(A)(1), 28-1381(A)(2), 28-1444, 13-701, 13-702, 13-801. "Appendix H"

A.D.S. Sections: 28-1383(A)(1), 28-1381(A)(3), 28-1444, 13-701, 13-702, 13-801. "Appendix H"

STATEMENT OF THE CASE

Jurisdictional Statement

The Supreme Court shall have appellate Jurisdiction, both as to law and fact. U.S. Constitution Article III. Statute 28 U.S.C.A. § 2254; section 2254(a) provides, Jurisdiction to the Supreme Court to entertain an application for a writ of Certiorari, from a state prisoner challenging The Constitutionality of his detention...

in October 2011, Mr. Ramirez was convicted on three counts of aggravated DUI. (Id. at 773-75), (Id. at 786, 788, 790), (Id. at 796-03). was also, convicted for The "misdemeanor offenses" of driving under The influence. (Id. at 773-75), (Id. at 783, 789, 791), (Id. at 766), (Id. at 832-33). The Court sentenced Petitioner to three concurrent ten-year prison terms. (Id. at 829-33). Petitioner appealed to The Arizona Court of appeals, (Id. at 836-48). The Court affirmed his convictions. (Id. at 885-97). Petitioner filed a petition for review in The Arizona Supreme Court. (Id. at 899-08), which was denied on December 4, 2012. (Id. at 909). without comment or citation.

on December 4, 2014, Petitioner filed a notice for Post-conviction relief ("PCR") (Id. at 910-13). PCR Counsel found no colorable claims. (Id. at 916-17), (Id. at 1066), (Id. at 919-20), (Id. at 983-87), (Id. at 1039-40). Petitioner filed a pro se PCR Petition. (Id. at 922-25), (Id. at 1121-45). The trial Court denied PCR relief (Id. at 1119-20). Petitioner's case was pending in the Arizona Court of appeal. (Id. at 1167-17), (Id. at 1235-40), when he timely initiated his federal habeas Corpus proceeding on October 3, 2016. (Doc. 4). on December 6, 2016, The Arizona Court of appeals granted review but denied relief. (Id. at 1241-42). Therefore, This Petitioner respectfully submits this petition which enumerates four grounds for habeas relief, That are hereby presented within this petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This Petition merits review because... The Supreme Court has never found there to be a fourteenth amendment right to pre-charge counsel during DUI investigations, and the lower courts have split on the question. *Mogard v. City of Laramie*, 32 P.3d 313, 323-24 (Wyo. 2001). There is no "clearly established federal law, as determined by The Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Meras v. Sisto*, 676 F.3d 1184, 1190 (9th Cir. 2012). ("In light of the extensive, reasoned disagreement between the lower courts ..., we can not say that the state courts unreasonably applied clearly established federal law. we need not speculate as to whether fairminded jurists could disagree... They in fact did.") *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005); *Kessee v. Mendoza-Powers*, 574 F.3d 675, 677 (9th Cir. 2009). Petitioner plainly argues, a constitutional right exists for pre-charge counsel during DUI investigations. This important question of federal law that has not been, but should be, settled by the Supreme Court. "Must be addressed." The liberty of Petitioner I, Jose Jesus Ramirez, is in a continual state of jeopardy and urges, because of the national importance of issue presented is "adequate to deserve encouragement to proceed further." Petitioner was denied his right to appeal through the application of a clearly erroneous preclusion. This violation of state law give rise to a cognizable due process claim, arguable under 28 U.S.C. § 2254; The resulting affirmation of the clearly erroneous determination of the state court by the government has resulted in a fundamental miscarriage of justice that has denied Petitioner his constitutional guarantees leaving him unguarded against this extreme malfunction in the state criminal justice system.

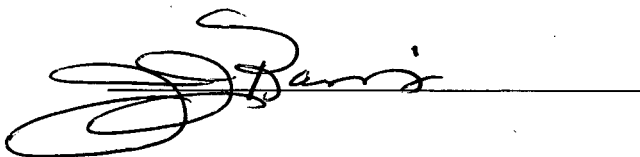
"To declare that in the administration of the criminal law,
The end justifies The means to declare that the government
may commit crimes in order to secure the conviction of a
private criminal - would bring terrible retribution;" The breakdown
of law in society. Olmstead P.475. (Brandes, J. dissenting).

The district court erred when it affirmed . . .
Petitioner's claims were fairly presented as I.A.C. Therefore,
can not be precluded under Rule 32.2 (c), violating
Petitioner's right to due process under Rule 32.1 (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "J. Davis", written over a horizontal line.

Date: November 8, 2018

Argument:

The district court erred when it affirmed the clearly erroneous determination of the state courts that petitioner was procedurally precluded on claims 2, 4, 5, 8, 9, (ii), (iii), 8, (b) (ii), (iii), (iv), (v), and 8(c) (i), (ii), (iii). The respondent's answer in (Doc. 18), begins its legal argument with a meritless claim that petitioner's claims are precluded under *Ariz. R. Crim. P. 33.2(c)*. The analysis consists of only eighteen lines of text, answer at 46, within that eighteen lines, however, the respondents concedes even assuming constitutional error occurred, there is no reason to believe it would have overcome this evidence, the 3 sentences and 200 exhibited memorandum of facts that appellate court manifest was not comprehensive. The court did not apply the procedural mechanism appropriately violating petitioner's right to equal protection of the laws under *Ariz. R. Crim. P. 33.1(c)*, *Ariz. R. Crim. P. 33.5*, *Ariz. R. Crim. P. 33.2, 9, 98 U.S.C. § 2254*, *Townsend v. Sain*, 372 U.S. 293, 330, 3 S.Ct. 745, 9 L.Ed. 2d 770 (1963), 372 U.S. 313-318 and 318-322, *Taylor v. Maddox*, 366 F.3d 982, 1000-01 (9th Cir. 2004); (Citing *Killian v. Poole*, 282 F.3d 1304, 1308 (9th Cir. 2002)) (11/01/24-42). Petitioner was prejudiced by ineffective assistance of counsel (IAC) by both trial counsel Erdman and appellate counsel Gerhardt. The claims can not be raised on direct appeal. *State v. Spritz*, 302 Ariz. 1, 39 P.3d 525 (2002); *Martinez v. Ryan*, 566 U.S. 14 (2012). This is petitioner's first rule 32 petition, the respondent makes no effort to explain at which prior stage petitioner had such an opportunity to raise the claims. The respondent's argument fails. Petitioner fairly raised his claims as ineffective assistance of counsel, violating petitioner's right to due process under *Ariz. R. Crim. P. 33.1(c)*, second *Estelle v. McGuire*,

502 U.S. 62, 68 (1991); *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002). The fourteenth Amendment provides The right to The "equal protection of the laws." U.S. Const. Amend. XIV. It is deeply rooted that evidence that "is so extremely unfair that its admission violates the fundamental concepts of justice." *Dowling v. U.S.*, 493 U.S. 342, 352 (1990); *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977); (quoting *Mooney v. Holohan*, 294 U.S. 103 (1935)). "The government must provide a procedural mechanism that is satisfactory in the abstract and the government must have applied these procedures appropriately in an individual's case." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Thus, The violation of a state law, The effect of which is a trial that is fundamentally unfair gives rise to a cognizable due process violation under The fourteenth Amendment. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475; *Newton v. Superior Court of California, in and for Alameda Cnty.*, 803 F.3d 1051, 1055 (9th Cir. 1986). The ninth Circuit has held that the "unreasonable determination standard." 28 U.S.C. § 2254(c)(2), applies to intrinsic challenges to state-court findings—situations where the petitioner challenges The state-court's findings based entirely on the state record—or claims that The process employed by The state court was defective; 28 U.S.C. § 2254(e)(1), states what an applicant will have to show for the district court to reject a state court's determination of factual issues. *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004). Petitioner challenges The state-court's findings based entirely on the state record. The factual finding is unsupported by sufficient evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Ward v. Starnes*, 334 F.3d 696, 705-08 (7th Cir. 2003). (Doc. 18). answer to petition for writ of habeas corpus, February 28, 2017.

