No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY LEE MCBRIDE,
Petitioner,

v.

CHARLES L. RYAN, WARDEN,
ARIZONA DEPARTMENT OF CORRECTIONS
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDICES

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Appendix A *Ninth Circuit Court of Appeals* Case # 17-15344 Memorandum Decision (10/23/18)

Appendix B *Ninth Circuit Court of Appeals* Case # 17-15344 Order Denying Petition for Re-Hearing (11/29/18)

Appendix C *United States District Court* Case # CV 16-0485 Order Dismissing Petition for Writ of Habeas Corpus (1/26/17)

Appendix D *United States District Court Case* # CV 16-0485 Magistrate's Report and Recommendation (12/2/16)

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Appendix H *Pima County Superior Court* Case #CR 2008-1861 Ruling Granting Re-Hearing (2/12/14)

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Appendix N *Pima County Superior Court* Case #CR 2008-1861 Sentencing Transcript (8/17/09)

APPENDIX A

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NOT FOR PUBLICATION

FILED

OCT 23 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEWEY LEE MCBRIDE, Petitioner-Appellant, v. CHARLES L. RYAN, Warden, Respondent-Appellee.	No. 17-15344 D.C. No. 4:16-cv-00485-CKJ MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Submitted October 19, 2018**
San Francisco, California

Before: HAWKINS and HURWITZ, Circuit Judges, and EATON,*** Judge.

Dewey McBride, an Arizona state prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as untimely. We granted a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

certificate of appealability ("COA") limited to the timeliness issue, and McBride timely appealed. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and affirm.

1. McBride's § 2254 petition was filed on July 21, 2016, and was subject to the one-year statute of limitations in 28 U.S.C. § 2244(d)(1)(A), which ran from "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The Arizona Supreme Court denied McBride's petition for review of the denial of his second petition for post-conviction relief ("PCR") on April 21, 2015. That denial became final ninety days later. *See McMonagle v. Meyer,* 802 F.3d 1093, 1096 (9th Cir. 2015). Thus, even assuming, as McBride contends, that the limitations period ran from the date the judgment on his second PCR petition became final, it expired on July 20, 2016, one day before he filed his § 2254 habeas petition.

2. McBride argues that the statute of limitations should have been tolled while his petition for a writ of certiorari concerning the Arizona Supreme Court's April 21 order was pending before the Supreme Court of the United States. That argument, however, has been expressly rejected by the Supreme Court. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

3. Given our conclusion that the petition was untimely, we have no occasion to address the uncertified issue raised in McBride's brief. 28 U.S.C. § 2253(c)(2).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

APPENDIX B

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEWEY LEE MCBRIDE, Petitioner-Appellant, v. CHARLES L. RYAN, Warden, Respondent-Appellee.	No. 17-15344 D.C. No. 4:16-cv-00485-CKJ District of Arizona, Tucson ORDER

Before: HAWKINS and HURWITZ, Circuit Judges, and EATON,* Judge.

The panel has voted to deny the petition for panel rehearing. Judge Hurwitz votes to deny the petition for rehearing en banc, and Judges Hawkins and Eaton so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 40, is **DENIED**.

* Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dewey Lee McBride,

Petitioner,

v.

Charles L Ryan,

Respondent.

No. CV-16-00485-TUC-CKJ

ORDER

On December 2, 2016, Magistrate Judge Leslie A. Bowman issued a Report and Recommendation (Doc. 19) in which she recommended the Petition Under 28 U.S.C. §2254 for a Writ of Habeas Corpus by a Person in State Custody (Doc. 1) filed by Dewey McBride be denied. McBride objected to the Report and Recommendation. (Doc. 20). Respondents have not filed a response.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Further, under 28 U.S.C. § 636(b)(1), if a party makes a timely objection to a magistrate judge's recommendation, then this Court is required to "make a de novo determination of those portions of the [report and recommendation] to which objection is made." The statute

does not "require [] some lesser review by [this Court] when no objections are filed." *Thomas v. Arn*, 474 U.S. 140, 149-50, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Rather, this Court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Id*. at 149.

No objections having been made to the magistrate judge's rendering of the procedural and factual history, the Court adopts those recitations. The Court now evaluates McBride's objections to statutory time computation, and finds McBride's petition is time-barred.

Procedural History

The Court will briefly reiterate facts mentioned in the Report and Recommendation and supplement them with additional facts in the record that specifically address the objections by McBride.

McBride was sentenced August 17, 2009, and filed his first petition for post-conviction relief on February 22, 2011. (Doc. 19, p. 2). The first petition requested an evidentiary hearing and resentencing on the issues of ineffective assistance of counsel and mental incompetency. (Doc. 12, p. 10; Doc. 19, p. 2). Specifically, McBride argued his mental health issues were not properly addressed by the court, and counsel failed to represent him in the presentence interview as well as failed to present mitigating evidence at sentencing. *Id.* The trial court denied the petition on November 30, 2011. (Doc. 13, pp. 36-38).

After the denial, McBride filed a petition for review in the Arizona Court of

Appeals on January 4, 2012. (Doc. 19, p. 2). The appeals court granted a limited remand to determine which exhibits the judge considered for sentencing. *Id.* The inquiry revealed a disparaging letter the trial judge had reviewed. *Id.* The letter was sealed and had not been disclosed to the parties. *Id.* Without directly addressing the letter, the Arizona Court of Appeals granted review but denied relief on May 25, 2012. (Doc. 14, p. 29). In its memorandum decision, the appeals court explained "McBride has failed to demonstrate the trial court abused its discretion, either in finding insufficient evidence that he was incompetent, or in concluding that counsel was not ineffective by failing to challenge McBride's incompetency at the change-of-plea and sentencing hearings." (Doc. 19, p. 2). McBride moved for a rehearing based on the letter but it was summarily denied. *Id.*

On October 13, 2012, McBride filed a petition for review in the Arizona Supreme Court. (Doc. 19, p. 2). This petition again argued incompetency and ineffective assistance, but also included a request to remand for resentencing before a different judge due to the sealed letter. (Doc. 14, p. 52; Doc. 19, p. 2). The Arizona Supreme Court denied the petition February 15, 2013. (Doc. 19, p. 2).

On April 12, 2013, McBride filed a second Notice of Post-Conviction Relief in the trial court. (Doc. 19, p. 3). The trial court dismissed the notice because the Arizona Court of Appeals had not yet issued its mandate, and the court did not have jurisdiction. *Id.*

McBride then filed another Notice of Post-Conviction Relief ("Notice") in the trial court on June 10, 2013, as well as a sealed motion for change of judge for cause. *Id.* When this petition was filed on August 12, 2013, McBride argued that the merits of the

issues raised in the First Petition (McBride's incompetency and counsel's ineffective assistance) needed to be re-reviewed because the disclosed letter constituted newly discovered evidence which could have had an impact not only on the sentencing, but in the trial court's initial Rule 32 proceedings. (Doc. 15, p. 47; Doc. 19, p. 3). The court reassigned the case to a different judge, finding "[the judge] has not, in any way, acted improperly, that she acted in good faith in these matters, and that she reasonably believed that no party would gain an advantage as a result of the *ex-parte* communication and that the communication did not have an effect at the time of sentencing. However, this Court does not wish there to be any issue of any nature surrounding these procedures." (Doc. 15, p. 36).

At first, the trial court held that the letter was not "newly discovered evidence" and denied both resentencing and re-evaluation of his first petition in front of a new judge. (Doc. 19, p. 3). But, after McBride filed a motion for rehearing, the trial court found the letter *was* "newly discovered evidence" and granted McBride a resentencing. (Doc. 17, pp. 6-7). It did not, however, re-examine its order denying a re-evaluation of the Rule 32 of-right petition in front of a different judge. (Doc. 19, p. 3).

McBride then filed a petition for review in the Arizona Court of Appeals on March 31, 2014. (Doc. 17, p. 11). The appeals court granted review but denied relief on September 22, 2014. (Doc. 18, pp. 3-6).

McBride filed for review in the Arizona Supreme Court but was this was denied on April 21, 2015. (Doc. 18, p. 20). The Arizona Court of Appeals' mandate issued on

May 7, 2015. (Doc. 8-4, p. 2).

Finally, McBride filed a petition for writ of certiorari with the U.S. Supreme Court on July 20, 2015 (Doc. 18, p. 36) which was denied on December 7, 2015. (Doc. 18-6, p. 2).

The pending petition for a writ of habeas corpus in this Court was filed July 21, 2016. (Doc. 1).

Statutory Limitations for Filing a Writ of Habeas Corpus

Under the Antiterrorism and Effective Death Penalty Act of 1996, a petitioner may file a writ of habeas corpus in federal court requesting relief from a state judgment, however, the time for the appeal is not unlimited. Petitioners have one year to file from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 8 U.S.C. § 2244(d)(1). "The time during which a properly filed application for State post-conviction . . . is pending shall not be counted toward any period of limitation." 8 U.S.C. § 2244(d)(2).

McBride's objections raise three issues: (1) whether the time between the conclusion of review of the first Rule 32 of-right proceedings and the Notice was tolled when calculating the one-year statute of limitations, (2) whether the sealed letter viewed by the judge but not counsel constituted structural error, negating the first round of appeals, and (3) whether the review was "pending" until the U.S. Supreme Court issued its denial of certiorari. The Court addresses these issues separately.

1. *Tolling of Time Between Petitions*

The magistrate judge found the end of direct review occurred on May 16, 2013; ninety (90) days after the Arizona Supreme Court denied McBride's first petition. The Report and Recommendation subtracts the twenty-four (24) day period between that date and the date of the properly filed Notice of Post-Conviction Relief from the one year filing deadline. *See Hemmerle v. Schriro*, 495 F.3d 1069, 1074 (9th Cir. 2007) (When notice is filed properly "it is sufficient to toll the AEDPA statute of limitations.").

McBride argues that the time between conclusion of the first round of Rule 32 proceedings and the filing of the Notice in the second petition on June 10, 2013 was tolled because his second petition met the two-pronged test laid out in *King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003) (per curiam) (abrogated on other grounds); *accord. Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012).

The *King* test determines whether a petitioner is entitled to tolling of "the period between petitions filed in the same court." *Stancle v. Clay*, 692 F.3d at 953 (quoting *Banjo v. Ayers*, 614 F.3d 964, 968 (9th Cir. 2010)). First, the Court must decide "whether the petitions are limited to an elaboration of the facts relating to the claims in the first petition." *King*, 340 F.3d at 823. If the Court considers the second petition an elaboration, "[the court] construe[s] the new petitions as part of the first 'full round' of collateral review" and allows tolling. *Id.* If the petitioner simply tried to correct deficiencies in the first petition the time would toll, but if the petitioner raises new claims, he brings a new round of collateral attack and the statute of limitations would run. *Stancle*, 692 F.3d at 954. Second, the Court must decide whether the state court denied the second claim based

on the merits or deemed the second petition untimely. *Id.*

Here, the magistrate judge's determination of the date that terminated direct review was made prior to McBride's objections. Assumedly, the decision was predicated on the assumption that each petition was separate; the first petition raised issues of ineffective assistance of counsel and mental competency, the second raised the claim of newly-discovered evidence.

Under this logic, McBride's first petition was first denied by the trial court, then the Arizona Court of Appeals, and finally the Arizona Supreme Court on February 15, 2013. The Report and Recommendation states the final judgment would commence ninety (90) days after the denial, giving McBride a three month period to petition the U.S. Supreme Court for certiorari. Since McBride did not petition to the U.S. Supreme Court, the time expired to seek such review.

Based on McBride's arguments before the magistrate judge, her conclusions were reasonable. The "newly discovered evidence" argument was not raised until after the magistrate judge made her Report and Recommendation. However, when analyzed under *King*, the newly discovered evidence issue was inextricably tied to the first proceeding and functioned as an expansion of the record in the first petition.

The District Court of Arizona's decision in *Corrales v. Ryan* is instructive. 2015 WL 4882632 (D. Ariz., Jun. 24, 2015). In that case, the defendant filed his first notice of post-conviction relief alleging his attorney was ineffective because he did not ask that counts be severed, and did not object to impeachment testimony or to the admission of

evidence. *Id.* at *2. The trial court denied the petition. *Id.* He then filed a petition for review to the Arizona Court of Appeals using the same arguments and was summarily denied. *Id.* Defendant did not file a petition to the Arizona Supreme Court, instead filing a second Rule 32 Notice in the trial court. *Id.* This time, defendant alleged ineffective assistance of counsel and newly-discovered evidence, but failed to include any argument or facts in support of either claim. *Id*. at 3. The court found that the second petition was not an elaboration of the first, instead it asserted new claims of ineffective assistance and newly discovered evidence and denied tolling of the time between petitions. *Id.* at 5. Addressing the second prong, the court also found the filings were untimely. *Id.* at 4.

