

18-9494

NO. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

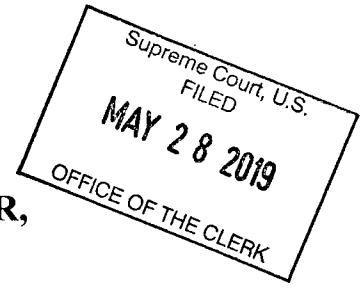
MATTHEW MOUNIR AWAD,

PETITIONER,

v.

MARK BRNOVICH, ATTORNEY GENERAL
OF THE STATE OF ARIZONA
and
CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

RESPONDENTS.



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

PETITION FOR WRIT OF CERTIORARI
AND APPENDICES

Matthew Mounir Awad ADC #245359
Arizona Department of Corrections
Eyman Complex - SMU I CDU
P.O. Box 4000
Florence, Arizona 85132
Petitioner In Propria Persona

May 28, 2019

QUESTIONS PRESENTED

1. Whether the Ninth Federal Circuit Court of Appeals correctly denied Petitioner’s Motion for Certificate of Appealability (hereinafter, “COA”). A Certificate of Appealability was a prerequisite to Petitioner submitting a formal appeal of the District Court’s summary denial of relief on the claims asserted in Petitioner’s **28 U.S.C. § 2254** habeas corpus petition.

The District Court issued a 3-page final Order (**Doc.25**), adopting the April 23, 2018 8-page Magistrate’s Report and Recommendation (**Doc.19**) (*see Doc.25, at Page 3, Lines 13-14*) and denied Petitioner’s request for a COA (*see Doc.25, at Page 3, Lines 18-19*). Upon application to the Ninth Circuit, the Ninth Circuit summarily denied Petitioner a COA (**Dkt.8**) on February 28, 2019 (“*The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not shown 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’*” (*see Dkt.8*)).

Importantly, there is an underlying question of whether the miscarriage of justice exception to an untimely habeas corpus petition should be subject to a limited expansion to include sentencing such as occurred in this case.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

Petitioner is Matthew Mounir Awad, a prisoner of the State of Arizona (ADC # 245359), who is currently incarcerated within the Arizona Department of Corrections, Eyman Complex, SMU-1 CDU, P.O. Box 4000, Florence, Arizona 85132.

Respondent is Charles L. Ryan, the Director of the Arizona Department of Corrections, Phoenix, Arizona.

Respondent is represented by Mark Brnovich, Attorney General of the State of Arizona, Appeals & Constitutional Litigation Division, 2005 North Central Avenue, Phoenix, AZ 85004-1580.

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In The
SUPREME COURT OF THE UNITED STATES

◆

PETITION FOR WRIT OF CERTIORARI

◆

Petitioner Matthew Mounir Awad respectfully prays that a Writ of Certiorari issue to review the judgment below, *i.e.*, the Ninth Circuit Court of Appeals, with respect to that court's denial of a certificate of appealability regarding the claims asserted by Petitioner in his United States District Court Petition for Writ of Habeas Corpus.

In the Ninth Circuit, Petitioner sought a certificate of appealability on each of six grounds for habeas corpus relief, where grounds one to six were intertwined violations of Petitioner's fundamental federal constitutional rights.

Ground One asserted that Petitioner's state court plea agreement was constitutionally invalid because not knowingly, intelligently, and voluntarily entered; integrally incorporates a constitutionally invalid sentencing waiver; and integrally incorporates a *de facto* waiver of his right to a separate jury trial and to the constitutionally required standard of proof of beyond a reasonable doubt.

Ground Two asserted that Petitioner was subjected to ineffective assistance of counsel at time of plea negotiation and plea agreement for failure to inform Petitioner of the applicable and essential federal constitutional rights necessarily attached to his state court plea agreement and thereby necessarily attached to trial and to applicable standard of proof.

Ground Three asserted that Petitioner's sentence was unconstitutional because it was grounded upon improperly determined aggravating factors, *i.e.*, aggravating factors not determined by proof beyond a reasonable doubt or admitted by petitioner; and based upon Petitioner being unknowingly induced to waive constitutional rights of which he had never been informed.

Ground Four asserted that Petitioner was subjected to ineffective assistance of counsel at time of sentencing for failure to inform Petitioner of the applicable and essential federal constitutional rights necessarily attached to aggravated sentencing.

Ground Five asserted that Petitioner was sentenced pursuant to a stipulated aggravated sentence without Petitioner stipulating to any aggravating factor and without being informed of the constitutional rights applicable to aggravated sentencing and determination of aggravating factors.