(Doc. 23), exhibit A, Petitioner reply to respondents limited answer, April 27, 2017. (Doc. 24), report and recommendation, November 30, 2017. (Doc. 27), (Doc. 31), Petitioners objections to report and recommendation, January 19, 2018, March 21, 2018. (Id. at 1185-95), (Id. at 997-98), (Id. at 12-61), (Id. at 132-91), (Id. at 973-79), (Id. at 1196-98), (Id. at 1067-82), (Id. at 1184), (Id. at 191-31), (Id. at 73-77), (Id. at 233-400), (Id. at 405-634), (Id. at 644-784), (Id. at 786-803), (Id. at 807-832), (Id. at 834-884), (Id. at 899-942), (Id. at 980-987), (Id. at 1066), (Id. at 1079-82), (Id. at 1084-85), (Id. at 1147-53), (Id. at 1155-56), (Id. at 1218-34). Petitioner here did not present any evidence in federal Court. Instead, The district Court rejected Petitioners claims at The initial, or intrinsic, stage of the review process. This appeal is Therefore, governed by The "unreasonable determination" standard of Section 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004) (citing) *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Greene v. Lambert*, 288 F.3d 1081, 1088 (9th Cir. 2002). Where The state-courts should have made a finding of fact but neglected to do so. The state-courts factual determination is per force unreasonable and There is nothing to which The presumption of correctness can attach. *Wiggins v. Smith*, 539 U.S. 516 (2003); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999); *Nunes v. Mueller*, 350 F.3d 1045, 1055-56 (9th Cir. 2003). (Id. at 1172-82), (Id. at 1210-14), (Id. at 1121-45), (Id. at 1119-20), (Id. at 1090-01), (Id. at 1102-03), (Id. at 1107-17), (Id. at 1235-40), and (Id. at 1241-42). Petitioner is constitutionally entitled to a factual finding. *Townsend v. Sain*, 372 U.S. 293, 320 (1963) (overruled by, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 (1992)). where The district Court plainly misapprehended or misstated The record as to The correct legal standard. *Caliendo v. Warden of California mens*

colony, 365 F.3d 691, 698, 64 Fed. R. Evid. Serv. 239 (9th Cir. 2007); *Ternandez v. Nor*, 286 F.3d 1073, 1077 (9th Cir. 2002); *Wade v. Terhune*, 202 F.3d 1199, 1197 (9th Cir. 2000). Obviously, when the district court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it.

GROUND 1.

on October 11, 2011, Petitioner filed a motion in limine to preclude the state from impeaching Petitioner with prior convictions, see Appendix I, (Id. at 390-92), (Id. at 345-46). The court addressed issue immediately before trial commenced on that day. In fact, prosecutor Shea promised: "So I would agree that those that I would not use these at trial." (Id. at 392-94). In the ruling the court stated: "The court does not find that the state has shown what exceptional circumstances justify using the convictions from 1999. However, the court finds under 609, the convictions under 2003, under the CA 2002-0366, and the 2005 case, CE 2005-0860 can be used in the appropriate impeachment purposes if Mr. Ramirez takes the stand in this case." (Id. at 396-99).

Petitioner subsequently testified in his own defense. At the outset, Gilinder asked Petitioner "How many felony convictions he had and he answered 'Two', (Id. at 654). This circumstance would create an advantage in the battle in the states favor, that would deny Petitioner fundamental fairness at trial. At some point, Shea requested he be permitted to impeach Petitioner with his (1999) convictions in light of his alleged false testimony, even though, the state admittedly could not prove the allege (1999) priors

(Id. at 675-79). The court ruled that Petitioner could be impeached

with The yavapai (1999), prior and a conviction That was more Than 10 years old. (Id. at 679-84). The court cited: "And again just reiterating, you know, it's not a situation where I am finding That Mr. Ramirez, you know, intentionally lied, about having only two felony convictions, But, I think it was apparent to me That Mr. Ramirez raised The issue That agent Rintala had planted evidence on him, raised That speculation in There with his testimony, That the relevance of the two priors convictions Kind of raised The bar, I guess, if you will, such That These prior convictions should come in. Now, I don't know Mr. Ramirez's motivation on it. I'm not going to sit here and speculate on it, But it was apparent obviously from Mr. Ramirez's answers That he knew That he had more than two, he had more Than two convictions. (Id. at 699-04). Petitioner plainly argues, he was denied a "fair trial in a fair tribunal." The state vigorously litigated to exhaust his position by illegally "Shifting The burden of proof to the defense-Theory of events." "denying" his constitutional right to present a complete defense, and the right to have the states case encounter and survive a credible meaning of The adversarial testing process, violating due-process of law under The state and federal constitutions. U.S. Const. Amends. 5 & 14; Ariz. const. Art. 2 section 4. when The defendant takes The witness stand The state may inquire if he was previously convicted of a felony if The answer is affirmative it may inquire as to the "names and nature of The crimes, and the place where They were committed and if the answers are correctly given The inquiry must end There."

State v. Polan, 78 Ariz. 253, 259, 278 P.2d 432, 437 (1954). if any answer of The defendant in This regard is incorrect, or if he claims he does not remember, or if he denies such conviction or equivocates in his response to questions as to conviction of felonious crimes, The facts of his, conviction or convictions may be shown by The record Thereof. State v. Hilliard, 89 Ariz. 129, 135, 359 P.2d 66, 70 (1961). However, error lies only where The state makes insinuations which it is not able and prepared to prove; it is well-settled Arizona law That it is improper and prejudicial. State v. Meador, 113 Ariz. 515, 516, 538 P.2d 9, 10 (1976); State v. Stage, 82 Ariz. 285, 288 (1952); State v. Singleton, 66 Ariz. 49, 65 (1947). in fact, a prosecutor can not impeach a defendant with evidence of prior conduct without offering evidence to prove The bad conduct of trial. State v. Bailey, 132 Ariz. 472, 477-78, 647 P.2d 170, 176-77 (1982); "M. V. DALL & J. Livermore, Arizona law of evidence §47 at 93 (2nd ed. 1982). The basis of This rule is That by asking questions That have no basis in fact; The questioner can leave in The minds of The jurors all kinds of damaging and prejudicial but false or inadmissible facts, facts which can't be adequately rebutted. State v. Smith, 146 Ariz. 491, 495, 707 P.2d 289, 293 (1985); citing, State v. Holsinger, 124 Ariz. 18, 21, 604 P.2d 1054, 1057 (1979). The Courts actions in This case are analogous to a deferred ruling on a motion for a directed verdict. There is precedent for holding That the reservation on a ruling of This type of motion, when made at The close of The States case is reversible error. State v. Villegas, 101 Ariz. 465, 467, 420 P.2d 940, 942 (1966). in fact, "The Courts decision on a defendants motion under rule 20 shall not be reserved, But shall be made with all possible speed." Ariz. R. Crim. P. 20(c)."