McBride's situation is distinguishable from *Corrales*. In that case, the defendant had neither discovered new evidence during the pendency of the first proceedings, nor attempted to have the newly discovered evidence addressed during the pendency of the first round of review. When the defendant raised ineffective assistance and newly discovered evidence claims in the second round of proceedings, he failed to amend his second petition with any additional facts that were unknown to the trial court in the first. McBride, on the other hand, attempted at the earliest possible opportunity to obtain a rehearing at the Arizona Court of Appeals on the issue of the sealed letter during the first round of proceedings. He then petitioned for review of the issue to the Arizona Supreme Court. When McBride filed his second petition at the trial court, it included the letter, a newly discovered fact which was presented in the first round of review, but had not been properly addressed by the trial court in the first petition because the fact was unknown at

the time of filing. In McBride's case, the trial court granted him resentencing and found there was newly discovered evidence which could have altered the sentence. (Doc. 17, p. 6). McBride was attempting to fix the discrepancies and errors in the first petition based on facts that were only revealed in the process of his first Rule 32 post-conviction proceedings. Unlike *Corrales*, McBride reasserted his original claims, but then asked that these claims be re-examined based on the newly-discovered letter. The "newly discovered evidence" should not be considered another claim, but the avenue in which McBride was able to elaborate on the facts included in the first Rule 32 petition.

The second prong of the two-part analysis is satisfied as well. The trial court did not find McBride's second petition untimely, and denied the petition on the merits.

The Court finds the later petition, filed June 10, 2013, was not a subsequent round of collateral review, but elaborated on the facts of the first petition. Therefore, the time between the conclusion of direct review in the Arizona Supreme Court and the Notice in the second round of post-conviction proceedings was tolled.

2. Structural Error

In the alternative, McBride argues that if the Court rejects the argument that the time between proceedings is tolled, then the second Notice should be treated as the Rule 32 of-right petition for the purposes of beginning the one-year statute of limitations. He reasons the first petition and all of its appeals proceedings were void because the sealed letter constituted structural error by the trial court, and cannot be used to calculate the time.

Structural errors "infect the entire trial process and necessarily render a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 7–9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *see State v. Ring (Ring III)*, 65 P.3d 915, 993 ¶ 45 (2003). Structural error "is limited to such circumstances as denial of counsel or a biased [trier or fact]," *State v. Valverde*, 208 P.3d 233, 235–36 (Ariz. 2009) (en banc) (citing *State v. Garza*, 163 P.3d 1006, 1013 n. 6 (2007). In such cases, prejudice is presumed, because errors were "so intrinsically harmful as to require automatic reversal." *Id.* at ¶ 10.

A biased trial judge may constitute structural error, but bias means more than simply considering evidence that should not have been considered. McBride's examples differ from the present situation. In those cases, the judges had a high degree of improper personal involvement. In *Williams v. Pennsylvania*, a judge on a panel did not recuse himself from post-conviction review, but should have because he had approved the death penalty against the defendant when he served as a district attorney. __ U.S. __, 136 S.Ct. 1899, 1910, 195 L.Ed.2d 132 (2016). In another case, the judge had a pecuniary interest in the outcome of the case. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In the last case, a judge denied a defendant the right to a jury verdict, and instead substituted his own. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

The error committed here was not structural error. The sentencing judge sealed one letter and reviewed it for sentencing, however, she had no interest in the outcome and viewing the letter did not undermine the entire sentencing process. This situation is much

closer to that of a jury permitted to review evidence which had not been admitted. *See e.g., Eslaminia v. White*, 136 F.3d 1234, fn. 1 (9th Cir. 1998) (not structural error when jurors considered taped interview of individual who did not testify, tape was not in evidence, and counsel did not find out until after deliberations.); *People v. Gamache*, 227 P.3d 342, 385-86 (Cal. 2010) (not structural error when jurors viewed tape of two witnesses not admitted into evidence); *but see United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996) (structural error found when judge allowed jury to view 14 incriminating tapes of defendants' statements). Because there was no structural error, prejudice is not presumed. *Valverde*, 208 P.3d at 236. McBride has failed to show prejudice during his first round of post-conviction proceedings, and the Court finds the denials of review in McBride's first round of post-conviction review proceedings are valid.

Therefore, the conclusion of direct review occurred after the Arizona Supreme Court denied review in the first round of proceedings on February 15, 2013. *See section 4, infra* (discussing conclusion of review occurs on the date the state's highest court denied review).

Nonetheless, even if this Court found the first round of post-conviction review void due to structural error, the Court would not agree with McBride's conclusion. Because the Court finds tolling of all the time from the first petition to the conclusion of the second petition, McBride's argument would not increase the tolled time.

3. Final Judgment to U.S. Supreme Court

McBride then argues the case remained "pending" until his petition for certiorari

to the United States Supreme Court was denied on December 7, 2015. He cites no case law supporting this theory. If true, it would mean the entire time between final judgment of the Arizona Supreme Court on May 16, 2013, to the denial of his petition for certiorari by the U.S. Supreme Court on December 7, 2013 was excluded from statute of limitations calculations. Accordingly, the pending petition (Doc. 1) would have been filed within the statutory time, 227 days later on July 21, 2016.

McBride's calculations for the end of tolling are incorrect. A petition to the U.S. Supreme Court for certiorari does not stop the statute of limitations clock from running. The U.S. Supreme Court explained:

> "[T]he statute of limitations is tolled only while state courts review the application. . . . [A] state post-conviction application 'remains pending' 'until the application has achieved final resolution though the State's post-conviction procedures.' [The U.S. Supreme Court] is not a part of a 'State's post-conviction procedures.' And an application for state post-conviction review no longer exists. All that remains is a separate certiorari petition pending before a *federal* court. The application for state post-conviction review is therefore not 'pending' after the state court's post-conviction review is complete, and § 2244(d)(2) does not toll the 1-year limitations period during the pendency of a petition for certiorari."

Lawrence v. Florida, 549 U.S. 327, 332 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (emphasis in original). Applying this to the pending writ, the time between the Arizona Supreme Court denial on the second round of post-conviction review and the final denial of certiorari from the U.S. Supreme Court was not tolled.

4. Denial from Arizona Supreme Court

Since the Court finds that McBride's petition was not pending while seeking a petition for certiorari to the U.S. Supreme Court, the Court must now determine the

actual date the tolling of time concluded and the clock began to run.

Tolling concludes at the time in which "the State's highest court has issued its mandate *or denied review*." *Lawrence*, 549 U.S. at 332 (emphasis added). In Arizona, the denial of review by the State Supreme Court ends the pendency of appeals proceedings and allows the clock to begin again. *Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th Cir. 2007), *cert. denied*, 555 U.S. 829 (2008); *Flores v. Trujillo*, 2013 WL 424725 (D. Ariz., Apr. 10, 2014) ("When the Arizona Supreme Court denied his petition for post-conviction review, the limitation period began running again from where it left off.").

The Court concludes the date the proceedings were no longer 'pending' was on April 21, 2015, when the Arizona Supreme Court denied relief. Therefore, the clock began on April 24, 2015, the day after the Arizona Supreme Court decision and expired 366 days later on April 23, 2016.[1] McBride filed his federal habeas petition on July 21, 2016, 457 days after the clock started. So, even granting tolling for the twenty-four (24) days between his first and second petition, the pending habeas is still eighty-nine (89) days overdue and is deemed untimely. The Court therefore finds:

1. The entire time period between McBride's filing of his first Rule 32 petition of-right on February 22, 2011, and his denial by the Arizona Supreme Court on April 21, 2015 is tolled.

[1] Like the magistrate judge, the Court uses the "anniversary method" and includes an additional day because 2016 was a leap year. (Doc. 19, p. 6) (citing *United State v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). Since the filing deadline was a Sunday, the court extends the deadline to Monday, April 24, 2016. Fed.R.Civ.P 6(a)(1)(C).

2. The clock for the one-year time limit to file a writ for habeas corpus in federal court began the day after the Arizona Supreme Court issued its denial of review, April 22, 2015.
3. Petitioner's deadline for filing within the one-year time limit expired April 24, 2016.
4. Petitioner filed his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody on July 21, 2016, eighty-nine (88) days after the one-year statute of limitations had expired.
5. Petitioner's writ is therefore time-barred.

Certificate of Appealability ("COA")

Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. This Court must determine, therefore, if a COA shall issue.

The standard for issuing a COA is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). "When the district court denies a habeas petition on procedural grounds without reaching

the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *see also Robbins v. Carey*, 481 F.3d 1143,1146-47 (9th Cir. 2007) (failure to object to magistrate judge's conclusions does not automatically waive appellate challenge) In the certificate, the Court must indicate which specific issues satisfy the showing. *See* 28 U.S.C. § 2253(c)(3).

The Court finds that jurists of reason would not find it debatable whether the Petition was filed within the statutory time limitations and the Court finds that jurists of reason would not find it debatable whether the district court was correct in its procedural ruling. A COA shall not issue as to McBride's claims.

Any further request for a COA must be addressed to the Court of Appeals. *See* Fed. R.App. P. 22(b); Ninth Circuit R. 22-1

Accordingly, IT IS ORDERED:

1. The Report and Recommendation (Doc. 19) is ADOPTED IN PART;
2. The Petition Under 28 U.S.C. §2254 for a Writ of Habeas Corpus by a Person in State Custody (Doc. 1) is DENIED;

. . .

. . .

. . .

3. The Clerk of the Court shall enter judgment and shall then close its file in this matter, and;

4. A Certificate of Appealability shall not issue in this case.

Dated this 26th day of January, 2017.

Honorable Cindy K. Jorgenson
United States District Judge

Exhibit D

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Dewey Lee McBride, Petitioner, vs. Charles L. Ryan; et al., Respondents.	No. CV 16-0485-TUC-CKJ (LAB) **REPORT AND RECOMMENDATION**

Pending before the court is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed on July 21, 2016, by Dewey Lee McBride, an inmate confined in the Arizona State Prison Complex in Buckeye, Arizona. (Doc. 1); https://corrections.az.gov/public-resources/inmate-datasearch.

Pursuant to the Rules of Practice of this court, this matter was referred to Magistrate Judge Bowman for report and recommendation. LRCiv 72.2(a)(2).

The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order dismissing the petition. It is time-barred.

Summary of the Case

McBride pleaded guilty in accordance with a consolidated plea agreement to three counts of second-degree burglary and possession of a dangerous drug for sale in case CR20081861 and

first-degree burglary in case CR20081871. (Doc. 11, pp. 10-11) On August 17, 2009, the trial court sentenced McBride to an aggregate prison term of 37 years (Doc. 11, pp. 14-21)

After several false starts, McBride filed his Rule 32 of-right post-conviction relief petition on February 22, 2011. (Doc. 12, p. 10) He argued his mental health issues were not adequately addressed and trial counsel was ineffective for failing to represent him properly at the presentence interview and failing to present mitigating evidence at sentencing. (Doc. 12, pp. 10-24); (Doc. 1, p. 2) The trial court denied the petition, but sua sponte held that the sentence for one of his burglary convictions was error. (Doc. 13, pp. 3-15) The state filed a motion for reconsideration, and on November 30, 2011, the court reversed itself and denied the entire petition. (Doc. 13, pp. 36-38)

On January 4, 2012, McBride filed a petition for review with the Arizona Court of Appeals. (Doc. 14, p. 3) On April 30, 2012, the court of appeals granted a limited remand to determine which documents the trial court relied upon during sentencing. (Doc. 15, p. 43) On May 3, 2012, McBride discovered that the trial court had received, prior to sentencing, a letter from his son's maternal grandmother, Cindy Taylor. *Id.* The letter was sealed by the trial court; its existence was not disclosed to the parties. (Doc. 15, p. 43)

The Arizona Court of Appeals granted review but denied relief on May 25, 2012. (Doc. 14, p. 29) The court explained that "McBride has failed to demonstrate the trial court abused its discretion, either in finding insufficient evidence that he was incompetent, or in concluding that counsel was not ineffective by failing to challenge McBride's competency at the change-of-plea and sentencing hearings." (Doc. 14, p. 33) McBride moved for permission to view the Taylor letter on June 7, 2012. (Doc. 15, p. 43) He found that it described him as "a violent, dishonest career criminal." (Doc. 15-9, p. 4) He moved unsuccessfully for a rehearing. (Doc. 15, p. 43)

On October 13, 2012, McBride filed a petition for review with the Arizona Supreme Court. (Doc. 14, pp. 44-60) In that petition, he argued he should be resentenced before a different judge because the trial court concealed the Taylor letter from him. *Id.* The Arizona Supreme Court denied his petition for review on February 15, 2013. (Doc. 14, p. 61)

On April 12, 2013, McBride filed notice of post-conviction relief raising the issue of the Taylor letter. (Doc. 15, p. 3) On April 19, 2013, the trial court dismissed the notice because the Arizona Court of Appeals had not issued its mandate, and the trial court was without jurisdiction over the case. (Doc. 15, p. 6)

On June 10, 2013, McBride refiled his notice of post-conviction relief arguing that the Taylor letter was a newly discovered material fact that would have changed the sentence. (Doc. 15, pp. 19-20) He filed his petition on August 12, 2013. (Doc. 15, p. 40) On August 14, 2013, the case was reassigned to a different judge on the defendant's motion. (Doc. 15, pp. 36-38)

On November 15, 2013, the trial court held that the Taylor letter was not "newly discovered evidence," denied McBride's request for resentencing before a new judge, and denied his request to have his Rule 32 of-right petition reevaluated by a new judge. (Doc. 16, pp. 30-38) On rehearing, the trial court partially reversed itself holding that the Taylor letter *was* "newly discovered evidence" and granting McBride a resentencing. (Doc. 17, pp. 6-7) The trial court did not revisit its order denying McBride a reevaluation of his Rule 32 of-right petition before a different judge. *Id.*

McBride filed a petition for review on March 31, 2014. (Doc. 17, p. 11) The Arizona Court of Appeals granted review but denied relief on September 22, 2014. (Doc 18, pp. 3-6) The court held that "no basis for relief described in Rule 32.1 expressly permits a collateral attack on an earlier Rule 32 proceeding – each substantive provision specifically addresses a defect in the defendant's conviction or sentence." (Doc. 18, p. 6)

McBride filed a petition for review with the Arizona Supreme Court. (Doc. 18, p. 8) The court denied review on April 21, 2015. (Doc. 18, p. 20) The court of appeals filed its mandate on May 7, 2015. (Doc.18-4, p. 2) McBride filed a petition for certiorari with the U.S. Supreme Court on July 20, 2015. (Doc. 18, p. 36) It was denied on December 7, 2015. (Doc. 18-6, p. 2)

On July 21, 2016, McBride filed the pending petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1) He claims "the state courts violated his right to due process as guaranteed by the Fourteenth Amendment to the Constitution by denying him the right to have

the issues raised in his initial post-conviction petition . . . decided by a judge who is not biased as a matter of law." (Doc. 1, pp. 4-5)

The respondents filed a limited answer arguing, among other things, that the petition is time-barred. (Doc. 10) They are correct. The court does not reach the respondents' alternate argument that McBride's claim is procedurally defaulted.