Ground Six asserted that Petitioner was subjected to ineffective assistance of counsel at time of direct appeal and post conviction relief for failure to assert the constitutional violations set forth in Grounds One through Five; and that the state post conviction court failed to perform a review of the record for fundamental error, expressly including the violations asserted in Grounds One through Five.

OPINIONS / DECISIONS BELOW

The Decision of the Ninth Circuit Court of Appeals denying Petitioner's motion for issuance of a Certificate of Appealability is not reported, and a copy is attached hereto as **Appendix A**. The Order of the U.S. District Court adopting the Magistrate's Report and Recommendation and denying a Certificate of Appealability is unreported and a copy is attached hereto as **Appendix B**. The Magistrate Judge's R & R is unreported and a copy is attached hereto as **Appendix C**. Petitioner's Objections to the Magistrate's R & R is unreported and a copy is attached hereto as **Appendix D**.

JURISDICTION

The unpublished decision of the Ninth Circuit Court of Appeals was filed February 28, 2019 (**Dkt.8**). No motion for rehearing was filed in that court. Within the 90-day period prescribed by **Rule 13(1), Rules of the United States Supreme Court**, which ends on May 29, 2019, Petitioner submits his *pro se* Petition for Writ of Certiorari. This Court has jurisdiction pursuant to **28 U.S.C. § 1254(1)**; the Petition is timely filed¹ pursuant to **28 U.S.C. § 2101(c)** and **Rule 13.1**:

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

Rule 13.1 of the Rules of the Supreme Court of the United States.

¹

A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.

Rule 29(2), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The **Fourteenth Amendment** to the **U. S. Constitution**, which has been held to incorporate the **Fifth and Sixth Amendments**, provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The **Fifth Amendment** to the **United States Constitution** provides, in pertinent part:

No person shall be ..., nor be deprived of life, liberty, or property, without due process of law....

The **Sixth Amendment** to the **United States Constitution** provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In CR 2007-113620-001 SE, Petitioner entered a plea of guilty pursuant to a plea agreement offered by the State and was convicted pursuant to that plea agreement. Because there was no trial, there was no testimony by Petitioner.

At the state court Change of Plea Hearing, Petitioner's attorney Jaime Hindmarch² provided the factual basis for each Count of the Plea Agreement. The Plea Agreement contained no statement of fact, factual allegation, or factual admission by Petitioner constituting an aggravating factor for purposes of sentencing. Petitioner affirmed the basic statement of the offenses provided by his attorney but made no statement with regard to any aggravating factor. The attorney's factual basis for the plea contained no statement of fact, factual allegation, or factual admission by Petitioner constituting an aggravating factor for purposes of sentencing.

At no time prior to, during, or subsequent to the Change of Plea Hearing, was Petitioner informed of the constitutional rights associated with aggravated sentencing and aggravating factors, specifically that Petitioner had the right to a jury trial for the determination of aggravating factors and that the constitutionally required standard of proof for aggravating factors is beyond a reasonable doubt.

²

Attorney Jaime Hindmarch was Petitioner's attorney on a separate case which was handled in the Change of Plea proceeding at the same time as the case now before this Court for review. Petitioner's attorney on this case, Ms. Tracy Westerhausen, was not present during the proceeding. Ms. Hindmarch was standing in for Ms. Westerhausen during the Change of Plea proceeding.

At the sentencing proceeding, Petitioner was sentenced to an aggravated term of imprisonment for Count 2.

By pleading guilty, Petitioner waived his statutory right to a direct appeal but retained his state constitutional right to an appeal, and therefore also retained federal constitutional protection for his first appeal as of right. **Ariz. Const. art. 2, § 24** guarantees criminal defendants “*the right to appeal in all cases.*” Pursuant to ***State v. Ward***, 211 Ariz. 158, 118 P.3d 1122, 1125-26 (App. 2005, Div. 1) (as amended 09/08/2005), *rev. denied* (04/20/2006) and ***State v. Cleere***, 213 Ariz. 54, 138 P.3d 1181, 1184 n. 2 (App. 2006, Div. 2), *rev. denied* (June 27, 2006), a **Rule 32** “*of-right*” proceeding is a form of “*direct review*” rather than collateral review, and that “*of-right*” proceeding is “*the functional equivalent of a direct appeal.*” Further, pursuant to ***Summers v. Schriro***, 481 F.3d 710, 716-17, (9th Cir. 2007), Arizona’s **Rule 32** “*of-right*” proceeding for plea-convicted defendants is a form of direct review within the meaning of **28 U.S.C. § 2244(d)(1)(A)**.

Within 90 days of his sentencing, Petitioner filed a Notice of Post Conviction Relief (NPCR).