This ruling must be made speedily because the defendant must know the outcome in order to decide whether to rest or proceed with the defendant's evidence. *State v. de Andra*, 9 Ariz. App. 134, 137, 449 P.2d 971, 974 (1969). Petitioner therefore, presented these issues to the state-courts and properly exhausted his claims. 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 1351, 158 L. Ed. 2d 64 (2004). The "likelihood" that petitioner would have prevailed at trial but for Erlinder's deficient performance and "inattention or neglect" to explore all avenues leading to facts, relevant to the merits of the case after counsel was "put on notice" is "substantial not just conceivable" and fatal to petitioner's right to present a complete defense and vacant of reasoned judgment counsel did not conduct adequate pretrial investigation and preparation. This vacancy of reasoned judgment was vis à vis to counsel's neglect to argue the dispositive legal claims, ABA Std 4-4.1(a) and ER 1.4 Ariz. Prof. C., *Harrington v. Richter*, 562 U.S. 86 (2010). The evidence is sufficient to overcome the "clear and convincing" evidence standard governing resolution in 28 U.S.C. § 2254(c)(1); *Arizona v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997). The district court erred when it affirmed the clearly erroneous determination of the state-courts, that petitioner testimony "opened the door" the simple truth is judge Skayton, determines testimony is so believable that more impeachment should be allowed to protect the interest of the state to the detriment of the petitioner which is clearly an "unreasonable determination" that deprived petitioner a "fair trial in a fair tribunal" where the state courts made a factual finding under misapprehension as to the correct legal standard and the state court

legal error infected The fact finding process "Coliendo V. Warden of California mens Colony, 365 F.3d 691, 698, 64 Fed.R. evid 239 (9th cir. 2004). 28 U.S.C. § 2254(d)(2). "it is sometimes difficult to distinguish a mixed question of law and fact, from a question of fact" William V. Taylor, 529 U.S. 362, 408 (2000). The record is not "Slippery" Therefore, "an appellate panel applying The normal Standard of review could not reasonably consider That the finding is supported by The record" Taylor V. Maddox, 336 F.3d 982, 1000-01 (9th cir. 2004). 28 U.S.C. § 2254(d)(2). The district court affirmed The state-courts "Unreasonable determination" and denial to a "fair trial in a fair tribunal" violating Petitioners right to due process under 28 U.S.C. § 2254. Ariz. R. crim. P. 32.9, Ariz. R. crim. P. 32.6, Ariz. R. crim. P. 32.9, Ariz. Const. Art. 2 section 4, U.S. Const. Amends. 5 & 14. Accord Estelle V. McGuire, 502 U.S. 62, 68 (1991). The denial of the right to a procedurally satisfactory process resulted in a "fundamental miscarriage of justice" denying petitioner equal protection of the laws under Arizona caselaw precedents, State and Federal constitutions. The government has not applied 28 U.S.C. § 2254, appropriately in this case. Estelle V. McGuire, 502 U.S. 62, 68 (1991). "I respectfully submit here That it was The very failure of The district court---to conduct a proper review of The record that warrants relief here as I plainly argued That their resolution revolved around The purely factual question of was Petitioners denial of due process by The state-courts an "unreasonable determination" under subsection (d)(1) and (d)(2)." Petitioner reliance on, Bracy V. Gramley, 520 U.S. 839, 904-05 (1997); Tumey V. State of Ohio, 273 U.S. 510, 532 (1927); Ungar V. Sarafite, 376 U.S. 575, 588 (1964).

GROUND 2.

The record extant clearly that on May 12, 2014, Petitioner in good faith filed an amended Petition for Post-Conviction relief. (Id. at 1121-45). Petitioner claimed both trial counsel Erlinder and appellate counsel Bernhard, were constitutionally deficient and Petitioner suffered prejudice in the end as a result.

Strickland v. Washington, 466 U.S. 668 (1984). Moreover, Petitioner raised constitutional issues relevant to the (Ipe) claims against the government appointed counsels in compliance with Ariz. R. Crim. P. 32.1(c). Petitioner claimed that he was denied his right to consult with an attorney after his arrest in violation of the 4th, 5th, 6th and 14th Amendments to the United States Constitution, and the corresponding sections of the Arizona Constitution, including Article 2 Section 4, and 8. see.

appendix J, (Id. at 1023-25), (Id. at 1026-34). At approximately 1:26 a.m., The morning of August 23, 2010, Officer Lasiewicki, Flagstaff Police Department stopped the truck Petitioner was driving. Thereafter, Lasiewicki, called for back-up unit to assist. Second officer on scene Nintels, performed the HGN field sobriety test (FST) on Petitioner, he refused additional FST. Nintels handcuffed Petitioner and placed him in back seat of the patrol car and read him Miranda rights. Petitioner understood his rights and said he was not answering any questions and to "call his lawyer?" Nintels closed door, end of conversation. (Id. at 140-41). clearly Nintels recognized that Petitioner invoked his right to consult with an attorney. (Id. at 511). Nintels transported the Petitioner to the county jail for booking purposes. (Id. at 141). Nintels claimed that during all that time he did not have a conversation of an "investigatory nature" he also claimed there was no conversation about "lawyers or phone calls." (Id. at 144).

Rintala took Petitioner to the phlebotomy room where there is a phone on the desk. But Rintala made no attempt to allow Petitioner to contact his attorney. In fact, Rintala asked to submit to additional testing and Petitioner refuses, immediately Petitioner was rushed out of room, it seeming like a police tactic. (Id. at 143-47). (Id. at 512-13). Once they placed Petitioner again inside of the phlebotomy room, "I looked at him and I told him, 'Hey, can I call my lawyer?'" (Id. at 157-60). Despite Petitioner's repeated requests they were just simply ignored. At 3:33 am, and 3:49 am, two blood samples were seized more than two hours and thirty three minutes from initial arrest. Erlinder argued Mr. Ramirez was denied the right to consult with an attorney in the night of his arrest. The appropriate remedy suppression of all evidence obtained in violation of Mr. Ramirez's right. (Id. at 178-87). Petitioner argues that Erlinder's performance was deficient when she overlooked or ignored evidence highly probative and central to Petitioner's "right to counsel" claim. Rintala's denial deprived Petitioner's constitutional right to gather "exculpatory evidence" no longer available. Had a attorney been allowed to be present, he could have gathered firsthand, any and all discovery in the Police's custody. (Id. at 1067-76). and more importantly, the information needed in order to properly, calculate the blood alcohol concentration, through retrograde extrapolation in respect to the expert performing the calculation needs the following factors:

"(1) when the person began to drink; (2) when the person stopped drinking; (3) how much the person drank; (4) what the person drank; (5) how much the person weighs and (6) if the person has a full or empty stomach."

Dr. Hunt M. Dubawski "Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects" (Id. at 73-76) Petitioner asserts, neither The defense nor The state had The alluded above Crucial information, which puts to question The reliability of The scientific procedure used To convict Petitioner. A defendant can make out a claim of ineffective assistance of Counsel ("IAC") by pointing out to specific errors made by trial counsel. *U.S. v. Cronin*, 446 U.S. 648, 658 (1984). in Arizona, The accused has a right to contact an attorney as soon as feasible after arrest so long as That contact does not interfere with The investigation at hand. *McNutt v. Superior Court*, 133 Ariz. 79, 648 P.2d 112, 124 (1982). Ariz. R. Crim. P. 6.1(c)(6). A long line of Arizona cases protect The defendants right to counsel in DUI cases. Petitioners reliance on *Martinez v. Superior Court*, 181 Ariz. 467, 891 P.2d 934 (App. 1994); *State v. Juarez*, 161 Ariz. 76, 81, 775 P.2d 1140, 1145 (1989); *Kunzler v. Pima County Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987); *State v. Holland*, 147 Ariz. 453, 456, 711 P.2d 592 (1985); *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ariz. App. Div. 1, 1996). The right to counsel in DUI cases does not just encompass The opportunity to consult with an attorney before deciding whether to submit testing, it is also a qualified due process right to collect exculpatory evidence. *State v. Rosengren*, 199 Ariz. 112, 12, 14 P.3d 303 (Ariz. App. Div. 2, 2000). Such cases, including *State ex rel. Webb v. City Court*, 25 Ariz. App. 214, 216, 542 P.2d 467, 469 (1975); *U.S. v. Canane*, 622 F. Supp. 279, 281 (W.D.N.C. 1985); *Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986); *State v. Carr*, 128 Idaho, 181, 911 P.2d 774, 777-78 (App. 1995); *Smith v. Cade*, 114 Ariz. 510, 514, 562 P.2d 390, 394 (App. 1977); *Smith v. Ganske*, 114 Ariz. 575, 517, 562 P.2d 395, 397 (App. 1977); *Gideon v. Wainwright*, 372 U.S. 335 (1963);