McBride did not file a reply arguing he is entitled to equitable tolling or that he is "actually innocent."

Discussion

The writ of habeas corpus affords relief to persons in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The petition, however, must be filed within the limitation period or it will be dismissed. The statute reads in pertinent part as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). The "one-year statute of limitations . . . applies to each claim in a habeas application on an individual basis." *Mardesich v. Cate*, 668 F.3d 1164, 1170 (9th Cir. 2012).

"Equitable tolling is available to a habeas petitioner if (1) the petitioner pursued his rights diligently, and (2) an extraordinary circumstance prevented timely filing." *Yow Ming Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir.), cert. denied sub nom. *Yow Ming Yeh v. Biter*, 135 S. Ct. 486 (2014). "This is a very high bar, and is reserved for rare cases." *Id*.

A showing of "actual innocence" may also serve to excuse an untimely petition. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). The Supreme Court has cautioned, however, that "tenable actual-innocence gateway pleas are rare: A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id*. (punctuation modified).

McBride's claim is based on the Taylor letter, which McBride discovered in June of 2012, while he was litigating his Rule 32 of-right petition. (Doc. 15, p. 43) This happened before his judgment became final, so the limitation period for this claim was not triggered until that later date – "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

The trial court finally denied McBride's Rule 32 of-right petition on November 30, 2011 after the state's successful motion for reconsideration. (Doc. 13, pp. 36-38) The Arizona Court of Appeals granted review but denied relief on May 25, 2012. (Doc. 14, p. 29) McBride's petition for review with the Arizona Supreme Court was denied on February 15, 2013. (Doc. 14, p. 61) McBride then had 90 days to petition the U.S. Supreme Court for review. Sup. Ct. R. 13. When he did not do so, his judgment became final on May 16, 2013. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

The limitation period began running the next day[1] and ran for 24 days until June 10, 2013 when McBride filed his notice of post-conviction relief, which tolled the running of the limitation period. *See* 28 U.S.C. § 2244(d)(2). Tolling pursuant to § 2244(d)(2) continued until the Arizona Supreme Court denied relief on April 21, 2015. (Doc. 18, p. 20) The court of appeals did not file its mandate until May 7, 2015, but this ministerial act does not affect the limitation calculation. (Doc.18-4, p. 2); *Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th Cir. 2007) ("We conclude that after the February 20, 2003, denial by the Arizona Supreme Court, nothing remained 'pending' for purposes of § 2244(d)(2)"); *White v. Klitzkie*, 281 F.3d 920, 923 n. 4 (9th Cir. 2002) ("[I]t is the decision of the state appellate court, rather than the ministerial act of entry of the mandate, that signals the conclusion of review.").

The limitation period began running the next day, on April 22, 2015, and expired 342 days later on March 28, 2016. The court adds 342 days rather than 341 days because the limitation period is calculated according to the "anniversary method," and 2016 is a leap year. *See United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). The limitation period was not tolled while McBride's petition for certiorari was pending before the U.S. Supreme Court. *Lawrence v. Florida*, 549 U.S. 327, 332, 127 S. Ct. 1079, 1083 (2007) ("[Section] 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari.").

McBride filed his petition for writ of habeas corpus in this court on July 21, 2016, which is 115 days after the limitation period expired. (Doc. 1) It is time-barred.

RECOMMENDATION

[1] The notice of post-conviction relief filed on April 12, 2013 did not trigger stautory tolling pursuant to 28 U.S.C. § 2244(d)(2). (Doc. 15, p. 3) The trial court was without jurisdiction over the case at that time, so the notice was not "properly filed" as the statute requires. (Doc. 15, p. 6); *Artuz v Bennett*, 531 U.S. 4, 9, 121 S.Ct. 361, 364 (2000) ("If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction . . . it will be *pending* but not *properly filed*."). (emphasis in original) Consequently, there was no "gap" tolling between April 19, 2013, when the notice was dismissed, and June 10, 2013, when the notice was refiled. *See, e.g., Hemmerle v. Schriro*, 495 F.3d 1069, 1075 (9th Cir. 2007). So the clock started running the day after the judgment became final on May 16, 2013.

The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order DISMISSING the petition for writ of habeas corpus. (Doc. 1) It is time-barred.

Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within 14 days of being served with a copy of this report and recommendation. If objections are not timely filed, they may be deemed waived. The Local Rules permit a response to an objection. They do not permit a reply to a response.

DATED this 2nd day of December, 2016.

Leslie A. Bowman
Leslie A. Bowman
United States Magistrate Judge

APPENDIX E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 7, 2015

Mr. Natman Schaye
Arizona Capital Representation Project
101 E. Pennington Street
Ste. 201
Tucson, AZ 85701

Re: Dewey Lee McBride
v. Arizona
No. 15-6394

Dear Mr. Schaye:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX F

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

April 21, 2015

RE: STATE OF ARIZONA v DEWEY LEE McBRIDE
Arizona Supreme Court No. CR-14-0363-PR
Court of Appeals, Division Two No. 2 CA-CR 14-0089 PRPC
Pima County Superior Court No. CR20081861 and
CR20081871

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 21, 2015, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Nicolette Kneup
Natman Schaye
Dewey Lee McBride, ADOC #189870, Arizona State Prison, Lewis – Administrative Office
Jeffrey P Handler
adc

APPENDIX G

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DEWEY LEE MCBRIDE,
Petitioner.

No. 2 CA-CR 2014-0089-PR
Filed September 22, 2014

Petition for Review from the Superior Court in Pima County
Nos. CR20081861 and CR20081871
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Respondent

Natman Schaye
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Dewey McBride seeks review of a trial court order that denied, in part, his second petition for post-conviction relief. The successive petition claimed the original trial court judge's orders made after she read an ex parte sentencing letter should have been vacated. The affected orders comprised the sentencing and summary denial of the first Rule 32 petition. The successive petition was assigned to another judge, who ruled that McBride stated a sufficient claim to require a resentencing, but the court would not vacate or reconsider the original judge's denial of the first petition. The resentencing has not occurred. We decline relief for the following reasons.

¶2 McBride pled guilty to first-degree burglary, possession of a dangerous drug for sale, and three counts of second-degree burglary. He was sentenced by Judge Eikleberry to a combination of concurrent and consecutive prison terms totaling thirty-seven years. He sought post-conviction relief, contesting the voluntariness of his guilty pleas and arguing his trial counsel had been ineffective. The trial court, Judge Eikleberry, summarily dismissed those claims, and this court denied relief on review. *State v. McBride*, No. 2 CA-CR 2012-0001 (memorandum decision filed May 25, 2012).

¶3 McBride then filed a motion to reconsider the memorandum decision based on his discovery that Judge Eikleberry reviewed a letter from McBride's maternal grandmother (C.T.) regarding sentencing, which the court did not disclose to the parties. The letter is extremely critical of McBride, characterizing him as a "con man" skilled at manipulating the justice system. This court

summarily denied that motion for reconsideration, and our supreme court denied McBride's petition for review.

¶4 McBride then filed a notice of and petition for post-conviction relief, claiming the letter constituted newly discovered evidence. He argued that the letter called into question Judge Eikleberry's impartiality and, therefore, required that he be resentenced by a different judge. He further argued that, because Judge Eikleberry had dismissed his first Rule 32 petition, a different judge should address the claims raised in that petition.

¶5 The matter was reassigned to Judge Nichols, who initially denied relief, concluding the letter would not have altered McBride's sentences and Judge Eikleberry had not relied on C.T.'s letter in making her sentencing determination. Judge Nichols further concluded McBride was not entitled to reconsideration of the claims raised in his first proceeding, noting that "the Court of Appeals and the Supreme Court . . . have both denied [McBride]'s request for a rehearing on his initial petition based on the discovery of the . . . [l]etter." The court, however, granted McBride's motion for rehearing and ordered that McBride be resentenced. This petition for review followed.

¶6 On review, McBride repeats his contention that he is entitled to have another judge review the merits of the claims raised in his first post-conviction proceeding. He asserts the letter called into question Judge Eikleberry's impartiality and thereby "denied [him] an impartial arbiter to decide his Rule 32 of-right petition." He further asserts that proceedings before a judge "whose impartiality may reasonably be questioned" constitutes structural error which "always requires reversal." *See generally State v. Granados*, 692 Ariz. Adv. Rep. 10, ¶ 12, (Ct. App. Aug. 5, 2014) ("bias or the objective potential for bias based on the judge's 'direct, personal, substantial pecuniary interest' or other strong personal interest in the outcome of the case" can constitute structural error), *quoting Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

¶7 McBride characterizes his claim as one of newly discovered evidence. But the plain language of Rule 32.1(e) permits a claim that "[n]ewly discovered material facts probably exist and

such facts probably would have changed the verdict or sentence," not a claim that there might have been a different result in a previous collateral proceeding. Indeed, no basis for relief described in Rule 32.1 expressly permits a collateral attack on an earlier Rule 32 proceeding—each substantive provision specifically addresses a defect in the defendant's conviction or sentence.[1]

¶8 McBride contends he has a due process right to bring his claim under Rule 32, relying generally on *Martinez v. Ryan*, ___, U.S. ___, ___, 132 S. Ct. 1309, 1317 (procedural default does not bar a federal habeas court from hearing a substantial claim of ineffective assistance in the initial-review collateral proceeding if counsel was ineffective). *Martinez*, however, is inapposite because there is no claim of ineffective assistance, and McBride does not otherwise develop this argument; therefore, we do not address it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶9 For the reasons stated, although we grant review we deny relief.

[1]The provisions of Rule 32.1 appear to provide no procedural avenue for a defendant to present a successor claim of judicial bias to challenge the validity of a previous post-conviction proceeding. *See* Ariz. R. Crim. P 32.1(a), (e)(providing avenue to challenge due process violations, or claims arising from newly discovered evidence, exclusively when marshaled to challenge a conviction, verdict or sentence). McBride has not asserted that he should be allowed to pursue that claim by any other procedural avenue.

APPENDIX H

ARIZONA SUPERIOR COURT, PIMA COUNTY

2014 FEB 13 AM 11:19

HON. RICHARD D. NICHOLS

CASE NO. CR20081861
CR20081871

DATE: February 12, 2014

STATE OF ARIZONA
Plaintiff,

vs.

DEWEY LEE MCBRIDE
Defendant.

RULING

POST-CONVICTION RELIEF UNDER ADVISEMENT RULING

This Court has read and considered Petitioner's Motion for Rehearing of Petition for Post-Conviction Relief, all other motions submitted, and the oral arguments of both parties in court on February 10, 2014.

The issue at hand is whether Petitioner satisfied the fifth *Bilke* prong, thus entitling him to relief under Rule 32.1 (e) as newly-discovered evidence.

To qualify as newly discovered evidence that would demand, at the least, resentencing, "(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial." *State v. Bilke*, 162 Ariz. 51, 52-53 (1989).

In its Ruling on November 13, 2013, this Court found that Petitioner satisfied the first four *Bilke* prongs, but not the fifth. Petitioner timely filed a Motion for Rehearing of Petition for Post-Conviction Relief. The motion was granted and a rehearing took place on February 10, 2014.

This Court agrees with Petitioner in that this issue falls under the analysis of *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979), and *State v. Emmanuel*, 159 Ariz. 464, 465, 768 P.2d 196, 197 (App. 1989). Because this Court agrees that the initial non-disclosure of the Taylor Letter constitutes fundamental error, the fifth prong of *Bilke* is therefore satisfied. Accordingly, this Court finds that the Taylor Letter is newly-discovered evidence as under Rule 32.1 (e). Petitioner is thus entitled to relief.