The Rule 32 Management Unit, Judge Gary Donahoe, issued an initial Rule 32 Order appointing the Office of the Public Defender of Maricopa County to represent Petitioner on his post conviction relief action. Deputy Public Defender Christopher Johns filed a Notice of Completion of Post Conviction Review stating that he was “*unable to find any claims for relief to raise in post-conviction relief proceedings.*”

The Maricopa County Superior Court issued a Minute Entry Order summarily dismissing the Rule 32 proceeding. The sole basis for the dismissal of the post conviction relief action was that Petitioner had not filed a *pro se* Petition in the matter. The Superior Court did not perform an independent review of the case for purposes of determining whether the records of the case demonstrated constitutional error at the plea negotiation, plea decision, plea agreement, change of plea proceeding, or sentencing proceeding. Such independent review for error is required for *Anders*-type proceedings.³

A review of the plea agreement and the change of plea transcript reveals that there was constitutional error, arguably structural error, arising from the failure of the (two) plea counsels, the state prosecutor, and the Judge to inform Petitioner of the right to a jury trial for the determination of aggravating factors with the standard of proof of beyond a reasonable doubt. Even if not to be structural error, the error results in the failure to obtain a valid waiver of Petitioner's right to trial for aggravating factors and simultaneously renders unconstitutional the stipulation to an aggravated term of imprisonment as well as the subsequent sentencing of Petitioner to an aggravated term of imprisonment without determination of any aggravating factor by the standard of proof of beyond a reasonable doubt.

³ *Anders v. California*, 386 U.S. 738 (1967), which held that appellate counsel should file what has become known as an *Anders* brief stating that no appellate issues have been identified. Moreover, the *Anders* procedure is not limited to review by the appellate court. The *Anders* process is a two part process, consisting of a review and reporting by appointed counsel in a "brief referring to anything in the record that might arguably support the appeal," *Anders*, 386 U.S. at 744, followed by review by the court.

A review of the sentencing transcript reveals that the State adduced no evidence (other than its own wholly conclusory and hearsay statements claiming that aggravating factors existed) in support of an aggravated term of imprisonment. A review of the sentencing transcript reveals that the Court made its finding of aggravating factors without any properly introduced evidence or any admission by Petitioner and without application of the constitutionally required standard of proof of beyond a reasonable doubt.

Petitioner did not file a Petition for Review of the Superior Court's denial of post conviction relief, because his appointed PCR attorney informed him that he had no viable claims for post conviction relief.

Upon further review by a different attorney, Petitioner filed a federal habeas corpus action asserting six grounds for relief, which bear repeating here. **Ground One** asserted that Petitioner's state court plea agreement was constitutionally invalid because (1) not knowingly, intelligently, and voluntarily entered, (2) integrally incorporates a constitutionally invalid sentencing waiver, and (3) integrally incorporates a *de facto* waiver of his right to a separate jury trial and to the constitutionally required standard of proof of beyond a reasonable doubt. **Ground Two** asserted that Petitioner was subjected to ineffective assistance of counsel at time of plea negotiation and plea agreement for failure to inform Petitioner of the essential federal constitutional rights necessarily attached to his state court plea agreement and thereby necessarily attached to trial and to applicable standard of proof. **Ground Three** asserted that Petitioner's sentence was unconstitutional

because it was grounded upon improperly determined aggravating factors, *i.e.*, aggravating factors not determined by proof beyond a reasonable doubt or admitted by petitioner; and based upon Petitioner being unknowingly induced to waive constitutional rights of which he had never been informed. **Ground Four** asserted that Petitioner was subjected to ineffective assistance of counsel at time of sentencing for failure to inform Petitioner of the applicable and essential federal constitutional rights necessarily attached to aggravated sentencing. **Ground Five** asserted that Petitioner was sentenced pursuant to a stipulated aggravated sentence without Petitioner stipulating to any aggravating factor and without being informed of the constitutional rights applicable to aggravated sentencing and determination of aggravating factors. **Ground Six** asserted that Petitioner was subjected to ineffective assistance of counsel at time of direct appeal and post conviction relief for failure to assert the constitutional violations set forth in Grounds One through Five; and that the state post conviction court failed to perform a review of the record for fundamental error, expressly including the violations asserted in Grounds One through Five.

Petitioner was denied habeas corpus relief and a certificate of appealability by the District Court. In the Ninth Circuit Court of Appeals, Petitioner was summarily denied a certificate of appealability.

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

In the trial level court, **Fifth, Sixth, and Fourteenth Amendment** rights as incorporated into the Fourteenth Amendment and applied against the States were implicated by Petitioner's filing of a *pro se* Notice of Post Conviction Relief and the Notice was summarily dismissed by the post conviction court, as set forth above in the Statement of the Case.