Amos v. Bowen, 143 Ariz. 324, 328, 693 P.2d 979, 983 (App. 1984). The state agreed that petitioner has to be allowed to consult with his attorney (Id. at 178-91). Petitioner made a "clear and unequivocal" request for counsel. (Id. at 147). The record shows petitioner had a relationship with an attorney. (Id. at 157-58). See e.g., *Rosengren*, 199 Ariz. 112, 12, 14 P.3d 363 (Ariz. App. Div. 2, 2000). "The state may not use a search warrant to escape the consequences of a denial of due process." This very circumstance exists here. "Custody" includes the deprivation of freedom of actions in any significant way. *Stansbury v. Cal.*, 511 U.S. 318, 322 (1994); (quoting *Cal. v. Beheler*, 463 U.S. 1121, 1125 (1983)). In this case, petitioner was handcuffed, placed in the back seat of a police car and informed that he was under arrest for driving while alcohol impaired to the slightest degree. (Id. at 498). The right to counsel attaches when adversarial proceedings had begun. *Kirby v. Ill.*, 406 U.S. 682, 689 (1972). See also, *Brewer v. Williams*, 430 U.S. 387, 461 (1977); *Booth v. Gillespie Cnty.*, 534 U.S. 191, 213 (2008). It is clear that petitioner's request to call and consult with an attorney was not honored. This is not a harmless error. *Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1991). The Exclusionary rule: *Weeks v. U.S.*, 232 U.S. 383, 398 (1914). Overruled on other grounds by *Elkins v. U.S.*, 364 U.S. 206, 208 (1960); *Bram v. U.S.*, 168 U.S. 532, 548 (1897); *U.S. v. Wade*, 388 U.S. 218, 237-39 (1967). In this case two tubes of blood were seized from petitioner and used at trial to prove the charges, for purposes of the right to counsel. The initiation of adversary judicial criminal proceedings arraignment on 8/23/10, (Id. at 1185-91). Petitioner argues the plain and unambiguous meaning in "Garcia," the state of Arizona has clearly incorporated the 6th Amendment right, to counsel in DUI precedent. Therefore, petitioner is constitutionally entitled to those

protections. *Withrow v. Williams*, 507 U.S. 680, 688-93 (1993). "Relief is warranted only if no reasonable jurist could disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014). On May 12, 2014, Petitioner in good faith filed an amended petition for post-conviction relief. Quoting the record: (1) At suppression hearing defendant testified on direct examination that after officer Rintala put him in custody and read him his Miranda rights the defendant asked the officer to call his lawyer. Quoting: "I told him to call my lawyer." [R.t. 10/6/11, pg 28, L. 14-25, pg 29, L. 1-6]. and once they placed me inside of the phlebotomy room. "I looked at him and I told him, 'Hey, can I call my lawyer?'" [R.t. 10/6/11, pg 30, L. 6-14]. yet, the record shows that trial court granted defendant's motion in limine to preclude consent on defendant's rights under Miranda." [R.t. 10/6/11, pg 69-72, Court order]. (Id. at 1134-35), (Id. at 1121-45). On September 8, 2014, Petitioner filed a motion for rehearing. (Id. at 1093-96), (Id. at 1090-00). On October 29, 2014, Petitioner filed a petition for review of denial of post-conviction relief. Quoting the record: (2) Here, Petitioner repeatedly invoked his right to counsel at the scene, during initial seizure by the police and prior to any blood draw was done. Although counsel finally did file a motion to suppress evidence on August 10, 2011, and a supplemental motion to dismiss count 1 and suppress evidence September 15, 2011, (PCR, ex. I). The motion was filed very late in the process and initially under the doctrine of suppression of evidence. Petitioner was denied his fundamental right to have counsel present at every critical stage of the proceedings, interrogation of Petitioner continued by police officer after he had invoked his right to counsel, and Petitioner was denied the opportunity to collect exculpatory evidence when the police

continued to ask him questions after he invoked his right to counsel and repeatedly demanded to call his attorney prior to the blood draw. Petitioners' fundamental right to counsel under the 5th, 6th and 14th Amendments were violated. *Butler v. McKellan*, 484 U.S. 407 (1990); *Tare v. Michael*, 442 U.S. 707 (1979); *Miranda v. Arizona*, 384 U.S. 436 (1966). It is axiomatic that the right to counsel is a fundamental right. *Gideon v. Wainwright*, 372 U.S. 335 (1963). When this fundamental right is violated outright dismissal of the charge is required. *Amos v. Bowen*, 143 Ariz. 324, 328, 693 P.2d 929, 983 (App. 1984), (citing *Gideon*); *Smith v. Cado*, 114 Ariz. 510, 514, 519, 522 P.2d 390, 394 (App. 1977); *Smith v. Gonske*, 114 Ariz. 515, 517, 520 P.2d 395, 397 (App. 1977). *Minimum Competence* under prevailing norms for defense counsel requires counsel, inter alia, to file pretrial motion to dismiss charges. *Krimmelman v. Morrison*, 477 U.S. 365, 368 (1986); *State v. Lee*, 142 Ariz. 310, 313-14, 669 P.2d 153, 156-57 (1984); *State v. Watson*, 134 Ariz. 1, 653 P.2d 351 (1982). *Here*, this required counsel to file the motion to dismiss at the earliest stage, and seek an interlocutory appeal or special action to have the charges dismissed. Counsel failed to file the motion to dismiss. This deprived Petitioner his right to have the charges dismissed and to have special action relief. Both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984), have been met by counsels' failure to file a motion to dismiss all the counts. (Id. at 1112), (Id. at 1167-117), (Id. at 1235-40). Petitioner therefore, presented these issues to the state courts and properly exhausted his claims. 28 U.S.C. § 2254 (b) (1) (A); *Isaacs v. Friesa*, 541 U.S. 27, 32 (2004). The "likelihood" that Petitioner would have prevailed at trial. But, for Erlindens inept failure to properly present and articulate the fact that Petitioner's counsel had deprived Petitioner of the

constitutional right to gather exculpatory evidence no longer available, in respect to any and all discovery in the Police's custody at the time of arrest. (Id. at 1067-76). and second, Petitioner was prejudiced by Counsel's deficiency because the information needed in order to properly calculate the retrograde extrapolation. (Id. at 73-76). is "Substantial not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011). The evidence is sufficient to overcome the "clear and convincing" evidence standard governing resolution in 28 U.S.C. § 2254(c)(1). *Arizona v. Terry* 295, 189 Ariz. 580, 944 P.2d 1194 (1997). The district court erred when it affirmed the clearly erroneous determination of the state courts, that Petitioner was procedurally precluded under Ariz. R. crim. P. 32.2(c). "where the state court made a factual finding under misapprehension as to the correct legal standard and the state court legal error infected the fact finding process." *Cabinda v. Warden of California men's Colony*, 365 F.3d 691, 698, 64 Fed. Cl. Evid. Serv. 239 (9th Cir. 2004). 28 U.S.C. § 2254(d)(2). "it is sometimes difficult to distinguish a mixed question of law and fact, from a question of fact." *Williams v. Taylor*, 529 U.S. 362, 408 (2000). "The record is not 'slippery' Therefore, 'an appellate panel applying the normal standards of review, could not reasonably consider that the finding is supported by the record.'" *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004). 28 U.S.C. § 2254(d)(2). The district court affirmed the state's erroneous preclusion, violating Petitioner's right to due process under 28 U.S.C. § 2254, Ariz. R. crim. P. 6.1(a)(b), Ariz. R. crim. P. 32.1(c), Ariz. R. crim. P. 32.2(c)(3), Ariz. R. crim. P. 32.6, Ariz. R. crim. P. 32.9, and Arizona Supreme Court precedent in *Doyle* cases. accord *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). moreover, violating Petitioner's right to due process under *Townsend v. Sain*,