IT IS THEREFORE ORDERED that Petitioner is **GRANTED** a resentencing.

Daniel Klopper/lad
Judicial Law Clerk

IT IS FURTHER ORDERED that Counsel for Petitioner shall prepare a writ necessary to secure Petitioner's presence.

IT IS FURTHER ORDERED setting Resentencing on March 17, 2014 at 2:30 p.m. in Division 14 for 30 minutes.

R Nichols

HON. RICHARD D. NICHOLS

cc: Hon. Richard D. Nichols
Kellie L. Johnson, Esq.
Natman Schaye, Esq. (Writ to issue)
Clerk of Court - Under Advisement Clerk

Daniel Klopper/lad
Judicial Law Clerk

APPENDIX I

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RICHARD D. NICHOLS

CASE NO. CR20081861
CR20081871

DATE: November 13, 2013

STATE OF ARIZONA
Plaintiff,
vs.

DEWEY LEE MCBRIDE
Defendant.

RULING

POST CONVICTION RELIEF RULING

This Court has read and considered Petitioner's Petition for Post-Conviction Relief, the State's Response to Petition for Post-Conviction Relief and Petitioner's reply to Prosecution's Response to Petition for Post-Conviction Relief.

On May 13, 2008, Petitioner Dewey Lee McBride was indicted in CR20081861 of twenty counts of criminal conduct. These counts included: six counts of Burglary in the Second Degree, a class three felony; three counts of Forgery, a class four felony; two counts of Theft of a Credit Card, a class five felony; two counts of Taking the Identity of Another, a class four felony; one count of Attempted Theft of Means of Transportation by Control and/or by Controlling Stolen Property, a class four felony; one count of Theft by Control, a class two felony; two counts of Burglary in the Third Degree, a class four felony; one count of Attempted Burglary in the Second Degree, a class four felony; one count of Fleeing from Law Enforcement Vehicle, a class five felony; and one count of Possession of a Dangerous Drug for Sale, a class two felony.

The condensed facts for these indictments are as follows. On May 31, 2007, Petitioner burglarized the home of Lisbeth Leggett. On June 24, 2007, Petitioner burglarized the home of Darcy McCue. On July 9, 2007, Petitioner burglarized the home of Luis Ochoa-Lopez. On July 27, 2007, Petitioner committed burglary on a home owned by Ann and Daniel Beaver. On August 3, 2007, Petitioner committed burglary on a residence belonging to Shirley Fisher. On August 17, 2007, Petitioner committed a burglary on a home owned by Henry and Lillian Martinez. On August 21, 2007, Petitioner burglarized the home of victim Barbara Connaghan. On August 22, 2007, Petitioner burglarized the home of victim Jennifer Prileson. On August 24, 2007, an informant told authorities that Petitioner could be located at an apartment complex in Tucson. After obtaining and

Lucas Kimes
Judicial Administrative Assistant

executing a search warrant, Petitioner's self-proclaimed girlfriend was found at the apartment wearing stolen jewelry. Additionally, the police officers recovered stolen property valued at more than $25,000, belonging to eleven separate victims. On September 4, 2007, Petitioner broke into Fred Kasper's vehicle and stole his wallet. On September 13, 2007, Petitioner burglarized a vehicle owned by Norman Carlson. On September 14, 2007, Pima County Sheriff's Department deputies attempted to stop a vehicle driven by Petitioner and bearing a stolen license plate. Petitioner fled. When found, Petitioner presented Fred Kasper's driver's license and claimed he was Kasper. Petitioner also possessed 13.02 grams of methamphetamine and approximately $2,800 in cash. Petitioner was arrested and released on bond on September 25, 2007. A warrant was issued for his arrest in October 2007.

On May 15, 2008, Petitioner was indicted in CR20081871 of the following: one count of Burglary in the First Degree, a class two felony; one count of Theft by Control, a class two felony; two counts of Possession of a Dangerous Drug, a class four felony; one count of Possession of Drug Paraphernalia, a class six felony; one count of Possession of a Deadly Weapon by a Prohibited Possessor, a class four felony; one count of Aggravated Taking the Identity of Another, a class three felony; one count of Theft of Means of Transportation, a class three felony; and one count of Taking the Identity of Another, a class four felony.

The condensed facts for these indictments are as follows. On October 28, 2007, Petitioner burglarized a residence owned by Ben and Linda Pitney. On November 2, 2007, Gary Brinlee reported that his truck was stolen from a car dealership. Later that day, Petitioner was found in a motel with a license plate belonging to Brinlee's vehicle and a gun taken from Pitney's home. Additionally, Petitioner was found with 3.3 grams of Ecstasy, 3.51 grams of methamphetamine, drug paraphernalia, and $1,025 in cash. Petitioner was then arrested again.

On January 1, 2008, Petitioner was indicted in CR20080140 on two counts of Theft of a Credit Card, a class five felony.

On March 24, 2008, Petitioner was indicted in CR20081099 of one count of Burglary in the Second Degree, a class three felony, and one count of Theft by Control, a class four felony.

On May 9, 2009, Petitioner pled guilty, as to CR20081861, to three counts of Burglary in the Second Degree, a class three felony, and one count of Possession of a Dangerous Drug for Sale, a class two felony. In the same plea agreement, Petitioner pled guilty, as to CR20081871, to one count of Burglary in the First Degree, a class two felony. By pleading guilty to the abovementioned counts in these two cases, all remaining counts, including those in CR20080140 and CR20081099, were dismissed.

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Judicial Administrative Assistant

The plea agreement set forth the following statutory sentencing range for the counts to which Petitioner pled guilty. For CR20081861, Counts One and Eight, Burglary in the Second Degree, there was no mitigated sentence, but the presumptive sentence was 3.50 years, the aggravated sentence was seven years, and the substantially aggravated sentence was 8.75 years. For Count 10, Burglary in the Second Degree, there was no mitigated sentence, but the presumptive sentence was 6.50 years, the aggravated sentence was seven years, and the substantially aggravated sentence was 16.25 years. For Count 20, Possession of a Dangerous Drug for Sale, the mitigated sentence was five years, the presumptive sentence was ten years, and the aggravated sentence was 15 years.

For CR20081871, Count One, Burglary in the First Degree, the substantially mitigated sentence in the above-referenced plea was three years, the mitigated sentence was four years, the presumptive sentence was five years, the aggravated sentence was ten years, and the substantially aggravated sentence was 12.50 years.

Petitioner was sentenced on July 17, 2009. For CR20081861, Count One, Petitioner was sentenced to the aggravated term of seven years. In so sentencing, Judge Eikleberry noted that the court had considered the large number of victims, as well as the emotional and financial harm to the victims. For CR20081861, Count Eight, Petitioner was sentenced to the aggravated term of seven years, with Judge Eikleberry citing the same circumstances as in Count One. This sentence was to run consecutively with that of Count One. For CR20081861, Count Ten, Petitioner was sentenced to the aggravated term of thirteen years, with Judge Eikleberry citing the same circumstances as in Count One. This sentence was to run consecutively with that of Count Eight. For CR20081861, Count Twenty, Petitioner was sentenced to the presumptive sentence of ten years. This sentence was to run concurrently with that of Count Ten. For CR20081871, Count One, Petitioner was sentenced to the aggravated sentence of ten years with consecutive community supervision, with Judge Eikleberry citing the same circumstances as Count One in CR20081861. This sentence was to run consecutively with the sentenced imposed as to CR20081861.

Petitioner filed his first Petition for Post-Conviction Relief, which was based on a claim of ineffective assistance of counsel, on February 22, 2011. The result of this Petition was that Petitioner was to be resentenced as to Count Ten in CR20081861. On September 27, 2011, however, the hearing regarding Petitioner's resentencing was vacated. In the November 29, 2011 Order, the court confirmed its September 27 ruling, holding that Petitioner's sentence as to Count Ten was, in fact, legal, and thus did not demand Petitioner be resentenced. In so holding, the court agreed with the State's claim that the "sentencing range listed in the plea

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agreement was the correct range because Petitioner pled to Count Ten under the sentencing enhancement of then A.R.S. § 13-702.02(A) and B(). This statute has since been renumbered as A.R.S. § 13-703(I)."

On April 12, 2013, Petitioner filed the current Petition for Post-Conviction Relief.

The crux of Petitioner's current Petition rests on the "Taylor Letter," a confidential letter critical of Petitioner which was written by Cindy Taylor, the maternal grandmother of Petitioner's child. As was discovered in a May 3, 2012 Minute Entry, Judge Eikleberry listed this letter as one of the documents considered in Petitioner's sentencing for CR20081861 and CR20081871. Specifically, the Minute Entry states that the letter was a "confidential letter from Cindy Taylor dated July 14, 2009, which was sealed and filed as an exhibit." *See* May 3, 2012 Minute Entry.

Petitioner now raises three issues. The first is whether the Taylor Letter is newly discovered evidence that warrants Petitioner's convictions be set aside or, alternatively, that Petitioner be resentenced. The second is whether Judge Eikleberry's consideration of the Taylor Letter requires resentencing by a different judge. The third is whether a new judge must address the merits of the issues raised in Petitioner's initial Petition for Post-Conviction Relief.

The first issue is whether the Taylor Letter is considered newly discovered evidence.

To qualify as newly discovered evidence that would demand, at the least, resentencing, "(1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial." *State v. Bilke*, 162 Ariz. 51, 52-53 (1989).

Petitioner argues that the Taylor Letter does constitute newly discovered evidence as under Rule 32.1 (e). Although Petitioner acknowledges that the letter existed at the time of Petitioner's sentencing, Petitioner notes that its existence was unknown to either side at that time. In fact, it was not known until after Petitioner's initial Rule 32 petition. Petitioner thus argues that he was diligent in requesting that the Court of Appeals order production of all evidence considered at sentencing, as the letter was ultimately revealed through this request.

The State agrees that this letter was unknown at the time of sentencing. However, the State argues that Petitioner was not diligent in discovering that the letter existed due to the fact that the letter was in the court's file at the time of sentencing.

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Judicial Administrative Assistant

Here, the Court looks at the five *Bilke* prongs in determining whether the Taylor Letter constitutes newly discovered evidence.

The first prong has been satisfied, as the Taylor Letter existed as of July 14, 2009, but was not discovered until May 3, 2012. Petitioner was sentenced on August 18, 2009. The letter therefore existed at the time of sentencing, but was not discovered until after the fact. This issue could not have been raised in Petitioner's initial Rule 32 Petition for the same reason.

The second prong has been met, as this Court concludes, from the facts, that Petitioner was diligent in discovering the existence of the Taylor Letter and bringing it to the court's attention. The existence of the letter and its use was unknown to both the prosecution and the defense until, on April 30, 2012, the Court of Appeals granted Petitioner's request to determine what exhibits Judge Eikleberry relied on at sentencing. Although this letter was in the court file at the time of sentencing, this Court finds that Petitioner was diligent in requesting the aforementioned exhibit list which led to the discovery of the letter.

The third prong is satisfied, as this is clearly not cumulative or impeaching evidence.

The fourth prong is met, given that the letter was directly relevant to the case. Judge Eikleberry included the Taylor Letter in the list of exhibits she considered at sentencing, and it was a letter written about Petitioner. However, it is noted that Judge Eikleberry specifically stated that she did not consider the letter in imposing Petitioner's original sentence.

Thus, the fifth prong is where Petitioner's case falls short. The fifth *Bilke* prong states that the evidence must have "likely" altered the sentence if it was known at the time of trial. In imposing Petitioner's sentence, Judge Eikleberry expressly stated that she did not consider the Taylor Letter, which was known to her at the time of trial. With regard to this issue, Petitioner argues that Judge Eikleberry's statement, made in a "notice," may not be considered because it violated Criminal Rule 10.6 (once motion for change of judge is filed, "the judge shall proceed no further in the action..."). Even if this Court ignores Judge Eikleberry's express statement that she did not consider the Taylor Letter at the time of sentencing, this Court still does not find that the existence of the letter would have altered the sentence if Petitioner had been able to rebut it. In so holding, this Court looks to the circumstances which Judge Eikleberry listed in imposing the aggravating sentences, namely, that that the court had considered the large number of victims, as well as the emotional and financial harm to the victims, in imposing such sentences. Because this clearly does not mention any information provided to her *ex parte*, this Court finds that the sentence was not altered due to the Taylor Letter. Therefore, the fifth element is not satisfied.

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Judicial Administrative Assistant

As all five *Bilke* prongs are not met, this Court therefore finds that the Taylor Letter does not constitute newly discovered evidence.

IT IS THEEFORE ORDERED that Petitioner's request to have his conviction set aside or, alternatively, to be resentenced, based on newly discovered evidence is summarily **DENIED.**

The second issue Petitioner raises is whether Judge Eikleberry's consideration of the Taylor Letter requires resentencing by a different judge.

Arizona Rule of Criminal Procedure, Rule 26.6(a), states that

> The court shall permit the prosecutor and defense counsel, or if without counsel, the defendant, to inspect all presentence, diagnostic and mental health reports... Once the pre-sentence report is made available to the defendant, the court shall permit the victim to inspect it except those parts excised by the court or made confidential by law.