In the United States District Court, the **Fifth, Sixth, and Fourteenth Amendment** rights were directly and expressly raised by Petitioner's filing of a federal habeas corpus petition. The Petition was summarily dismissed by the District Court Judge by Order accepting the Magistrate Judge's Report and Recommendation, as set forth above in the Statement of the Case.

The federal issues included (1) the right to appointment of effective counsel; (2) the right to be informed of fundamental constitutional rights — including a) the right to a jury trial for the determination of aggravating factors and b) the right to the standard of proof of beyond a reasonable doubt for the determination of aggravating factors not inherent to the plea of guilty or admitted for purposes of sentencing; (3) the right to be informed of fundamental constitutional rights before agreeing to a waiver of such rights; (4) the right not to be sentenced for an enhanced offense — one greater than the offense for which he entered a plea of guilt — in the absence of a) a jury trial for the determination of aggravating factors with b) the right to the standard of proof of beyond a reasonable doubt for the determination

of aggravating factors not inherent to the plea of guilty or admitted for purposes of sentencing; (5) a fair sentencing proceeding, including proper determination of aggravating factors in accord with the constitutionally required standard of proof for aggravating factors or constitutionally appropriate waiver of fundamental rights.

Accordingly, Petitioner's state court plea agreement was constitutionally invalid because it was not knowingly, intelligently, and voluntarily entered; because it integrally incorporates a constitutionally invalid sentencing waiver; and because it integrally incorporates a *de facto* waiver of his right to a separate jury trial for aggravating factors that rendered him subject to sentencing for an offense greater than the one to which he entered a plea of guilty a *de facto* waiver of his right to the constitutionally required standard of proof of beyond a reasonable doubt for the determination of aggravating factors.

REASONS FOR GRANTING THE WRIT

- I. **REASONABLE JURISTS — INCLUDING THE JUSTICES OF THE UNITED STATES SUPREME COURT — HAVE ALREADY HELD THAT DENIAL OF A JURY TRIAL AND DENIAL OF THE RIGHT TO THE CONSTITUTIONALLY REQUIRED STANDARD OF PROOF OF BEYOND A REASONABLE DOUBT CONSTITUTES A "SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT" AND THEREFORE THE PRESENTATION OF THOSE GROUNDS WERE "ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER"**

In order for a habeas petitioner to obtain a certificate of appealability, an appellant must make a "*substantial showing of the denial of a constitutional right*" to the Court. **28 U.S.C. § 2253(c)(2)**. A litigant successfully satisfies this standard by demonstrating "*that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.*" **Miller-El v. Cockrell**, 537 U.S. 322 (2003) (emphasis by bold print added).

Based upon his District Court federal habeas corpus petition and his appellate court motion for issuance of a certificate of appealability, Petitioner asserts that his claims for relief are entitled to be the subject of a certificate of appealability, which will allow Petitioner to present full briefing of the facts and law underlying the fundamental miscarriage of justice that occurred in this case.

The appellate court "*reviews mixed questions of law and fact...de novo and pure questions of law de novo.*" **Mayfield v. Woodford**, 270 F.3d 915, 922 (9th Cir.2001) (en banc). The inquiry is not a detailed one, nor is the standard

difficult to meet:

...[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "*a substantial showing of the denial of a constitutional right.*" 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, *supra*, at 484. Applying these principles to petitioner's application, we conclude a COA should have issued.

Miller-El v. Cockrell, supra, 537 U.S. at 327.

The determination to be made, in accord with the holding of ***Miller-El v. Cockrell, supra***, requires an overview of the claims presented in the habeas petition and a general assessment of their merits.

The question is whether the resolution of Petitioner's claim was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. A certificate does not require a showing that the appeal will succeed. Accordingly, a court should not decline the application for a certificate merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in ***Slack, supra***, would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. A certificate properly will issue in some instances where there is no certainty of ultimate relief.

After all, when a certificate of appealability is sought, the whole premise is that the prisoner has already failed to obtain relief in the District Court. **The certificate of appealability inquiry asks only if the District Court's decision was debatable, not incorrect.**

In *Holland v. Florida*, 560 U.S. 631 (2010), this Court remanded a case to the federal court of appeals to resolve a mixed question of fact and law implicating both ineffective assistance of counsel and the concept of equitable tolling. Following Holland's state court criminal conviction and appeal, the lower federal court denied habeas corpus relief and the appellate federal court ruled that even gross negligence on the part of the attorney representing the petitioner in the state court system would not constitute grounds for the relief the petitioner sought. This Court held that the District Court's determination of diligence and the appellate court's use of an overly rigid approach combined to erroneously preclude judicial review and consideration that was demanded by applicable federal statutes and constitutional guarantees.