372 U.S. 283, 320 (1963). Petitioners federal right to an evidentiary hearing, 372 U.S. 313-318, and 372 U.S. 318-322 and violating petitioners due process right to a factual finding. *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004); (citing *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002)). The denial to the right to a procedurally satisfactory process resulted in "fundamental miscarriage of justice" denying petitioners equal protection of the laws under, *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), and The 6th, 14th Amendments U.S. Const. The government has not applied 28 U.S.C. § 3254, appropriately in this case. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

"I respectfully submit here that it was the very failure of the district court... to conduct a proper review of the record that warrants relief here as I plainly argued that their resolution revolved around the purely factual question of was petitioners preclusion under Ariz. Crim. P. 32.2(c), by the state courts an "unreasonable determination," under subsection (d)(1) and (d)(2)." Petitioner asserts, The Supreme Court, has never found there to be a "Fourteenth Amendment right to pre-charge counsel during DUT investigations." and The lower courts have split on the question. *Mogard v. City of Laramie*, 32 P.3d 317, 323-24 (Wyo. 2001); *Meras v. Sisto*, 676 F.3d 1184, 1190 (9th Cir. 2012). in light of the extensive, reasoned disagreement between the lower courts. Petitioner argues, a constitutional right exists for pre-charge counsel during DUT investigations, this important question of federal law that has not been, but should be, settled by the Supreme Court. "Must be addressed," Petitioner urges, because of the national importance of the issue presented is "adequate to deserve encouragement to proceed further..."

GROUND 4.

no idea of the stop exists even though a fact arose during unsavory testimony by Lasiewicz, whom originally stopped. The truck Petitioner was driving, "he had a hand held Camcorder in his patrol car." The trial court determination that Petitioner waived his right to contact and consult with an attorney when he refuses to take additional test after his repulsive request to be allowed to call his counsel is an "unreasonable determination" under 28 U.S.C. § 2254(d)(2). (Id. at 187-91) First, the burden is on the prosecution to prove that the accused voluntarily, knowingly, and intelligently waived his right. Miranda v. Arizona, 384 U.S. 436, 475 (1966); Colo. v. Connelly, 479 U.S. 157, 170 (1986); Moran v. Berbine, 475 U.S. 412, 431 (1986); Boykin v. Alabama, 395 U.S. 238, 243 (1969). The state argued that the Petitioner did not make any request to contact an attorney while being in custody of the county jail. (Id. at 180-85). On October 6, 2011, immediately after hearing all testimony and closing arguments, trial judge Slayton, denied the suppression motion from the bench citing: 1.)

1.) The case that you have testified to and which you admitted and agreed with, was that you ordered the police officer to call your attorney, and that is not a clear unequivocal expression of: I want an attorney, and I'm not going to respond to any question. I want an attorney - your statement, it was like a command to them, it was not a -- it was not an invocation of that right, it was a command for them to call an attorney -- now, you got into kind of a separate issue that has been carved out in our law and that is the right to consult with an attorney. before acquiescing to a test and determining, you know, what you are going to do -- from my analysis and from my belief is that there was a refusal to take the test.

17.

The question is, at that point do you need -- is there a right for after the person, in essence, says, I'm going to refuse the test, you have a right to consult with an attorney before you take the test --- This court believes they, in essence, at that point, becomes a waiver, that you have been given the right to talk to an attorney before you decide on whether you were going to take the test. (Id. at 187-91). The record shows that trial court granted defendant's motion in limine to preclude comment on defendant's silence after arrest. Court: "Defendant invoked his rights under miranda." (Id. at 198-01). Brintola's actions at the scene, demonstrate that Petitioner clearly and unequivocally invoked his rights to remain silent and to consult with an attorney. *Davis v. U.S.*, 512 U.S. 452, 458-59 (1994). (Id. at 140-41), (Id. at 152). It is obvious that Brintola clearly and unequivocally got the message. Clearly, the Court's reasoning is based on an "unreasonable determination" of the facts, *Wilson v. Carcoran*, 562 U.S. 1, 5 (2010). 28 U.S.C. § 2254(d)(2). "violating federal law." The state court's conclusion that Petitioner had been given the right to consult with an attorney prior to deciding what to do, But that he waived that right at the moment he refuses to voluntarily submit to additional testing is "inconsistent with rudimentary demands of fair procedure." *Reed v. Farley*, 512 U.S. 339, 348 (1994) (quoting *Hill v. U.S.*, 368 U.S. 424, 428 (1962)). It was contrary to, and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. In its ruling the court made clear that in Arizona the right to consult with an attorney attaches to DWI suspects before acquiescing to a test (Id. at 189). Where the rights to counsel attaches, the accused need not

affirmatively request counsel for the right to attach. *Brewer V. Williams*, 430 U.S. 387, 404 (1977); *Cainley V. Cochran*, 369 U.S. 506, 513 (1962); *Matteo V. Superintendent*, 521 F.3d 877, 892, 93 (3d Cir. 1999); *Williams V. Taylor*, 529 U.S. 362, 408 (2000). Rintala's ambiguous assertions at the Suppression hearing that he could not recall whether Petitioner had requested counsel, "Rintala repeated invocation of equivocal phrases such as, 'I don't recall,' and 'not that I recall,' raises the purely factual question of what really happened during Ramirez's arrest and did Rintala perjure himself." (Id. at 142), (Id. at 144), (Id. at 147), (Id. at 149), (Id. at 152) and (Id. at 154). The trial court ultimately credited Rintala's testimony over Petitioner's. (Id. at 190-91). The state has failed to prove by preponderance of the evidence that Petitioner's rights under the 4th, 5th, 6th and 14th Amendments, U.S. Const. were not violated, and the trial court decision that Petitioner waived his right to counsel and the refusal to suppress the blood evidence denied Petitioner of his right to a "fair trial in a fair tribunal." "Relief is warranted only if no reasonable jurist could disagree that the state courts erred." *Murry V. Schuie*, 746 F.3d 418, 465-66 (9th Cir. 2014). Petitioner argues, That Erlinders performance was deficient when she overlooked or ignored evidence highly probative and central to petitioner's "right to counsel" claim. Rintala's denial deprived Petitioner's constitutional right to gather "exculpatory evidence" no longer available, had attorney been allowed to be present, he could have gathered firsthand, any and all discovery in the Police's custody. (Id. at 167-76). and second, The information needed in order to properly, calculate the blood alcohol concentration, through retrograde extrapolation. (Id. at 73-76). Petitioner asserts, neither the defense nor the