Information gathered *ex parte* has been held to be a violation of due process when considered in determining a defendant's sentence, even when revealed to the parties. In *State v. Valencia*, 124 Ariz. 139, 140-141 (1979), for example, the trial court judge was met by the victim's brother, who spoke with the judge specifically about the victim's family's feelings that the defendant should be sentenced to death. The victim's brother alluded to other aggravating factors to support his feeling. The trial judge informed defense counsel of this unsolicited, in-person meeting, but the Supreme Court still ordered that the defendant be resentenced before a different judge because "the fundamental rights of the defendant to a fair hearing have been impinged." *Id.* The Court noted that then-A.R.S. §13-703 provided that the "admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules" of evidence." *Id.* at 141. The key point that this Court finds in *Valencia* is that the *ex parte* communication was directly and specifically pointed at aggravating factors and requesting an aggravating sentence.

Even when a judge does not consider information gathered *ex parte*, it has still been held that a different judge must resentence the defendant. In *State v. Emmanuel*, 159 Ariz. 464 (App. 1989), for example, the trial court judge conducted an *ex parte* inquiry into the defendant's background prior to sentencing, such that the judge had communications with three of the defendant's former employers. Even though the judge claimed that he did not consider these *ex parte* discussions in imposing defendant's sentence, the Appellate Court still reversed, stating that sentencing judges must not "consider allegations of misconduct by the defendant not present in the sentencing record." *Id.*

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Here, Petitioner argues that, because Judge Eikleberry neither gave Petitioner notice of the Taylor Letter nor an opportunity to rebut the letter, it violates the Arizona Rules of Criminal Procedure, particularly Rule 26.6(a). Petitioner argues that this violation goes against his due process right to be sentenced by an impartial judge whose impartiality cannot reasonably be questioned.

Petitioner further cites to *Valencia* and *Emmanuel* in support of his argument that he must be resentenced by a different judge because his fundamental rights to a fair hearing have been impinged. As Judge Eikleberry's "impartiality might reasonably be questioned," Petitioner argues that he is entitled to have his Petition granted. Supreme Court Rule 81, Code of Judicial Conduct, Rule 2.11(A).

The State argues that Petitioner is not entitled to resentencing. The State claims that Petitioner's argument is without merit, as Judge Eikleberry specifically stated that she did not consider the information in the Taylor Letter. Further, the judicial conduct regarding a judge's impartiality is not the same here as it was in *Valencia* and *Emmanuel*.

The State distinguishes *Valencia* by noting that here, unlike in *Valencia*, the parties did not have to rely on a summarized *ex parte* conversation; rather, Judge Eikleberry simply indicated that she did not consider the content in the letter. The State also distinguishes *Emmanuel*, noting that there the Court deliberately set out to obtain information about the defendant and had undocumented conversations with multiple individuals. The *Emmanuel* court also referenced those undocumented conversations at sentencing. Here, on the other hand, Judge Eikleberry did not set out to obtain any information found in the Taylor Letter.

This Court agrees that both *Valencia* and *Emmanuel* are distinguishable. Unlike in *Valencia*, Judge Eikleberry did not meet privately with Taylor, nor did she summarize the content of the letter at sentencing. More importantly, as far as this Court is aware, the Taylor Letter was not directly or specifically pointed at aggravating factors, nor did it request an aggravated sentence. It must be noted that this Court has not read the Taylor Letter, and is relying upon Petitioner's statement that it was merely "critical" of him. This Court distinguishes the *ex parte* communication in *Valencia*, which specifically dealt with the issue of an aggravated sentence, with the *ex parte* communication in the present case, which is merely critical of Petitioner.

Additionally, although the judge in *Emmanuel* claimed that he did not consider the *ex parte* discussion in imposing the defendant's sentence, he still deliberately set out to obtain the background information that he received from the defendant's employers. Here, however, the Taylor Letter was unsolicited.

Because Judge Eikleberry did not deliberately set out to find *ex parte* background information or how Petitioner's family felt about Petitioner's imminent sentence, these two cases are distinguishable.

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Judicial Administrative Assistant

Because these cases are distinguishable, this Court is not bound by their rulings.

Further, this Court notes that the policy behind *Valencia* and *Emmanuel* is to prevent the appearance of impropriety and to prevent a judge from impinging on Petitioner's right to a fair hearing. This Court does not find that Judge Eikleberry's reading of the Taylor Letter gives the appearance of impropriety for the aforementioned reasons. Because Judge Eikleberry expressly noted the circumstances for aggravating Petitioner's sentences, circumstances which were completely detached from the Taylor Letter and based solely on the facts of the case such as those presented in the August 17, 2009 Presentence Report, this Court finds that Judge Eikleberry's impartiality cannot reasonably be questioned by reading the letter before sentencing Petitioner.

IT IS ORDERED that Petitioner's request to be resentenced by a new judge is summarily **DENIED**.

The third issue Petitioner presents is whether a new judge must address the merits of the issues raised in Petitioner's initial Petition for Post-Conviction Relief.

Rule 32.1(e) states that one ground for relief in a Rule 32 of-right proceeding is that "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence."

Rule 32.2(a) of the Arizona Rules of Criminal Procedure states that claims that are not raised in previous collateral proceedings or finally adjudicated on the merits in a previous collateral proceeding are precluded from being raised in a successive Rule 32 Petition for Post-Conviction Relief.

Here, Petitioner argues that Judge Eikleberry's secret review of the Taylor Letter constitutes newly discovered evidence, as it did not come to light until after she summarily denied Petitioner's initial Post-Conviction Petition for Relief. Petitioner argues that the merits of the issues presented in his first Petition must be addressed for the same reasons that resentencing is required.

The State disagrees, arguing that Judge Eikleberry's review of the Taylor Letter is not considered newly discovered evidence. Similar to the abovementioned arguments, this is because the fifth *Bilke* prong was not met, as the reviewing of the Taylor Letter would not have changed Petitioner's sentence given that Judge Eikleberry's expressly noted circumstances for aggravating Petitioner's sentences.

The State also argues that the Taylor Letter was already in the court file at the time of Petitioner's initial Rule 32 Petition, and therefore, since this issue should have already been raised, Petitioner's claim must be precluded as under Rule 32.2(a). However, this Court has already addressed this issue, and rejects the State's claim that Petitioner did not exercise due diligence in failing to find the Taylor Letter in the court file at the time Petitioner filed his initial Petition.

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Further, the State notes that, when the letter was discovered, Petitioner moved for a rehearing on his initial petition. The Court of Appeals denied his request, and the Supreme Court of Arizona denied his Petition for Review.

What is dispositive of Petitioner's third issue, then, is that the Court of Appeals and the Supreme Court of Arizona have both denied Petitioner's request for a rehearing on his initial Petition based on the discovery of the Taylor Letter. This, combined with the fact that this Court does not find that the Taylor Letter constitutes newly discovered evidence or that there was an appearance of impropriety in Judge Eikleberry's sentencing, leads this Court to find that Petitioner's request for a rehearing on his initial Petition must be denied.

IT IS THEREFORE ORDERED that Petitioner's request to have a newly assigned judge address the merits of his initial Rule 32 Petition is summarily **DENIED.**

IT IS THEREFORE ORDERED that the requested relief is **DENIED**, and ordering the Petition for Post-Conviction Relief **DISMISSED.**

HON. RICHARD D. NICHOLS

cc: Kellie L. Johnson, Esq.
Natman Schaye, Esq.
Attorney General - Criminal - Tucson
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Office of Court-Appointed Counsel

Lucas Kimes
Judicial Administrative Assistant

APPENDIX J

FILED
08-01-13
TONI L. HELLON, Clerk
Ryan Lewis
Deputy

AUG 01 2013

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. SARAH R SIMMONS

CASE NO. CR20081861
CR20081871

COURT REPORTER: Kristi Valdez
Courtroom - 805

DATE: July 29, 2013

STATE OF ARIZONA

Kellie L. Johnson, Esq. counsel for State

VS.

DEWEY LEE MCBRIDE
Defendant

Natman Schaye, Esq. counsel for Defendant

MINUTE ENTRY

DEFENDANT'S MOTION FOR CHANGE OF JUDGE

Defendant not present, in custody.

Defendant's exhibits #A through #F are identified as follows:

#A Copy of Motion to Remand for Evidentiary Hearing to Attempt to Complete Record or to Grant Other Appropriate Relief
#B Copy of Order from Court of Appeals, April 30, 2012
#C Copy of Motion for Order to Provide Defense Counsel With Copy of Supplemental Record; Motion for Extension of Time to File Motion for Rehearing or Petition for Review
#D Copy of Order from Court of Appeals, June 12, 2012
#E Copy of Sealed Document Coversheet and Letter
#F Copy of Affidavit, Mark Resnick

Counsel argue their respective positions to the Court.

THE COURT FINDS that Judge Eikleberry has not, in any way, acted improperly, that she acted in good faith in these matters, and that she reasonably believed that no party would gain an advantage as a result of the *ex-parte* communication and that the communication did not have an effect at the time of sentencing. However, this Court does not wish there to be any issue of any nature surrounding these procedures, and therefore, in the interest of justice and the Court,

IT IS ORDERED the motion is granted and the matters shall be reassigned.

Sarah R Simmons
HON. SARAH R SIMMONS

Ryan Lewis
Deputy Clerk

(DISTRIBUTION ONLY)

cc: Hon. Sarah R Simmons
Kellie L. Johnson, Esq.
Natman Schaye, Esq.
Pretrial Services

Ryan Lewis
Deputy Clerk

APPENDIX K

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

Rebecca White Berch
Chief Justice

Janet Johnson
Clerk of the Court

February 15, 2013

RE: STATE OF ARIZONA v DEWEY LEE McBRIDE
Arizona Supreme Court No. CR-12-0427-PR
Court of Appeals Division Two No. 2 CA-CR 12-0001 PRPC
Pima County Superior Court Nos. CR20081861 & CR20081871

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 15, 2013, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Berch, Vice Chief Justice Bales, and Justice Brutinel participated in the determination of this matter.

There is no record to return.

Janet Johnson, Clerk

TO:
Kent E Cattani
Jacob R Lines
Natman Schaye
Dewey Lee McBride, ADOC# 189870, Arizona State Prison, Lewis - Administrative Office
Jeffrey P Handler
adc

APPENDIX L

FILED BY CLERK
MAY 25 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DEWEY LEE MCBRIDE, Petitioner.	2 CA-CR 2012-0001-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20081861 and CR20081871

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Natman Schaye
Tucson
Attorney for Petitioner

K E L L Y, Judge.

¶1 Pursuant to a plea agreement, petitioner Dewey McBride was convicted in May 2009 of one count of first-degree burglary and possession of a dangerous drug for sale, and three counts of second-degree burglary, all arising from events that occurred on

separate occasions. In August 2009, the trial court sentenced him to consecutive and concurrent, partially aggravated and presumptive terms of imprisonment totaling thirty-seven years. In this petition for review, McBride challenges the court's order dismissing the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., and its order vacating its prior ruling that the sentence on one of the second-degree burglary counts (count ten) was illegal.

¶2 McBride argues, as he did in his petition below, that his guilty pleas were not knowing, intelligent, and voluntary because he was not mentally competent when he entered the pleas and at sentencing. He also contends trial counsel was ineffective for failing to raise the issue of his competency, for failing to attend the presentence interview with him and advise him to invoke his right to remain silent, and for failing to fully develop and present mitigating evidence at sentencing. He claims he is entitled to an evidentiary hearing in front of a new judge and to be resentenced on count ten. We will not disturb the trial court's ruling unless it has clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶3 McBride argues he was unable to understand the consequences of his guilty pleas and sentences due to his mental condition and the side-effects of Thorazine, a medication he was taking at the Pima County jail, and that his due process was denied by the trial court's failure to make a competency determination. He also argues his attorney, Mark Resnick, was ineffective for failing to raise his incompetence at the change-of-plea and sentencing hearings. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively

reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶4 McBride attached as exhibits to his petition for post-conviction relief affidavits of his mother and Resnick, as well as medical records from the jail documenting his mental health issues and the medications he was taking near the time he pled guilty and was sentenced. In his affidavit, Resnick attested he was not provided with a complete set of these documents when he requested them before the plea and sentencing hearings, and asserted he would have raised McBride's competency and consulted with a mental health expert if he had "been aware of these diagnoses [substance induced psychotic disorder, post-traumatic stress disorder and depression] and the administration of . . . medications [other than Paxil]."[1] McBride also attached a report prepared by psychologist Robert Smith documenting his examination of McBride in January 2011, almost two years after McBride had pled guilty. Smith opined that he had "a reasonable doubt as to whether Mr. McBride was competent at the time of his plea." He explained that McBride may have experienced "psychotic symptoms" when he pled guilty, making it "questionable" if he was able to knowingly and intelligently enter a plea agreement or be sentenced, or, even if he did not have these symptoms, "it is very possible that he was impaired due to the side-effects caused by Thorazine." Smith further

[1]Notably, Resnick nonetheless raised concerns regarding McBride's mental health in the sentencing memorandum.

concluded, "[t]he evidence reviewed supports the opinion that [McBride] was incompetent at the time of his sentencing."