In *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256 (2004), this Court held that a petitioner was entitled to a Certificate of Appealability that had been denied by the Fifth Circuit Court of Appeals in a case arising from the United States District Court for the Eastern District of Texas. This Court stated:

To obtain a certificate of appealability, a prisoner must “demonstrat[e] that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further.”

Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). ...[T]his case surely fits that description. A certificate of appealability, therefore, should have issued.

Banks v. Dretke, *supra* (stating conclusion).

II. BASED UPON A PARALLEL SITUATION INVOLVING STATE COURT PROCEDURAL DEFAULT AND FEDERAL PRINCIPLES OF CAUSE AND PREJUDICE, PETITIONER ASSERTS THAT HE WAS ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE WHETHER THIS COURT'S MISCARRIAGE OF JUSTICE EXCEPTION TO AN UNTIMELY HABEAS PETITION SHOULD BE GRANTED A LIMITED EXPANSION TO INCLUDE SENTENCING SUCH AS OCCURRED IN THIS CASE, AND THEREFORE THE PRESENTATION TO THE DISTRICT COURT WAS "ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER"

A. Discussion of the Cause and Prejudice Exception

Ordinarily, Petitioners seeking habeas relief cannot obtain an evidentiary hearing on their claims unless they comply with § 2254(e)(2). Section 2254(e)(2) severely restricts a petitioner's ability to obtain a hearing on a claim for relief where the petitioner “failed to develop the factual basis of a claim in State court proceedings” due to “a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.” See *Lopez v. Ryan*, 630 F.3d 1198, 1206 (9th Cir. 2011). A petitioner's attorney's “fault” is generally attributed to the petitioner for purposes of § 2254(e)(2)'s diligence requirement. See *Williams v. Taylor*, 529 U.S. 420, 437–40 (2000). 28 U.S.C. § 2254(e)(2), however, does not bar a hearing before the district court to allow a petitioner to show “cause” under *Martinez v. Ryan*, 566 U.S. 1 (2012). When a petitioner seeks to show “cause” based

on ineffective assistance of PCR counsel, he is not asserting a “*claim*” for relief as that term is used in § 2254(e)(2); indeed, showing cause based on ineffective assistance of PCR counsel is not a constitutional claim. *See Martinez*, 566 U.S., at 17-18. Instead, the petitioner seeks, on an equitable basis, to excuse a procedural default. *Id.* A federal court's determination of whether a habeas petitioner has demonstrated cause and prejudice (so as to bring his case within *Martinez*'s judicially created exception to the judicially created procedural bar) is not the same as a hearing on a constitutional claim for habeas relief. *See Coleman*, 501 U.S., at 750, 111 S.Ct. 2546 (recognizing the “*cause and prejudice*” exception to procedural default); *Woodford v. Ngo*, 548 U.S. 81, 91, 126 S.Ct. 2378 (2006) (“[H]abeas law includes the judge-made doctrine of procedural default”); *Dretke v. Haley*, 541 U.S. 386, 394, 124 S.Ct. 1847 (2004) (describing the “various exceptions to the procedural default doctrine” as “judge-made rules”).

Therefore, a petitioner, claiming that PCR counsel's ineffective assistance constituted “*cause*,” may present evidence to demonstrate this point. The petitioner is also entitled to present evidence to demonstrate that there is “*prejudice*,” *i.e.*, that the petitioner's claim is “*substantial*” under *Martinez*. Therefore, a district court may take evidence to the extent necessary to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*.

If a petitioner shows cause and prejudice to excuse his procedural default, the AEDPA no longer applies and a federal court may hear this new claim *de novo*.

Pirtle v. Morgan, 313 F.3d 1160 (9th Cir.2002). *Martinez* provides a means to show

“cause” to overcome the default and reach the merits of the new claim. Because § 2254(e)(2) by its terms does not prevent consideration of the substantive evidence of the claim to the extent necessary to determine if Petitioner has successfully proven “cause,” a petitioner is entitled to a fair opportunity to show cause and prejudice so as to overcome the procedural bar of the otherwise defaulted claim. *See Martinez*, 566 U.S., at 17-18. Thus, § 2254(e)(2) does not bar a cause and prejudice hearing on a petitioner’s claim of PCR counsel’s ineffectiveness, which requires a showing that a petitioner’s underlying trial-counsel IAC claim is substantial.