State had the alluded above crucial information which puts to question the reliability of the scientific procedure used to convict petitioner. *U.S. v. Cromie*, 466 U.S. 648, 658 (1984). On May 12, 2014, Petitioner in good faith filed an amended petition for Post-conviction relief. (Id. at 1121-45). On September 8, 2014, Petitioner filed a motion for rehearing. (Id. at 1090-11). On October 29, 2014, Petitioner filed a Petition for review of denial of Post-conviction relief. (Id. at 1107-17). On March 16, 2015, Petitioner filed a reply in support of petition for review. (Id. at 1235-40). The record extant clearly that Petitioner therefore, presented those issues to the state courts and properly exhausted his claims. 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese*, 514 U.S. 27, 32 (2004). 28 U.S.C. § 2254(d)(2). The "likelihood" that Petitioner would have prevailed at trial But, for Erlinders inept failure to properly present and articulate the fact that Rintalos denial of counsel had deprived petitioner of the constitutional right to gather exculpatory evidence no longer available, in respect to any and all discovery in the Policies custody at the time of arrest. (Id. at 1067-76). and second, the information needed in order to properly calculate the retrograde extrapolation. (Id. at 73-76). is "substantial not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011). The evidence is sufficient to overcome the "clear and convincing" evidence standard governing resolution in 28 U.S.C. § 2254(c)(1). *Arizona v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997). The district court erred when it affirmed the clearly erroneous determination of the state courts, that Petitioner was procedurally precluded under Ariz. Crim. P. 32.2(a). "Where the state court made a factual finding under misapprehension as to the correct legal standard and the state courts legal error infected the fact finding process."

Caliendo v. Warden Of California Mens Colony, 365 F.3d 691, 698, 64 Fed. R. evid. serv 239 (9Th Cir. 2004). 28 U.S.C. § 2254(d)(2). "it is sometimes difficult to distinguish a mixed question of law and fact, from a question of fact." *Williams v. Taylor*, 529 U.S. 362, 405, 408 (2000). The record is not "slippery" Therefore, "an appellate panel applying the normal standards of review, could not reasonably consider that the finding is supported by the record." *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9Th Cir. 2004). 28 U.S.C. § 2254(d)(2). The district court affirmed the states erroneous preclusion, violating petitioners right to due process under 28 U.S.C. § 2254(d)(2). Ariz. R. Crim. P. 32.1(c), Ariz. R. Crim. P. 32.6, and Ariz. R. Crim. P. 32.9, accord *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). moreover, violating petitioners right to due process under *Townsend v. Sain*, 372 U.S. 293, 320 (1963). Petitioner federal right to an evidentiary hearing 372 U.S. 313-318 and 372 U.S. 318-322, and violating petitioners due process right to a factual finding. *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9Th Cir. 2004) (citing *Killian v. Poole*, 282 F.3d 1204, 1208 (9Th Cir. 2002)). The denial of the right to a procedurally satisfactory process resulted in a "fundamental miscarriage of justice," denying petitioner equal protection of the laws under *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The 4th, 5th, 6th and 14th Amendments U.S. Const., and corresponding Section Ariz. Const. Art. 2 Sections 4 and 8. The government has not applied 28 U.S.C. § 2254(d)(2). appropriately in this case. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). "I respectfully submit here that it was the very failure of the district court --- to conduct a proper review of the record that warrants relief here as I plainly argued that these resolution revolved around the purely factual question of was petitioners preclusion under Ariz. R. Crim. P. 22.209) by the state courts an "unreasonable determination" under subsection (d)(1) and (d)(2). Petitioners

reliance on, *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *The 4th, 5th, 6th, 7th, and 14th*

Amend's U.S. Const., Ariz. Const. Art. 2 § 4 and 18.

(Group) 5.

The record extant clearly that, Petitioners counsel filed a motion for a free

hearing regarding retrograde extrapolation, on August 10, 2011, see appendix K,

(Id. at 73-76). Arizona law requires proof of a blood alcohol concentration within

two hours of the time of driving. *State v. Claybrook*, 193 Ariz. 588, 590, 975 P.2d 1101,

1103 (App. Div. 1, 1998). It is clear from the facts that the blood was drawn more

than two hours and thirty three minutes after the vehicle was stopped. "Within

two hours means 120 minutes," (Id. at 153). *Erlinder* argued that the defense is unaware

of any scientific literature or case law that supports a "retrograde extrapolation"

when the expert performing the calculation does not have any of the following

factors: (1) when the person began to drink; (2) when the person stopped

drinking; (3) how much the person drank; (4) what the person drank; (5) how

much the person weighs and (6) if the person has a full or empty stomach."

Erlinder cited, that the proponent of the evidence must demonstrate

acceptance within the scientific community "By those experts who are

relatively disinterested and impartial and whose livelihood therefore, is not

intimately connected with approval of the technique. "This requirement is

not satisfied with testimony from a single expert who personally believes

The challenged procedure is generally accepted as reliable by the larger

scientific community." *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 199 Ariz.

P.2d 1366 (1982). *Erlinder* argued a hearing was necessary and relevant in order

to address these issues and determine whether the retrograde extrapolation

is admissible in this case. Erlinder stated: "I believe that the state criminalist intends to testify to retrograde extrapolate, Mr. Ramirez's blood." (Id. at 203-05), (Id. at 206-12). Petitioner argues, Erlinders performance was deficient when she overlooked or ignored evidence highly probative and central to Petitioners claim. Arizona was a "Frye State" at the time of Petitioners trial and conviction "But subsequently" adopted, *Daubert v. Merrell Dow pharmaceuticals, INC.* 509 U.S. 579 (1993). on Jan 10, 2012, *State v. Perez*, 308 P.3d 1189, 1193 (Ariz. App. 2013). in fact, The Frye test is "contrary to" clearly established Supreme Court precedent under *Daubert*, supra, the Supreme Court held that scientific evidence must meet the requirements of the Federal rules of evidence, not the Frye test to be admissible. *Williams v. Taylor*, 529 U.S. 362, 405, 408 (2000). Arizona Rule of evidence 702(d). Rule 702 mirrors its federal counterpart therefore, we may look to the federal rule and its interpretation for guidance. *U.S. v. Cronin*, 466 U.S. 648, 658 (1984). At the hearing the court stated: "That is a fair area for cross-examination as to the weight and credibility that the analysis should do." (Id. at 212). motion denied.

Mary Martinez, expert witness.

cross-examination by Ms. Erlinder:

Q. And then to look at the jury when you respond to it?

A. yes.

Ms. Erlinder: That's all, Thank you.

The Court: redirect, Mr. Shea?

Mr. Shea: Thank you, Judge, no questions.

The Court: I will turn to the members of the jury to see if you have any questions for Ms. Martinez, it does not appear that we do.

can this witness be excused?

Mr. Shea: Yes, your honor.

The Court: Ms. Martinez, Thank you for your testimony. you are excused.

Mr. Shea: The states rest, your honor.

The Court: Okay. let me see Counsel and the Court reporter in chambers or on the office.

The Court: for the record the state has rested in this case. Ms. Erlinder, do you have a motion you wish to make?

Ms. Erlinder: No. (Id. at 648-49).

Petitioner asserts, The motion for a hearing should have been granted the issue here was resolved without an evidential hearing which affects Petitioner's substantial right. *U.S. v. Madach*, 149 F.3d 596, 601 (7th Cir. 1998). The Petitioner generally bear the burden of persuasion with respect to this prejudice.

U.S. v. Olano, 507 U.S. 725, 734 (1993); *U.S. v. Blandin*, 435 F.3d 1191, 1195 (9th Cir. 2006).

But when source of error is supervening judicial decision that alter settled law, The government bear burden of persuasion regarding prejudice.