¶5 As authorized by Rule 32.6(c), Ariz. R. Crim. P., the trial court dismissed McBride's petition without an evidentiary hearing but explained its reasoning in a careful and well-reasoned, thirteen-page minute entry ruling. In its ruling, the court explained in great detail McBride's arguments and Smith's opinions. Among the considerations the court cited in dismissing the petition were: Resnick did not state in his affidavit that he had noticed anything that lead him to believe McBride had difficulty understanding the plea or that he had had any similar concerns at the change-of-plea hearing; Smith did not seem to consider that the jail records in the month before McBride pled guilty showed his "mood and affect were of a normal intensity," he was alert with "perceptions [that] were reality based," and "he was rational but depressed, with no cognitive issues"; and, in its colloquy with McBride at the change-of-plea hearing, McBride told the court he had not consumed any drugs "within the past 24 hours that would make it difficult for [him] to understand the proceedings" and that he understood the terms of the plea agreement, including the sentencing range. In summary, the court found McBride had "failed to establish that reasonable grounds existed at the time he entered his plea and at the time he was sentenced to call for a competency hearing," and noted it would have held a competency hearing only "if there was sufficient evidence to indicate that the Petitioner was unable to understand the nature of the proceedings against him and that he was unable to assist in his own defense." The court then concluded McBride had failed to "meet this test."

¶6 Notably, the trial court expressly relied on its own observations at the change-of-plea hearing and at sentencing to conclude that McBride "did not act in a way nor make any statements to suggest to this Court that he did not understand the proceedings taking place or the nature and consequences of the plea," he "was coherent when he addressed this Court at his sentencing, apologizing to the victims, [and] accepting responsibility for his actions," and "[a]t no point during his statements at the sentencing did this Court have any reason to suspect that Petitioner might be incompetent." Ultimately, the court concluded that, merely because McBride had been "diagnosed with mental illnesses and on medication to treat such illnesses is not sufficient to establish that there was an issue regarding [his] competency."

¶7 McBride has failed to demonstrate the trial court abused its discretion, either in finding insufficient evidence that he was incompetent, or in concluding that counsel was not ineffective by failing to challenge McBride's competency at the change-of-plea and sentencing hearings. The court denied relief in a comprehensive minute entry order that identified and correctly ruled on McBride's arguments in a manner that will allow any future court to understand their resolution. We therefore approve and adopt the court's ruling on these claims and see no need to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We further note that the court was not required to accept Smith's opinion regarding McBride's competency. *Cf. Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986) (trial court not bound by opinions of mental health expert and may rely on own observations of defendant at competency hearing). In addition, because we conclude the court properly found

McBride failed to assert any colorable claims meriting post-conviction relief, he was not entitled to an evidentiary hearing. A defendant is entitled to a hearing only if he raises a colorable claim for relief, which is one that, if taken as true, likely would have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

¶8 McBride also argues Resnick was ineffective for failing to attend the presentence interview with him or to advise him to remain silent during the interview, and for failing to present "readily available" mitigating evidence at sentencing. We also approve of and adopt the trial court's ruling on these claims. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360. Not only did the court note that McBride was not prejudiced by Resnick's conduct, but it added that "there was sufficient mitigation evidence presented . . . [and] Mr. Resnick did more to present mitigation evidence than the vast majority of defense attorneys do."

¶9 Finally, in its post-conviction ruling, filed in July 2011, the trial court found, "upon its own review," that the thirteen-year sentence imposed for count ten was illegal because McBride had pled guilty to a nonrepetitive, rather than a repetitive offense on that count. The court thus set a hearing to resentence McBride on count ten. However, in a November 2011 ruling, the court granted the state's motion for reconsideration, and ruled that McBride had, in fact, been sentenced on count ten legally, and that the state had established good cause for excusable delay in not filing its motion earlier. On review, McBride contends the court's July 2011 order was correct, the state's motion for rehearing of that order was untimely, and he is entitled to be resentenced on count ten. In its November 2011 ruling, the court set forth the correct legal and factual

reasons for vacating its prior ruling, and for considering and granting the state's motion. We approve and adopt the court's ruling on this claim and see no need to restate it here. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360.

¶10 For all of the aforementioned reasons, we grant review and deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

APPENDIX M

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: JANE L. EIKLEBERRY CASE NO: CR20081861
CR20081871

STATE OF ARIZONA,

Plaintiff/Respondent, DATE: July 7, 2011

vs.

DEWEY LEE McBRIDE

Defendant/Petitioner.

RULING

IN CHAMBERS RULING RE: PETITION FOR POST-CONVICTION RELIEF

Petitioner filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting an ineffective assistance of counsel claim. Petitioner argues that he was denied his constitutional rights because he was incompetent at the time he entered into his plea agreement and at the time of sentencing and his trial counsel was ineffective for not raising the issue of Petitioner's competence prior to his entering into a plea or sentencing. Petitioner further claims that his trial counsel provided ineffective assistance for failing to attend Petitioner's interview for the pre-sentence report and for not advising Petitioner to invoke his right to remain silent during such interview. Finally, Petitioner claims that trial counsel was ineffective for not providing specific mitigation evidence for Petitioner's sentencing.

The Court has reviewed Petitioner's opening memoranda, the State's response, Petitioner's reply, and the court file.

Facts and Procedural History

On May 13, 2008, Petitioner was indicted in CR20081861 on twenty different counts, including burglary, theft, forgery, and possession of a dangerous drug for sale. The charges stem from thirteen different incidents. On May 15, 2008, Petitioner was

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indicted in CR20081871 on eight additional charges stemming from two separate incidents.

On May 15, 2009, Petitioner entered into a plea agreement and pled guilty to offenses charged under two separate case numbers: in CR20081861, he pled guilty to three counts of burglary in the second degree, all class three felonies, and one count of possession of a dangerous drug for sale, a class two felony. In CR20081871, he pled guilty to one count of burglary in the first degree, a class two felony. Under the terms of the plea agreement, the charges in two additional indictments, in case numbers CR20080140 and CR20081099, were dismissed. Before accepting the plea agreement, this Court asked Petitioner if he had consumed any drugs, alcohol or medication in the past 24 hours that would make it difficult for him to understand the proceedings taking place, and Petitioner stated that he had not. This Court also explained the terms of the plea agreement and the rights he was giving up by pleading guilty. Petitioner was asked whether he understood these rights and wished to give them up, and Petitioner stated "Yes, ma'am." This Court also asked Petitioner whether he had sufficient time to talk to his attorney about the plea and Petitioner stated that he had. Before accepting the plea, this Court found that Petitioner had entered into the plea knowingly, voluntarily and intelligently. At the end of the change of plea hearing, Petitioner's trial counsel, Mr. Resnick, asked for additional time when setting sentencing because of the amount of mitigating evidence potentially available to investigate and present on behalf of his client. Sentencing was set for July 15, 2009.

This Court continued Petitioner's sentencing to August 17, 2009, after granting Mr. Resnick's motion to continue, which stated that he was in the process of receiving additional mitigation documents and that Mr. Resnick had a family emergency to attend to.

Prior to Petitioner's sentencing, Mr. Resnick submitted a sentencing memorandum to this Court, pointing out many mitigating factors, including Petitioner's strong family support, his truthfulness in cooperating with law enforcement regarding the circumstances surrounding the matter, his cooperation with the government, his addiction to methamphetamine, and his mental health issues. Regarding Petitioner's

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mental health issues, the memorandum stated that Petitioner was diagnosed with post-traumatic stress disorder and paranoid schizophrenia. The memorandum also objected to the way the pre-sentence report portrayed Petitioner, stating "[d]efense counsel believes the investigator entirely missed the point of [Petitioner's] candor, which was to hide nothing and be honest. She seeks to punish him for that." Attached to the sentencing memorandum were numerous letters in support of Petitioner submitted by family members and members of the community.

Petitioner also submitted a letter to this Court prior to his sentencing. Petitioner's letter is clear, coherent, and articulate. For instance, Petitioner expressed remorse for his actions, discussed his prior drug use and explained how it had affected him. It was apparent that Petitioner understood the effect his drug use had on his life and understood that his use of methamphetamine had caused his life to begin a "downward spiral." He explained that both he and his best friend began using methamphetamine, and that prior to their drug use, they were both very intelligent and outgoing, but their drug use had caused his friend to commit suicide and had caused Petitioner's life to begin a "downward spiral." Petitioner also pointed out past volunteer work he had done in the community to portray the type of person he was before he began using drugs. Additionally, Petitioner mentioned that he had cooperated with the police after his arrest and he discussed his past encounters with the criminal justice system. It was also apparent that Petitioner understood that he was facing a lengthy prison sentence and the impact the sentence would have on his life. For example, Petitioner wrote the following statements: "[t]his is perhaps the most important time of my life thus far," and "I know I owe my debt to society but I am asking for your leinience [sic]."

At the sentencing hearing on August 17, 2009, Mr. Resnick made additional arguments for a mitigated sentence, pointing out Petitioner's age and addiction to methamphetamine. Petitioner also gave a statement to this Court, apologizing to the victims, taking responsibility for his choice to begin using methamphetamine, and asking this Court to "give [him] another chance at life."

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The plea agreement provided that the sentences for counts one, eight and ten were to all run consecutively to one another and that the sentence for count 20 could run concurrently or consecutively to the sentences for counts one, eight and ten. There was no agreement in CR20081871 as to whether the sentence in that case would run concurrently or consecutively to the sentences in CR20081861. The plea agreement provided that the substantially mitigated and the mitigated sentences were not available for counts one, eight and ten in CR20081861. The plea agreement incorrectly stated that the range of sentence for count ten in CR20081861 was a presumptive term of 6.5 years, an aggravated term of 13 years, and a substantially aggravated term of 16.25 years.

This Court sentenced Petitioner in CR20081861, counts one and eight, to two partially aggravated terms of seven years to run consecutive to each other, in count ten to one partially aggravated term of 13 years to run consecutive to the two seven year terms, and in count 20 to one presumptive term of 10 years to run concurrent with the other terms. In CR20081871 this Court sentenced Petitioner to one partially aggravated term of ten years to run consecutive to the sentences in CR20081861. The sentences total 37 years. Restitution was capped at $500,000.00.

Petitioner's Competency Claim

Petitioner claims that a combination of errors by the prosecution, through the county jail, and errors by Petitioner's trial counsel prevented the issue of his competence from being raised and decided at the time he entered into the plea agreement and also at the time of sentencing.

Under Arizona law, "[a] person shall not be tried, convicted, sentenced or punished for a public offense . . . while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense." Ariz. R. Crim. P. 11.1. Rule 11.1 defines "mental illness, defect or disability" as "a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms." However, the mere presence of a mental illness, defect, or disability is not enough to find a defendant incompetent. *Id.* The test that must be applied is whether the mental illness or defect renders a criminal defendant

"unable to understand the proceedings against him or her or to assist in his or her own defense." *Id. See also, State v. Moody,* 208 Ariz. 424, ¶ 56, 94 P.3d 1119, 1139 (2004); *State v. Anzivino,* 148 Ariz. 593, 596, 716 P.2d 50, 53 (App. 1985) (a mere diagnosis of mental disease or defect does not mean that the defendant is unable to make rational decisions regarding his or her case).

Once competency proceedings are commenced, the trial court must first determine whether reasonable grounds exist to call for a competency hearing. *Moody,* 208 Ariz. at ¶ 52, 94 P.3d at 1139. Reasonable grounds exist only if there is "sufficient evidence to indicate that the defendant is not able to understand the nature of the proceedings against him and to assist in his defense." *Id.* (citing *State v. Salazar,* 128 Ariz. 461, 462, 626 P.2d 1093, 1094 (1981)). If the trial court finds that reasonable grounds do exist and there is a competency hearing, it has been held that a defendant's competence to plead guilty must be determined by a higher standard than his competence to stand trial. *Anzivino,* 148 Ariz. at 596, 716 P.2d at 53 (citing *State v. Pierce*, 116 Ariz. 435, 438, 569 P.2d 865, 868 (App. 1977)). "A defendant is not competent to plead guilty if the mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and understand the nature of the consequences of his plea." *State v. Bishop,* 162 Ariz. 103, 105, 781 P.2d 581, 583 (1989) (citing *Sieling v. Eyman,* 478 F.2d 211, 215 (9th Cir. 1973)).

In this case, Petitioner has failed to establish that reasonable grounds existed at the time he entered his plea and at the time he was sentenced to call for a competency hearing. This Court would have only held a competency hearing at that time if there was sufficient evidence to indicate the Petitioner was unable to understand the nature of the proceedings against him and that he was unable to assist in his own defense. The evidence Petitioner has set forth in his Petition fails to meet this test.

The evidence Petitioner relies on for his competency claim is an affidavit submitted by Mr. Resnick, Petitioner's trial counsel, an affidavit submitted by Sandra McBride, Petitioner's mother, a report by Dr. Robert L. Smith, a psychologist, and copies of medical records from the Pima County Jail for the duration of Petitioner's incarceration from when he was arrested to the date he was sentenced.