The exhaustion doctrine generally requires that a claim of ineffective assistance be presented to the state courts as an **independent** claim before it may be used to establish cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488–89 (1986). However, the case law in light of *Martinez* now indicates that there is no requirement that a petitioner assert an ineffective assistance of PCR counsel claim as cause in state court in order to demonstrate cause in federal court. In *Martinez*, the first time the petitioner argued ineffective assistance of PCR counsel was in his federal habeas petition. *See Martinez*, 566 U.S., at 6-7; *Martinez v. Schriro*, 623 F.3d 731, 734 (9th Cir.2010), *rev'd by Martinez*, 132 S.Ct. 1309. The Supreme Court did not find the claim barred for not being presented to the state courts. Therefore, where *Martinez* applies, there is no requirement that the claim of ineffective assistance of PCR counsel as cause for an ineffective-assistance-of-sentencing-counsel claim be presented to the state courts.

B. The Argument for Expansion of the Miscarriage of Justice Exception

1. The District Court Judge’s Order failed to address — or even mention — Petitioner’s assertion of this Court’s miscarriage of justice exception to an untimely petition

The District Court Judge’s “review” failed to present any specific discussion of any issue, and instead provided a purely “*pro forma*” conclusory statement that a review had occurred. *See* District Court Order (Doc.25), at page 2, lines 4-13, and page 3, lines 7-11. More importantly, however, was the utter absence of any attention to the crux of Petitioner’s Objection to the Magistrate Judge’s analysis, *i.e.*, the United States Supreme Court’s miscarriage of justice exception to an untimely petition. It is fundamentally insufficient for a formal review to merely state that a petition is untimely when the petitioner has openly conceded its untimeliness; it is fundamentally insufficient for a formal review to merely state that a petitioner is not entitled to equitable tolling while ignoring the petitioner’s assertion of an exception to untimeliness that is not dependent upon the traditional framework for equitable tolling. Petitioner asserts that a “review” that fails to address the crux of an argument is not a review in the sense that is contemplated by due process of law.

2. The District Court Magistrate Judge’s legal analysis and conclusion regarding the inapplicability of the miscarriage of justice exception failed to take account of recent decisions by this Court

The Magistrate Judge concluded that the “*fundamental miscarriage of justice*” exception to an untimely filed Petition is not applicable to Petitioner, on the ground

that Petitioner did not assert and argue a claim of actual innocence (“*Therefore, Petitioner’s concession of guilt [by plea agreement] and failure to claim actual innocence [in the habeas petition] is fatal to his untimely habeas petition. Accordingly, Petitioner fails to show a fundamental miscarriage of justice adequate to excuse his untimely petition.*”). **04/23/2018 R & R (Doc.19)**, at page 7, lines 15-16.

Petitioner disagrees that the “*fundamental miscarriage of justice*” exception to an untimely filed Petition is not applicable to his case. Petitioner asserts that this case does present a fundamental miscarriage of justice that should excuse his state court procedural default and allow for federal habeas review of his claim of ineffective assistance of counsel.

Petitioner asserts that the District Court’s reading of the miscarriage of justice exception to untimeliness is too narrow. “*A court may also excuse an untimely petition if the prisoner shows that a fundamental “miscarriage of justice” has occurred.* **McQuiggin v. Perkins**, 569 U.S. 383, 133 S. Ct. 1924, 1935 (2013). It is correct that the **McQuiggin** case emphasizes the actual innocence issue in ruling on the miscarriage of justice exception. **However, there is a quirk to this case that was not present in any of the other cases cited by the Magistrate Judge.**

Here, there were **TWO JURY TRIALS** at issue. Petitioner waived his right to a jury trial for guilt on the underlying offense, but was denied a jury trial on the greater offense. Petitioner disputes that he was guilty of the greater offense and that the complete and total denial of a jury trial on that greater offense qualifies

for application of the “*fundamental miscarriage of justice*” exception to an untimely filed Petition.

For the miscarriage of justice exception to untimeliness, it suffices that Petitioner can demonstrate beyond a doubt that he was denied **the entire proceeding** at which the separate trial on the issue of guilt on aggravating factors — *i.e.*, *Apprendi*’s “*functional equivalent of elements of a greater offense*” — were to be determined by a jury. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Sentencing based on aggravating factors not implicit within the basic judgment of guilt and not admitted for sentencing purposes by the defendant constitute **convictions for greater offenses than the underlying offense and are entitled to the same fundamental constitutional rights and protections as the conviction on the lesser offense:**

Despite what appears to us the clear “elemental” nature of the factor here, the relevant inquiry is one not of form, but of effect — **does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?**

On the other hand, when the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. **Indeed, it fits squarely within the usual definition of an “element” of the offense.** See post, at 2368-2369 (THOMAS, J., concurring) (reviewing the relevant authorities).

The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.

Apprendi v. New Jersey, 530 U.S. 466 (2000), at 494 and 497 (bold print added).