U.S. v. Outen, 286 F.3d 622, 639 (3d Cir. 2002). and although there has been a significant change in the law, when a new principle of law is articulated, a Petitioner whose conviction is final that Petitioner is insulated from

The rules of finality and preclusion when there has been a significant change in the law applied in the process which led to his conviction or

sentence. *Walker v. True*, 399 F.3d 315, 326-27 (4th Cir. 2005); *Hamling v. U.S.*, 418 U.S. 87, 102

(1974); *U.S. v. Lazquez-Triera*, 407 F.3d 476, 487 (1st Cir. 2005) (same) *U.S. v. Mulder*, 989

F.3d 239, 240 (9th Cir. 1989); *U.S. v. Davis*, 538 F.3d 914, 917 (8th Cir. 2008);

U.S. v. Armistead, 552 F.2d 769, 785 (9th Cir. 2008); *Johnson v. U.S.*, 520 U.S. 461, 468 (1997).

The record extant clearly that, on May 12, 2014, Petitioner in good faith filed an amended Petition for Post-Conviction relief. (Id. at 1121-45). Quoting the record:

"Defendant claims that his trial counsel failed repeatedly to challenge the prosecutor's evidence diligently, that trial counsel should have objected to expert testimony explaining findings of blood samples and levels and chemicals found in the blood samples, or call an expert witness in rebuttal, trial counsel failed in not pursuing an exculpatory explanation (Id. at 1127). On September 8, 2014, Petitioner filed a motion for rehearing. (Id. at 1090-01), (Id. at 1096-98). On October 29, 2014, Petitioner filed a petition for review of denial of Post-Conviction relief.

(Id. at 1107-17). Quoting the record: Petitioner's counsel failed to obtain an expert witness to rebut the state's purported expert. This denied Petitioner the ability to challenge the state's case regarding alleged scientific evidence used against him in trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Trial counsel was deficient for failing to hold the state to its burden to prove every fact and challenge the state's recitation and presentation of evidence. *Strickland v. Washington*, 466 U.S. 668 (1984). This failure denied Petitioner a fair trial. Id. (Id. at 1113). On March 16, 2015, Petitioner filed reply in support of Petition for review. (Id. at 1235-40). Petitioner Therefore, presented these issues to the state courts and properly exhausted his claims. 28 U.S.C. § 2254(b)(1)(A); *Padilla v. Reese*, 514 U.S. 27, 32 (2004). 28 U.S.C. § 2254(d)(3). The "likelihood" that petitioner would have prevailed at trial But, for Erlinders inept failure to contract an expert rebuttal witness to contradict the state's expert witness is "substantial not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011).

The evidence is sufficient to overcome the "clear and convincing" evidence standard governing resolution in 28 U.S.C. § 2254(c)(1). *Arizona v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997). The district court erred when it affirmed the clearly erroneous determination of the state courts that Petitioner was procedurally precluded under Ariz. R. Crim. P. 32.2(a). "where the state court made a factual finding under misapprehension as to the correct legal standard and the state court legal error infected the fact finding process." *Caliendo v. Warden of California men's Colony*, 365 F.3d 691, 698, 64 Fed. R. Evid. Serv. 239 (9th Cir. 2004). 28 U.S.C. § 2254(d)(2). "it is sometimes difficult to distinguish a mixed question of law and fact, from a question of fact." *Williams v. Taylor*, 529 U.S. 362, 405, 408 (2000). The record is not "slippery" Therefore, "an appellate panel applying the normal standards of review, could not reasonably consider that the finding is supported by the record." *Taylor v. Maddox*, 366 F.3d 892, 1000-01 (9th Cir. 2004). 28 U.S.C. § 2254(d)(2). The district court affirmed the states erroneous preclusion, violating Petitioner's right to due process under 28 U.S.C. § 2254(d)(2). Ariz. R. Crim. P. 32.1(c), Ariz. R. Crim. P. 32.1(c), Ariz. R. Crim. P. 32.6, and Ariz. R. Crim. P. 32.9, accord *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Moreover, violating Petitioner's right to due process under *Townsend v. Sain*, 372 U.S. 293, 320 (1963). Petitioner's federal rights to an evidentiary hearing 372 U.S. 313-318 and 372 U.S. 318-322, and violating Petitioner's due process right to a factual finding. *Taylor v. Maddox*, 366 F.3d 892, 1000-01 (9th Cir. 2004); (citing *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002)). The denial of the right to a procedurally satisfactory process resulted in a "fundamental miscarriage of justice" denying Petitioner equal protection of the laws under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). The government has not applied 28 U.S.C. § 2254(d)(2).

appropriately in This case, *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

"I respectfully submit here that it was the very failure of The district court --- to conduct a proper review of the record that warrants relief here as I plainly argued that their resolution revolved around the purely factual question of Was Petitioners preclusion under Ariz. R. Crim. P. 32.2(a) by the state-Courts an "unreasonable determination" under Subsection (d)(1) and (d)(2). Petitioners reliance on *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *Townsend v. Sain*, 372 U.S. 293, 320 (1963); *Taylor v. Maddox*, 266 F.3d 992, 1000-01 (9th Cir. 2004); *Stanley v. Schirra*, 548 F.3d 612, 624 (9th Cir. 2016); *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007).

The Sixth Amendment guarantees, in both state and federal prosecutions that "The accused shall enjoy the right --- to have the assistance of counsel for his defense." U.S. Const. Amend. VI; Ariz. Const. Art. 2 section 24; Ariz. R. Crim. P. 6.1(a)(6). This right extends to both retained and appointed Counsel and is examined using the same standard. *Mickens v. Taylor*, 535 U.S. 162, 166, 168 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). The violation of this Sixth Amendment right to the effective assistance of Counsel may constitute grounds for federal habeas corpus relief. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *U.S. v. Cronin*, 466 U.S. 648, 658 (1984). Petitioner has a constitutional right to the effective assistance of Counsel in direct appeal under Rule 6, pursuant Ariz. R. Crim. P. 31. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991); *Evitts v. Luey*, 469 U.S. 387, 396-99 (1985); *State v. Hughes*, 193 Ariz. 72 (1998). Petitioner, an Arizona state prisoner, plainly argues, that because he had the misfortune of being an "indigent-defendant" that left him at the mercy of his government-appointed Counsel's from the Coconino Public defenders office,

Steven, Harvey, Sarah Erlinder and appellate Counsel Allen H. Gerhardt. The record extant clearly that, each attorney willfully violated their "Ethical obligation" to provide competent counsel to Petitioner by plainly abandoning Petitioner's criminal case during "critical stages" to the mercies of the prosecuting state, tipping the scales of the battle in the states favor. Harvey, Erlinder and Gerhardt, Constitutionally deficient performance places Mr. Ramirez's liberty in a continual state of jeopardy.

GROUND 2, GROUND 8(9)(ii).

Harvey was deficient because he did not pursue diligently the wrongful arrests (Id. at 1185-91), (Id. at 999-99), (Id. at 1035-40). Causing an irreparable violation of the fundamental guarantee of a fair process. (Id. at 18-22), (Id. at 26-38), (Id. at 497-91), and (Id. at 1018-21). Creating an internal conflict between Petitioner and Harvey. (Id. at 1067-76). The "likelihood" that Petitioner would have prevailed at trial But, for Harvey's inept failure to properly present and articulate the fact that Rintala's denial of counsel had deprived Petitioner of the constitutional right to gather exculpatory evidence, no longer available, in respect to any and all discovery in the Police Custody at the time of arrest. (Id. at 1067-76). and Second, Petitioner was prejudiced by counsel's deficiency because The information needed in order to properly calculate The retrograde extrapolation. (Id. at 73-76). is "Substantial not just conceivable" *Harrington v. Richter*, 562 U.S. 86 (2011).

GROUND 2, GROUND 8(9)(iii).

Prosecutor Sullivan, presented a dismissed charge. (Id. at 1188-91), in a jury proceeding, this fact is anchored in the foundation of Petitioner's appeal record. (Doc. 23, ex. A).