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A. **Petitioner's Competency at the Time of Plea**

In the affidavit submitted by Mr. Resnick to support Petitioner's claim of incompetency at the time he entered into his plea, counsel states that at the time Petitioner pled guilty, counsel had not received any medical records from the jail, was unaware that Petitioner was diagnosed with substance abuse psychotic disorder, post-traumatic stress disorder, and depression, and he was unaware that Petitioner was receiving medications other than Paxil. Mr. Resnick asserts that if he had known of these additional diagnoses or medications, he would have raised the issue of Petitioner's competence at the time of the change of plea. Mr. Resnick does not state that he noticed anything during his interactions with Petitioner at the time of the change of plea that would have led him to believe Petitioner may not be understanding the proceedings before him or that Petitioner was unable to make a reasonable choice among the alternatives presented to him. Nor did Mr. Resnick state that he had any concerns at the time Petitioner entered into the plea that Petitioner had trouble understanding the plea or that Petitioner had trouble understanding the nature of the consequences of the plea.

Petitioner also submits a report by Dr. Robert L. Smith, a psychologist who opines that he has a reasonable doubt as to whether Petitioner was competent at the time he entered into the plea. Dr. Smith claims that if Petitioner experienced psychotic symptoms at the time of his plea, it is questionable that he was able to knowingly and intelligently enter into the plea agreement. Dr. Smith further opines that there is reason to believe that Petitioner's psychotic symptoms were not well controlled by the prescribed medication, Thorazine, that he was receiving since it was increased several times, beginning at 50 milligrams per day and increasing to 150 milligrams per day. Dr. Smith claims that if Petitioner's symptoms were not well controlled by the medication, he may have been experiencing paranoia, voices, and images that were not real during the time Petitioner was deliberating as to whether to take the plea.

Dr. Smith further opines that if Petitioner was not presenting psychotic symptoms because of the Thorazine, it is possible that he was impaired due to the possible side effects of Thorazine. Dr. Smith further asserts that the increase in dosage during that time prior to the change of plea increased the likelihood that Petitioner

experienced the side effects. These potential side effects cited by Dr. Smith are: excessive sedation, confusion, flat affect, and feeling disconnected from one's surroundings. Dr. Smith asserts that the following statement Petitioner made prior to sentencing is evidence that Petitioner may have been experiencing side effects during the time he entered into the plea: "[w]hen I took it I had no negative emotions. I just sort of floated through 1 ½ years. I didn't give a fuck about anything." Dr. Smith also reports Sandra McBride's statements regarding Petitioner around the time he entered into the plea agreement to bolster his opinion. Specifically, Dr. Smith reports that Mrs. McBride stated the following regarding Petitioner: "He was unable to discuss anything with me. He didn't make any sense. He was confused and kept asking me what he should do. I didn't know what to say so I foolishly told him to accept the plea. I didn't know what to do. I trusted his attorney. I wish I could take it back now. I had never seen [Petitioner] so impaired."

Dr. Smith bases his opinion on speculation and probability along with interviews of Petitioner and Mrs. McBride conducted after they were already unhappy with the sentence Petitioner received. Dr. Smith's report states that Mrs. McBride wishes she could take back the advice she gave her son to take the plea agreement. Dr. Smith's report also states that Petitioner "demonstrated an understanding of his conviction and expressed regret for accepting the plea bargain. He explained that he was under psychiatric care at the time and trusted his attorney who had assured him his sentence would be for only 10 years."

Dr. Smith's report fails to mention the fact that Petitioner was seen by medical personnel at the jail several times around the time Petitioner entered into the plea agreement. For instance, on April 13, 2009, Petitioner was seen by Michelle Carrillo, MHC, and Ms. Carrillo noted that Petitioner was clean and appropriately groomed, compliant with psychiatric medications, and that his housing area was organized and tidy. In regards to Petitioner's manner and attitude, Ms. Carrillo noted that Petitioner was calm and cooperative. Ms. Carrillo also noted that Petitioner's mood and affect were of a normal intensity, that his level of consciousness was alert, and that his perceptions were reality based. Further, Ms. Carrillo noted that Petitioner stated that the

current medications he was being given made him feel "groggy," and that he wanted a change of medications or a decrease. This shows that Petitioner understood the risk/reward ratio of the use of his medications.

Later on April 13, 2009, Petitioner was seen by Dr. K.C. Johnsten, and Dr. Johnsten noted that Petitioner was oriented to his person, the place and the time, and that Petitioner was cooperative and calm but sad. Petitioner told Dr. Johnsten that he was waking up in the middle of the night and that he was looking at 15 years in prison. Thus, Petitioner was able to describe his legal situation to Dr. Johnsten and, therefore, understood the consequences of accepting the plea agreement and even if the years he told the doctor he was facing were not the exact range he could be sentenced to, 15 years was within that range.

Additionally, Dr. Smith's report failed to mention that Petitioner was seen by medical personnel at the jail on May 18, 2009, and Petitioner told medical personnel that he wanted to try living without taking his medications but realized it was not working and wanted to begin taking his medications again. While the medication administration records for this time show that Petitioner had continued taking his medications, regardless if he had stopped them or was continuing them, he knew that there was a benefit to taking them. Further, the increased dosage in Thorazine was at Petitioner's request. On May 21, 2009, Petitioner was seen by Dr. Johnsten and the doctor noted that Petitioner reported that the Thorazine was working well for Petitioner at night, that Petitioner was again oriented to his person, the place and the time, was speaking in a clear, linear manner, and was sad. Thus, the jail medical records show that around the time Petitioner entered into the plea, he was rational but depressed, with no cognitive issues.

Further, at the change of plea hearing, this Court specifically asked Petitioner if he had consumed any drugs, alcohol or medication within the past 24 hours that would make it difficult for him to understand the proceedings taking place and Petitioner replied, "No, ma'am." This Court also explained the plea agreement, including the minimum and maximum sentences Petitioner could receive under the terms, and then asked Petitioner whether he understood, and he replied affirmatively. Petitioner did not

act in a way nor make any statements to suggest to this Court that he did not understand the proceedings taking place or the nature and consequences of the plea. The fact that Petitioner was diagnosed with mental illnesses and on medication to treat such illnesses is not sufficient to establish that there was an issue regarding Petitioner's competency at the time he entered into the plea agreement.

For the above reasons, this Court finds that Petitioner has failed to show that reasonable grounds existed at the time Petitioner entered into the plea agreement to require a competency hearing to have been held. Petitioner has also failed to show that he was indeed incompetent at the time he entered into the plea agreement.

B. **Petitioner's Competency at Time of Sentencing**

Petitioner also claims that he was incompetent at the time of sentencing. This Court finds that Petitioner has failed to meet the burden of showing that reasonable grounds existed at the time he was sentenced that would require a competency hearing to have been held.

Prior to sentencing, Petitioner submitted a letter to this Court that was well-written, clear and articulate. Petitioner also addressed this Court at his sentencing. It was apparent that Petitioner understood the nature of the proceedings against him and that he was facing a lengthy sentence based on the plea agreement he entered into. For instance, in the letter submitted for sentencing, Petitioner wrote the following statements: "[t]his is perhaps the most important time of my life thus far," and "I know I owe my debt to society but I am asking for your leinience [sic]." Petitioner was coherent when he addressed this Court at his sentencing, apologizing to the victims, accepting responsibility for his actions and stating that he knew it was his choice to begin using methamphetamine. At no point during his statements at the sentencing did this Court have any reason to suspect that Petitioner might be incompetent. Further, Mr. Resnick makes no statements in his affidavit claiming that he had suspicions of Petitioner's competency that he failed to raise at the time of sentencing. Petitioner's argument that he was incompetent at the time of sentencing is based largely on his mental health diagnoses and the treatment he was receiving, however, the mere presence of mental illness is not enough to establish that Petitioner was incompetent.

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This Court finds that Petitioner has failed to show that reasonable grounds existed at the time of his sentencing to hold a competency hearing or that he was incompetent at the time of sentencing.

Ineffective Assistance of Counsel

"The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant in a state criminal trial the fundamental right to effective assistance of counsel." *State v. Ysea,* 191 Ariz. 372, ¶ 14, 956 P.2d 499, 503 (1985) (*citing State v. Nash*, 143 Ariz. 392, 396, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143, 105 S.Ct. 2689 (1985)). A finding of ineffective assistance of counsel under Arizona law requires that a defendant show: (1) that trial counsel performed deficiently under prevailing professional norms, and (2) that counsel's deficiency prejudiced the defendant. *Nash,* 143 Ariz. at 397, 694 P.2d at 227 (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)).

Deficient performance occurs when a court concludes that "counsel's actions fell below objective standards of reasonable representation measured by prevailing professional norms." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). Moreover, a strong presumption exists that the challenged action was made for strategic or tactical purposes intended to benefit the defendant. *Id.*

The second prong requires that counsel's deficient performance prejudiced the client's defense. *Nash,* 143 Ariz. at 397, 694 P.2d at 227. In other words, there must be a reasonable probability that, but-for counsel's deficient performance, the outcome of the proceeding would have been different. *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984). A reasonable probability means "more likely than not but more than a mere possibility." *Id.*

The Court need not address both prongs of the test if defendant makes an insufficient showing on one. *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (1994).

A. Presentence Interview

Petitioner claims that his trial counsel provided ineffective assistance in advising Petitioner to tell the truth during the presentence interview instead of advising him to

invoke his right to remain silent. Petitioner has failed to show that this was not a tactical decision on Mr. Resnick's part, since counsel was arguing that Petitioner's cooperation and truthfulness with law enforcement and the government regarding the incidents was a mitigating factor that should be considered at the time of sentencing. While Mr. Resnick states in the affidavit he submitted for Rule 32 purposes that because he was "unaware that [Petitioner] was receiving Thorazine, Cogentin, Paxil and Wellbutrin, I did not evaluate whether it would be in his best interest to go into a presentence interview, unprepared without counsel, or whether I should have advised him simply to invoke his 5th amendment rights", Mr. Resnick does not address the fact that while he may have not known about Petitioner's medication, at the time of the interview, it is likely Mr. Resnick thought that it would be in Petitioner's best interests to continue to cooperate and be honest to bolster his argument for mitigation.

Further, even if this Court were to find Mr. Resnick's failure to advise Petitioner of his right to remain silent during the pre-sentence interview as ineffective assistance, Petitioner could not show the he was prejudiced since this Court did not rely specifically on Petitioner's statements in the pre-sentence report in imposing the sentence, but only *considered* the report along with everything else presented to this Court for the sentencing. In imposing partially aggravated terms of imprisonment on counts one, eight and ten, this Court cited to the large number of victims and the emotional and financial harm to the victims.

B. Mitigation Evidence Presented at Sentencing

Petitioner has also failed to show that Mr. Resnick performed deficiently in presenting mitigation evidence for sentencing. Mr. Resnick had a sentencing memorandum prepared for mitigation purposes that was presented to this Court prior to sentencing. Mr. Resnick also made additional arguments in court to supplement the sentencing memorandum. In addition, this Court received a pre-sentence report, a letter from Petitioner, and letters from Petitioner's family members and friends prior to sentencing.

Regarding Petitioner's claim that this Court was not informed of Petitioner being pistol whipped and shot in the head at point blank range in 2007, triggering his

post-traumatic stress disorder, this claim is untrue. Mr. Resnick presented this information in his sentencing memorandum and this information was also detailed in the jail medical records that were attached as an exhibit to the sentencing memorandum. These jail medical records that this Court received prior to sentencing also specified that Petitioner had been diagnosed with mental health issues, specifically post-traumatic stress disorder, depression, substance induced psychotic disorder, and cannabis dependency. Also contained in the records this Court received was the fact that Petitioner had a scar on his head from the gunshot.

Thus, there was sufficient mitigation evidence presented. In fact, Mr. Resnick did more to present mitigation evidence than the vast majority of defense attorneys do.

C. Petitioner's Competency Claim

Because Petitioner has failed to establish that reasonable grounds existed to require a competency hearing to be held at the time of his change of plea hearing or sentencing, Petitioner has failed to establish his claim that Mr. Resnick was ineffective for failing to raise the issue of Petitioner's competency at those times.

Accordingly, Petitioner has failed to present a colorable claim, his request for relief is denied, and his Petition for post-conviction relief is hereby dismissed.

However, this Court finds upon its own review that the sentence of 13 years for count ten in CR20081861 is illegal. It was based upon the plea agreement that stated that the range of sentence for count ten was a presumptive term of 6.5 years, an aggravated term of 13 years and a substantially aggravated term of 16.25 years. That sentencing range is correct for the charge *if* Petitioner had pled to a class three felony, repetitive offense. He did not, however. He pled guilty in count ten to Burglary in the Second Degree, a class 3 felony, nondangerous, nonrepetitive – just as he did in counts one and eight. Accordingly, the correct sentencing range for count ten, pursuant to the plea agreement that provided that the substantially mitigated and mitigated sentences were unavailable for that charge, was a presumptive term of 3.5 years, an aggravated term of 7.0 years and a substantially aggravated term of 8.75 years, to be served consecutively to the sentences for counts one and eight. The presentence report notes

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the error, but there was no apparent recognition of the error at the sentencing hearing by this Court or by counsel.