In *Jae Lee v. United States*, 137 S.Ct. 1958 (2017), this Court drew a sharp contrast between two types of ineffective assistance, separating for increased scrutiny those instances in which the attorney's deficient performance arguably **led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself**. The *Jae Lee* Court held that:

When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "*would have been different*" than the result of the plea bargain. **That is because, while we ordinarily "*apply a strong presumption of reliability to judicial proceedings*," "*we cannot accord*" any such presumption "*to judicial proceedings that never took place*."** (Internal citations omitted).

We instead consider whether the defendant was prejudiced by the "*denial of the entire judicial proceeding ... to which he had a right*."

Jae Lee v. United States, 137 S.Ct. 1958, 1965 (2017) (bold print added).

That is precisely what occurred here. Petitioner was constitutionally entitled to a trial by a jury on all aggravating factors the State might assert in order to subject Petitioner to sentencing greater than the presumptive term. Petitioner was not informed of that right by the Court, the State, or defense counsel. Petitioner was induced to enter a plea of guilty that subjected him to a stipulated aggravated sentence, compelling a waiver of his federal constitutional rights to a jury trial and to a determination of aggravating factors by proof beyond a reasonable doubt.

The constitutional violations and the intertwining of those violations is exceedingly important. Standing alone, a flawed state court procedure that does

not demonstrate actual innocence would not suffice to qualify for a miscarriage of justice exception to untimeliness. In this case, however, the intertwining of the violations does suffice to qualify for a miscarriage of justice exception to untimeliness:

To be sure, a habeas petitioner need not prove his innocence beyond all doubt in order to reach the safe haven of the miscarriage exception: it suffices if the petitioner can show a probability that a reasonable jury would not have convicted but for the constitutional violation.

Burks v. Dubois, 55 F.3d 712, 718 (1995), citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Here, Petitioner can show **more** than an error in proceedings where there **might** have been a difference in the outcome; Petitioner's claim involves the **complete denial of a trial** on the elements of the offense that subjected him to sentencing greater than allowed pursuant to his plea of guilty. In this regard, this Court has recently spoken, in *Jae Lee v. United States, supra*. Petitioner was subjected to a sentence greater than that constitutionally permissible on the basis of his plea of guilty, and this occurred solely because he was denied the jury trial to which he was entitled under the federal constitution.

Petitioner was duped into a plea agreement by means of ineffective assistance and by utter failure of the state court and prosecutor to inform him of the federal constitutional rights that are necessarily attached to state court plea agreements. Petitioner was duped into unwittingly waiving (unconstitutionally waiving) his federal constitutional rights to a jury trial and to proof beyond a

reasonable doubt for factors that are considered to be the functional equivalent of elements of a greater offense. Petitioner was sentenced in ignorance of those rights because of the state's and defense counsel's failures to comply with mandatory constitutional obligations. Petitioner was appointed appellate counsel, who ignored all of the violations previously enumerated and demonstrated and instead filed a Notice of Completion of Post Conviction Review stating that there were no colorable claims. The state PCR court then failed to perform a constitutionally required independent review of the case for fundamental error and summarily dismissed the PCR action. Petitioner was left in the dark about all of the constitutional violations in his case until current counsel reviewed the record at the request of Petitioner's family and informed him of the fundamental nature of the many constitutional violations. Upon learning of the constitutional violations involved, Petitioner acted promptly to bring the action to the federal court system's attention with a Petition for Writ of Habeas Corpus.

III. THE SIX GROUNDS PRESENTED TO THE DISTRICT COURT DEMONSTRATE THAT PETITIONER WAS CONVICTED AND SENTENCED FOR AN OFFENSE GREATER THAN THE UNDERLYING OFFENSE OF THE PLEA AGREEMENT WITHOUT TRIAL, WITHOUT JURY TRIAL, WITHOUT THE CONSTITUTIONALLY REQUIRED STANDARD OF PROOF OF BEYOND A REASONABLE DOUBT, AND WITHOUT BEING INFORMED OF FUNDAMENTAL CONSTITUTIONAL RIGHTS WHICH HE WAS UNKNOWINGLY INDUCED TO WAIVE — RESULTING IN A FUNDAMENTALLY UNJUST INCARCERATION

In *Murray v. Carrier*, 477 U.S. 478 (1986), this Court considered the issue of a fundamental miscarriage of justice. The *Murray v. Carrier* Court pointed out that

In re Winship, 397 U.S. 358 (1970) held that “*the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.*” See *Winship*, 397 U.S., at 364. The *Murray v. Carrier* Court emphasized that in *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (*per curiam*), the Court held the rule in *Winship* to be **fully retroactive**, to all cases, even those whose finality was unquestioned, because “*the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function,*” see 477 U.S., at 495.

The *Murray v. Carrier* Court held that in appropriate cases, the principles of comity and finality “*must yield to the imperative of correcting a fundamentally unjust incarceration,*” quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982), see *Murray v. Carrier*, 477 U.S., at 495.