Harvey was deficient when he chooses to remain a "neutral-observer" failing to challenge the defective indictment, moreover, one of the Counts, The "oxycodone" charge was never tested till one-day prior to trial. (Id. at 234), (Id. at 249-51), (Id. at 1173-75), (Id. at 1221-1214). Petitioner was prejudiced by counsels deficiency to correct the Constitutional errors "in context to" the 02/17/11, grand jury proceedings. (Id. at 1173-82), (Id. at 1035-40).

GROUND 3, GROUND 8(b)(ii).

Erlinder was deficient due to counsels "inattention or neglect" "to explore all avenues leading to facts relevant to the merits of the case after Counsel was "put on notice" was fatal to petitioner's right to present a complete defense and vacant of reasoned judgment Counsel did not conduct adequate pretrial investigation and preparation. This vacancy of reasoned judgment was vis à vis to counsels neglect to argue The dispositive legal claims. (Id. at 1022-34), (Id. at 1067-82), (Id. at 137-91), (Id. at 1183-91).

Spaziano v. Singletary, 36 f.3d 1038 (11th Cir. 1994). This inept failure clearly contributed to denial of the seized blood evidence. McManis v. Richardson, 397 U.S. 759, 771, 777 n.14 (1970). (Id. at 1147-53).

GROUND 3, GROUND 8(b)(iv).

Erlinder was deficient in her inept failure to file a motion to suppress and or dismiss at the earliest stage and seek an "interlocutory appeal or special action" deprived Petitioner his right to be released and to have special action relief. The Polices denial to have Counsel present denied Petitioner the constitutional right to gather "Brady material" evidence from two sources. first, exculpatory evidence no longer available, in respect to any and all

discovery in the Police custody at the time of arrest. (Id. at 1067-76). and second, The information needed to calculate the retrograde extrapolation on Petitioner's alcohol level. (Id. at 73-76). after Petitioner had invoked his miranda rights and repeated demands to call attorney prior to any blood seizure. (Id. at 191-03). a central issue. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). (Id. at 1107-17).

GROUND 4, GROUND 8(b)(v).

Erlinder was deficient when she failed to contract an expert witness to rebut the State's purported experts. This denied Petitioner the ability to challenge the State's case regarding alleged scientific evidence used against Petitioner in trial.

Ake v. Oklahoma, 470 U.S. 68, 83 (1985). (Id. at 73-76), (Id. at 78-80), (Id. at 95). Erlinder as an advocate to relinquish defense strategy after the trial court denied Petitioner's motion for a Frye hearing. Erlinder was constitutionally ineffective for failing to hold the State to its burden to prove every fact and challenge the State's recitation and presentation of evidence. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). (Id. at 203-12). Petitioner was prejudiced by the introduction of the "two tubes" of blood seized and used at trial to prove Count 2 and 3. This failure denied Petitioner the constitutional right to a fair trial.

Petitioner, Jose Jesus Ramirez, declares, Gerhardt failed to raise all viable issues, which under Arizona law is fundamental error. *State v. Hughes* 183 Ariz. 72 (1988). Gerhardt, failed to raise preserved claims extant in the record of errors which denied Petitioner a fair trial. "in deciding whether the omission of issues constitutes ineffectiveness on part of counsel the court must consider the merits of the omitted issue." *Smith v. Robbins*, 528 U.S. 259, 288-89 (2000). Gerhardt, never consulted with Petitioner at the

prison, or diligently pursued how the clients objectives were to be accomplished (Id. at 1172-83), (Id. at 120-14). Gerhardt, on direct appeal advanced a single argument That any experienced advocate would have recognized as O.O.A., and he ignored preserved claims, That would have been obvious to any reasonable lawyer, at the time of appeal having significantly more promise than the single claim actually raised and have had the reasonable probability of reversing Petitioners case entitling him to new trial. "The right to Counsel" accord Smith v. Robbins, 528 U.S. 259, 288-89 (2000).

Ground 2, Ground 8(c)(i).

Gerhardt, was deficient when he did not appeal, Petitioners denial of Counsel by The Flagstaff Police, after he had repeatedly invoked his right to counsel at the scene of the arrest and at the Police station, That Polices denial deprived and prejudiced Petitioner of the Constitutional right to gather "exculpatory evidence" no longer available, had attorney been allowed to be present, he could have gathered, first hand, any and all discovery in the Polices custody. (Id. at 1667-76), and second, The information needed in order to properly, calculate the blood alcohol concentration, Through retrograde extrapolation. (Id. at 73-76). Petitioner asserts, neither the defense nor the state had the alluded above crucial information.

Ground 3, Ground 8(c)(ii).

Gerhardt, was deficient when he did not appeal, the trial Courts denial of motion to suppress blood based on the denial of Counsel after Petitioner invoked his miranda right. trial Courts determination that Petitioner waived his right to contact and consult with an attorney when he

refuses to take additional test after his repetitive request to be allowed to call his counsel is an "unreasonable determination" under 28 U.S.C. § 2254(d)(2). violating Petitioner's Constitutional right under The 6th and 14th Amendments to pre-charge counsel during DUT investigation. (Id. at 1010-11), (Id. at 187-91). Ground 4, (Round 8)(c)(iii).

Gerhardt, was deficient when he failed to appeal the trial Courts failure to grant a Frye hearing, regarding the states use of retrograde extrapolation analysis, Gerhardt, could have provided the body of law that clearly explains the legal standard to be applied, The Court could have cited to, That Authority "Daubert" and argued that the "Frye test" was "contrary to" the laws established by The Supreme Court precedent. (Id. at 203-05), (Id. at 206-12). These claims and others were preserved in the record and go to the heart of the fundamental rights guaranteed under The due process clauses of the federal and state constitutions and which denied Petitioner a fair trial. Gerhardt, was Constitutionally ineffective for failing to raise these claims substantively and/or enumerate them as arguable claims pursuant to the orders mandate. Petitioner was denied appellate review of "dead-bang winners" in his direct appeal and the preservation of the claims for habeas review by The federal Courts pursuant to, 28 U.S.C. § 2254. (Id. at 1172-82), (Id. at 1216-14), (Id. at 1121-45), (Id. at 1090-00), (Id. at 1107-17), (Id. at 1235-40). Petitioner argues, That because he had the misfortune of being an "indigent defendant" that left him at the mercy of his government appointed appellate Counsel Gerhardt, and this present default is solely, based upon Gerhardt's ineffectiveness which now denies fair process and The opportunity to comply with the states procedures and obtain an

adjudication on the merits of his claims. *Smith v. Robbins*, 528 U.S. 259, 288-89 (2000). This is due to an external objective factor that can not fairly be attributed to Petitioner. *Smith v. Baldwin*, 510 F.3d 1127, 1146 (9th Cir. 2007). Petitioner, an Arizona prisoner moves to remand for reconsideration of procedural default in light of *Martinez v. Ryan*, 566 U.S. 1, 4 (2012); *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991); *Evitts v. Lucey*, 469 U.S. 381, 396 (1985); *Smith v. Robbins*, 528 U.S. 259, 288-89 (2000); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). "I respectfully submit here that it was the very failure of the district court --- to conduct a proper review of my claims and the factual support Petitioner provided through the appeal record, that warrants relief here as I plainly argued that their resolution revolved around the purely factual question of was Gerhardt's performance constitutionally ineffective, and was the procedural default of Petitioner's (IAC) claims an "unreasonable determination" by the state courts under 28 U.S.C. § 2254(c)(2). Petitioner reliance on 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese*, 541 U.S. 27, 32 (2004); *Combs v. Coyle*, 205 F.3d 269, 275-76 (6th Cir. 2000); 28 U.S.C. § 2254(d)(2).