IT IS HEREBY ORDERED that the State is to writ Petitioner to Pima County for resentencing on count ten in CR20081861 only. The resentencing hearing is scheduled for Tuesday, September 6, 2011 at 9:00 a.m.

DATED this 7th day of July, 2011

JANE L. EIKLEBERRY
JUDGE OF THE SUPERIOR COURT

cc:
Natman Schaye, Attorney for Defendant
Kellie Johnson, Pima County Attorney
Clerk of the Court – Appeals
Clerk of the Court – Criminal Desk

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APPENDIX N

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

No. CR20080140, CR20081099
No. CR20081861, CR20081871

vs.

DEWEY LEE MCBRIDE,

Defendant.

Tucson, Arizona

08/17/09

BEFORE: The Honorable Jane L. Eikleberry, Judge

Appearances:

Kellie Johnson, Esq.
Appearing for the State

Mark Resnick, Esq.
Appearing for the Defendant.

Sentences of Imprisonment as to
CR20081861 and CR20081871 and
Order of Dismissal as to
CR20080140 and CR20081099

GAIL D. VINSON, CR, RPR
Arizona # 50610
Official Court Reporter
Pima County Superior Court
Tucson, Arizona 85701

THE COURT: This is State of Arizona versus Dewey Lee McBride, CR20080140-001, 20081099-001, 20081861-001, and 20081871-001.

Would you state your appearances, please?

MS. JOHNSON: Yes, Judge. Good morning. Kellie Johnson on behalf of the State.

In the courtroom are several victims: Mr. McCue is here. Ms. Wilson is here. Ms. Beaver is here and Ms. Barbara Connaghan.

MR. RESNICK: Mark Resnick for Dewey McBride in all docket numbers. Present in the courtroom is his father in the first row.

THE COURT: Thank you. Am I correct, Ms. Johnson, that we need to dismiss 20080140 and 1099?

MS. JOHNSON: I think, yes, that is a condition of the plea agreement.

THE COURT: All right. It is hereby ordered that 20080140-001 and 20081099-001 are hereby dismissed.

Is there is there any legal cause why we can't proceed with sentencing on the other two case numbers?

MR. RESNICK: No, your Honor.

MS. JOHNSON: Judge, the only thing I did want to discuss, and I don't know how the Court wants

to deal with it, in the sentence -- or in the restitution issue, I was informed, I guess late in the week, that there was some confusion as to what probation did and didn't gather in regards to restitution, because the plea agreement requires restitution even in the dismissed cases.

I spent the last couple of days getting together with the victims. I talked to the victims, and I think I have a pretty good handle on the restitution. I know which amounts are owing. However, some of those things Mr. Resnick hasn't had a chance to see because they weren't covered in the presentence report. There are also some victims we have still waiting, the Pitneys and Mrs. Beaver is still getting documentation. I don't know if you wanted to order the amounts I am sure of or just want us to submit a form order we can agree on in 30 days.

THE COURT: Why don't we wait and do it all at once?

Mr. Resnick, you are nodding your head yes?

MR. RESNICK: I agree. And Mr. McBride, as always, states he will pay restitution, so that is fine.

THE COURT: It is ordered that the Court will maintain jurisdiction over the restitution amount.

The county attorneys office is given 30 days to submit an order for restitution for all the victims for all four cases.

MS. JOHNSON: Thank you.

Judge, before we begin, I also wanted to inquire. Ms. Beaver indicated she had faxed a letter to Probation for the court's consideration. The presentence report is -- it's not clear to me whether you received that? If not I have an extra copy. It's not very long.

THE COURT: I received quite a number of letters. Let me look.

I don't see it immediately. Why don't you hand that to me, please.

I have now read the letter from Ann Beaver.

Is there any legal cause why we can't proceed with sentencing this morning, Mr. Resnick?

MR. RESNICK: No, your Honor.

THE COURT: Sir, is your true name Dewey Lee McBride?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is your date of birth July 5, 1983?

THE DEFENDANT: Yes, ma'am.

THE COURT: It is the judgment of this

Court based upon a change of plea on May 15, 2009, that there has been a determination of guilt in this case by the plea on May 15, 2009, in both cases, that it is the judgment of this Court that in 20081861 the defendant is guilty of Count 1, burglary in the second degree, a Class 3 felony, nondangerous, nonrepetitive, committed May 31, 2007; Count 8, burglary in the second degree, a Class 3 felony, committed July 27, 2007, nondangerous nonrepetitive; Count 10, burglary in the second degree, a Class 3 felony, nondangerous, nonrepetitive, committed August 17, 2007; and Count 20, possession of a dangerous drug for sale, methamphetamine, a Class 2 felony, nondangerous, nonrepetitive committed on September 14, 2007.

In 20081871, it is the judgment of this Court that the defendant is guilty of Count 1, burglary in the first degree, a Class 2 felony, committed on October 28, 2007.

I have read the presentence report, the supplemental report. I have reviewed sentencing memorandum from defense counsel which include a number of letters and other exhibits. I reviewed a sentencing memorandum from the county attorneys office. I reviewed quite a number of letters from the victims.

What is the State's position?

MS. JOHNSON: Judge, before I make my comments, I believe that at least one of the victims would like to address the Court, Ms. Barbara Connaghan.

THE COURT: Good morning.

MS. CONNAGHAN: Good morning, your Honor.

I want to say how hurt I am of these people that broke into my house and stole my stuff, especially my sapphire necklace that my brother, which is deceased now, took. And I don't know why, but there was two ladies that came first and looked through my house. And then they left, and then the two gentlemen came. And they looked through my house, and they stood -- the one stood on the -- I had a sunken living room and he stood there and went back and forth and said, "Boy, you have some real nice stuff here."

The next thing I am coming back from my brother's in Arkansas because they broke into my house and took everything I had, your Honor. And it hurts because that is stuff I worked all my life to get. And my husband had just passed away, so ... and that's -- I think that they should be punished and punished dearly.

Thank you.

THE COURT: Thank you.

MS. CONNAGHAN: Thank you, your Honor, for hearing me.

THE COURT: Thank you for coming. I appreciate that.

MS. JOHNSON: Judge, I don't have any other victims that wish to speak. I obviously -- Several of the victims have submitted letters to you, and you have been able to see from the letters and the presentence report, the nature of the offense, just the severe emotional and financial impact that Mr. McBride's actions have had on these people.

One of the mitigating factors outlined in Mr. Resnick's sentencing memorandum is the lack of physical harm. And I would ask the Court to give that little to no weight whatsoever, because the emotional harm here is devastating given the number of victims, the number of crimes he committed, and the span of time during which he committed them.

For the reasons set north my sentencing memorandum -- I did want to clarify one thing, I'm sorry, in the presentence report. I am pretty sure the Court would have caught the error, as well. But there's some reference to Count 10 being a repetitive offense. However, obviously, that was with the 70202 allegation as to Count 10, that is that third offense in the 70202, and I think we were all on the same page there.

Based on the numerous aggravating factors in this case, Judge, I do ask you to impose aggravated consecutive terms as outlined in my sentencing memorandum.

THE COURT: Thank you.

Mr. Resnick?

MR. RESNICK: Yes, Judge. And a few corrections just before I begin.

The time calculation in my sentencing memorandum is in error. I think it's the 13.5 is the minimum you can give, not the 10.5 as we had laid out.

The other, just a few issues just regarding the State's sentencing memorandum regarding Mr. McBride not being assaulted at the jail. I would just like to point out that a lot of times that assaults at the jail don't necessarily get reported.

The victim in this case, you know, wanted Dewey to be punished dearly, and I can understand that. There's no way, no matter what sentence you give him that he doesn't get punished dearly. He is going to get a minimum of 13.5 years. He is 26 years old now.

If you look at the person Dewey is now, you know in 13 years, he is going to be very, very different. The person he was at the time that he committed this crime, I think he would tell you, he was

out of control. He was on drugs. He was addicted to methamphetamine. He was selling methamphetamine to feed his addiction.

And, as a lot of young people are, he was in -- He got himself into a very, very bad place, and he didn't know how to get out and couldn't see an end to it. And, on the other hand, there was nobody else who could have intervened, I suppose.

So he finds himself here and the only question then becomes: What do you do with him? The State under their sentencing suggestion would effectively have Dewey get no second chance at life. The years that they are talking about, and I think it works out to something like 37 years, for the crimes that he committed, would take him into his 60s by the time he gets out. And then what's left? All of this for behavior that occurred during a six-month period when he was in his twenties.

And I put in my sentencing memorandum several law review articles. I didn't actually expect the Court to be able to look at all of them. They all stand for the same proposition. That is, statistically speaking, occurrence of crime among young men is much higher in their twenties than it is in their forties and it drops off precipitously after age 40.

So the person who is sitting here before you today at 26 would not be the same person who will be sitting before you at age 40, which would be 14 years from now within the sentencing range. And in terms of protecting the community, statistically speaking, if you only kept him in prison until he was 40, you could be reasonably assured that he is not going to continue to commit crimes like this.

He is not going to continue to commit any crimes. It drops off precipitously at that age. If you think about that time, that's 14 years. How much do people change during any 14-year span during their lives and especially between their twenties and forties?

I was thinking about it when I was coming in here and thinking about the attorneys in this room. We have all seen each other change immensely. Over 14 years, even just the attorneys change immensely. Imagine how Dewey is going to change over 14 years. This is not going to be the same person.

I suppose -- I can't tell you exactly how I want the sentencing to run. All we can say, Judge, is even if we took all the State's aggravating factors, if you look at the mitigating factors, they are still numerous. I laid them out in my presentence report.

It makes no sense not to give Dewey another chance at life.

So we would ask you, no matter how you orchestrate the sentences, that you not keep him in prison past age 40.

Thank you.

THE COURT: Thank you.

Mr. McBride, is there anything you wish to say before the imposition of sentence?

THE DEFENDANT: Yes. I would like to address the victims and tell them I'm sorry. There really is no excuse for what I did, because I made the choice to start using methamphetamine and it really changed me. I did things that I would have never done.

And look at it, the victims out there right now, it's been -- I have been locked up for a couple of years, and I am back to the old me before I started doing all that. And I just -- I feel really bad.

I basically poured my heart out in the letter that I wrote to you. I am kind of -- I am real nervous right now. I just want to say the right things, because that's how I feel. But I'm sorry for every one that I hurt emotionally. I never would hurt anybody physically. And I would just ask for the right amount of time for the crimes that I committed.

And hopefully you will give me another chance at life. I have got son that I am not going to see grow up. And I have got family that loves me out there. And I am just begging the Court to give me another chance at life.

THE COURT: Thank you.

On 20081861, it is the judgment and sentence of this court that on Count 1, the defendant be imprisoned for the partially aggravated term of 7 years. The reason for aggravating the term is the large number of victims, and the enormous amount of financial and emotional harm done to those victims.

On Count 8, it is the judgment and sentence of this Court that the defendant be sentenced to the partially aggravated term of 7 years. The term is aggravated for the same reasons that the term in Count 1 is. The term for Count 8 is to run consecutive to the term in Count 1.

As to Count 10, it is the judgment and sentence of this court that the defendant be sentenced to the partially aggravated term of 13 years, this term to run consecutive to the terms for Count 1 and Count 8. And, again, the reason for the aggravation is the enormous amount of financial and emotional harm done to a very large number of victims.

As to Count 20, the defendant is sentenced to the presumptive term of ten years to run concurrently with the term for Count 10.

The sentence is to include presentence incarceration of 585 days.

On 20081871, it is the judgment and sentence of this Court that the defendant be imprisoned for the partially aggravated term of ten years. Again, the reason for the aggravated term is the large number of victims and the enormous financial and emotional harm done to the victims.

The sentence in 20081871 is to run consecutively to the sentence imposed in 20081861. It is to include presentence incarceration credit of 529 days.

After completion of the sentence, the defendant is to be placed on a term of community supervision.

The defendant is committed to the custody of the Arizona Department of Corrections as of this date. The Department of Corrections has authority to withhold prison earnings to make payments towards restitution.

Mr. McBride, you have the right to petition the Court for postconviction relief. If you want to do

so and you cannot afford an attorney, one will be appointed for you. The records and transcripts for a postconviction relief petition will be provided to you at no charge. If you want to petition the Court for postconviction relief, you must do so within 90 days from today or you will lose that right. You must sign for a copy of your postconviction relief rights today.

The Court affirms previously ordered attorneys fees in the case --

MR. RESNICK: Actually, Judge, I am retained.

THE COURT: Oh, I'm sorry. Thank you.

I think that's it. Is there anything further from the State?

MS. JOHNSON: No.

MR. RESNICK: Judge, just so I understand, did you run the ten years consecutive on the last count?

THE COURT: Yes, the ten-year sentence in 1871 is to run consecutive to the sentences in 1861. Did I say that right? 1871 is consecutive to 1861, but the sentence on Count 20 in 1861 is concurrent with the other sentences in that case number.

Thank you.

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C E R T I F I C A T E

I, Gail D. Vinson, do hereby certify that as a Certified Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability, and that the same was transcribed by me via computer-aided transcription, and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had, as set forth in the title page hereto.

_____

GAIL D. VINSON, RPR, CR
Arizona License No. 50610
Pima County Superior Court
Tucson, Arizona

08/31/09