This discussion is particularly important within the context of this case, for at least two reasons. First, of course, is the significance of the violations involved, which have been articulated in the District Court. The second reason, however, concerns the procedural issue of the miscarriage of justice exception itself and the self-imposed limitations the courts have accepted with reservations that appear to apply in this case. The Supreme Court, in *Dretke v. Haley*, 541 U.S. 386 (2004), discussed the limitations applicable to the miscarriage of justice exception:

The cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice. *Murray v. Carrier*, 477 U.S. 478 (1986), thus recognized a narrow exception to the

cause requirement where constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Id.*, at 496; *accord, Schlup v. Delo*, 513 U.S. 298 (1995). We subsequently extended this exception to claims of capital sentencing error in *Sawyer v. Whitley*, 505 U.S. 333 (1992). Acknowledging that the concept of "actual innocence" did not translate neatly into the capital sentencing context, we limited the exception to cases in which the applicant could show "by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.*, at 336.

We are asked in the present case to extend the actual innocence exception to procedural default of constitutional claims challenging non-capital sentencing error. We decline to answer the question in the posture of this case and instead hold that a federal court faced with allegations of actual innocence, **whether of the sentence or of the crime charged**, must first address all non-defaulted claims for comparable relief and other grounds for cause to excuse the procedural default. This avoidance principle was implicit in *Carrier* itself, where we expressed confidence that, "for the most part, 'victims of fundamental miscarriage of justice will meet the cause-and-prejudice standard.'" 477 U.S., at 495-496 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Our confidence was bolstered by the availability of ineffective assistance of counsel claims — either as a ground for cause or as a free-standing claim for relief — to safeguard against miscarriages of justice. The existence of such safeguards, we observed, "may properly inform this Court's judgment in determining '[w]hat standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims." *Carrier, supra*, at 496 (quoting *Reed v. Ross*, 468 U.S. 1, 9 (1984)).

Dretke v. Haley, 541 U.S. 386, 393 (2004) (bold print added).

The significance of the discussion immediately above serves to highlight the extraordinary circumstances of this case, which involves non-capital sentencing but with an astounding twist deserving of extending the miscarriage of justice

exception to the present case.

Here, the actual innocence is for **BOTH the sentence AND the crime charged**, because Petitioner was sentenced for a greater offense than the one charged in the plea agreement and his conviction for that greater offense was obtained by subterfuge and ineffective assistance of counsel. He was denied a jury trial on the greater offense and denied the constitutionally required standard of proof of beyond a reasonable doubt. He was denied the entire set of due process protections at which he could demonstrate his innocence of that greater offense.

This is not merely a procedural error; it is a fundamental miscarriage of justice, to eliminate without knowledge or consent the entire proceeding prescribed by the constitution for conviction and sentencing.

CONCLUSION

Petitioner's trial level counsel did not inform Petitioner of essential constitutional rights. The plea agreement did not inform Petitioner of those rights. The change of plea court did not inform the defendant of those rights. As a result, Petitioner unknowingly was induced to enter a plea bargain that and implicitly waived constitutional rights of which he never was informed. When he was sentenced, Petitioner received an aggravated term of imprisonment pursuant to an unadvised stipulation obtained without informing him of associated constitutional rights. When Petitioner sought appointment of counsel for purposes of direct review, his counsel failed to identify any errors. Finally, the PCR court failed to perform an independent review of the case documents that were available to the

court. As a result, Petitioner has been serving a prison sentence unconstitutionally obtained.

Respectfully Submitted this 22 day of May, 2019.



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*Petitioner In Propria Persona***

No. _____

SUPREME COURT OF THE UNITED STATES

MATTHEW MOUNIR AWAD,

PETITIONER,

v.

**MARK BRNOVICH, ATTORNEY GENERAL
OF THE STATE OF ARIZONA**

and

**CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,**

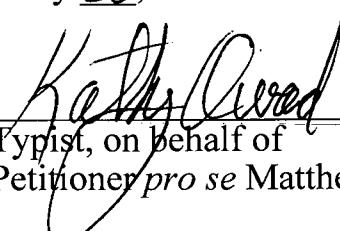
RESPONDENT.

**On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals**

STATEMENT OF COMPLIANCE

As required by **Supreme Court Rule 33.2(b)**, I certify that the document has margins of 1", is double spaced, except for indented quotations which are single spaced, printed on 8½" by 11" opaque, unglazed, white paper, using Times New Roman 14-point type, does not exceed 40 pages, and is stapled or bound at the upper left-hand corner. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 28, 2019.



Typist, on behalf of
Petitioner *pro se* Matthew Awad