No. 19-____

In the Supreme Court of the United States

BRADLEY WILLIAM KENNEDY,

Petitioner,

v.

STEPHEN MORRIS, WARDEN (ASPC EYMAN COMPLEX);
MARK BRNOVICH, ATTORNEY GENERAL
FOR THE STATE OF ARIZONA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Bradley Kennedy's petition for a writ of habeas corpus is time barred under the one-year statute of limitations set forth in the anti-terrorism & effective death penalty act of 1996 ("AEDPA")?

2. Whether Bradley Kennedy is entitled to relief pursuant to the Due Process Clause of the 14th Amendment because he was convicted without any plausible evidence of a critical element of the crime, and because of inadmissible prejudicial evidence?

3. Whether the cumulative effect of various trial errors so infected Bradley Kennedy's Trial with unfairness as to make his conviction a denial of Due Process?

4. Whether Bradley Kennedy's sentence violations the 8th Amendment's prohibition against cruel and unusual punishment?

PARTIES TO THE PROCEEDINGS

Petitioner

- Bradley William Kennedy

Respondents

- Stephen Morris, Warden
  (ASPC Eyman Complex)
- Mark Brnovich,
  Attorney General for the State of Arizona,

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 19-15480

Bradley William Kennedy, ADC #211800, Petitioner-Appellant *v. Gerald Thompson, Warden (ASPC Eyman Complex); Attorney General for the State of Arizona; Charles L. Ryan*, Respondents

Date of Final Order: October 25, 2019

Date of Rehearing Denial: December 20, 2019

United States District Court for the District of Arizona

No. CV-17-04300-PHX-GMS

Bradley William Kennedy, Petitioner *v. Gerald Thompson, Et Al.*, Respondents.

Date of Final Order: March 8, 2019

United States District Court for the District of Arizona

No. CV-17-04300-PHX-GMS (ESW)

Bradley William Kennedy, Petitioner *v. Charles Ryan, Et Al.*, Respondents.

Date of Final Order: September 18, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bradley William Kennedy (hereinafter "Petitioner" or "Mr. Kennedy" or "Kennedy" or "Defendant.") respectfully prays a writ of certiorari issue for review of his case.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Kennedy's Motion for Reconsideration and Motion for Reconsideration en banc is reproduced at App.21a. A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's request for a Certificate of Appealability is reproduced at App.1a. A copy of the Amended Order of the United States District Court for the District of Arizona denying and dismissing Kennedy's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is reproduced at App.3a.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit, decided this case was October 25, 2019. The Motion for Reconsideration and Motion for Reconsideration en banc was denied on December 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

- **United States Constitution Amendment VIII**

  In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

- **United States Constitution Amendment XIV**

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

FEDERAL STATUTES

- **28 U.S.C. § 2254**
- **28 U.S.C. § 2244(d)**

(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.

ARIZONA REVISED STATUTES

- **A.R.S. § 13-3553**

A. A person commits sexual exploitation of a minor by knowingly:

1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is exploitive exhibition or other sexual conduct.

2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.

- **A.R.S. § 13-3551(5)** defines "exploitive exhibition" as follows:

  > The "actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer."

- **A.R.S. § 13-3551(10)** defines "sexual conduct" as follows:

  > Actual or simulated: (a) Sexual intercourse, including genital-genital, oral genital, anal-genital or oral-anal, whether between persons of the same or opposite sex. (b) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure. (c) Sexual bestiality, (d) Masturbation for the purpose of sexual stimulation of the viewer. (e) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer. (f) Defecation or urination for the purpose of sexual stimulation of the viewer.

STATEMENT OF THE CASE

Bradley Kennedy was charged and convicted of crimes he did not commit, and sentenced to 119 years in prison.

A. Background

Kennedy was married and had a son. His marriage eventually ended up with a divorce, where he was ordered to pay a substantial amount of child support among other costs. An issue arose in arrears of child support. He had paid $11,000.00 toward the arrears of $26,000.00. The Judge ordered him to produce documents that show his income and expenses. When he failed to produce the documents, the Judge ordered him to jail. He spent Thanksgiving in jail before he was released.

After the divorce but before the charges leading to the convictions were filed, Kennedy was introduced to a young woman. They were married three weeks later, in November 1994. Their life together was good for a long time, until it started to deteriorate, and in 2003 she decided to divorce him. There was a child support case involving Kennedy's son, pending in the Superior Court of Maricopa County, Arizona, before Judge David Roberts. Attorney Sterling Threet represented his ex-wife in the case, and Mr. Kennedy represented himself. From 1998 to late 1999, Judge Roberts presided over the divorce case, and was handling the child support case.

In 2003 Kennedy was charged with seven counts of "Sexual Exploitation of a Minor," class 2 felonies, dangerous crimes against children, (Counts 1-7), and 1 count of Forgery, (Count 8), a class 4 felony, and 1 count of Harassment, (Count 9), which was later dismissed. The charges were based on a series of events that occurred three years earlier, in 1999. Record on Appeal ("ROA"), Item 77.

B. Summary

In November and December of 1999, envelopes were slipped through mail slots of office doors. They contained nude photographs of a child, along with writings. During the same time, small stickers containing disparaging remarks against Judge Roberts, were placed in various locations near his home. The photographs, writings, and stickers, were turned over to the Maricopa County Sheriff's Office Harassment Unit. After a year, the Sheriff's office closed the investigation. In 2003, Mr. Kennedy was arrested for possessing a gun in the Arizona State University library. The Sheriff's office opened the investigation into the harassment of Judge Roberts. A trial was held, and Mr. Kennedy was found guilty of seven counts of Sexual Exploitation of a Minor. Each count represented a single photograph. The seven counts were run consecutive, which caused Mr. Kennedy to be sentenced to 119 years in prison.

C. Evidence

The following excerpts from the trial transcripts support Mr. Kennedy's request for review. They prove Mr. Kennedy is not guilty of the crime of "Sexual Exploitation of a Minor."

1. Trial Day Three

Police officer Stephanie Heckel testified, on November 11th, 1999 she spoke with Tammy Radmacher, who gave her a sticker she found. It had disparaging remarks about Judge Roberts. Police officer Richard Elmore testified, on October 18th, 1999, he spoke with Claudia Alvarado, who found an envelope that was put through the mail slot in the door of her office.

The envelope contained three Polaroid photographs. The photographs were of a nude child. Barbara Meyerson testified, on October 14th, 1999, an employee showed her photographs she found in an envelope wedged in the office door. The photographs were of a nude child. RT-8/16/06.

2. Trial Day Four

Rebecca Cahill testified, she found the photographs given to Barbara Meyerson. Donna Millet, whose father is Judge Roberts, testified, on September 1999, she found a sticker. The sticker said, "David Lucifer Roberts." RT-8/17/06 at 28. Claudia Buelna testified, in 1999 a letter was put through the mail slot in the door to her office. It contained photographs of a nude child. Mather Willis testified, in 1999, while cleaning an office next to attorney Sterling Threet's office, he found an envelope that was put through the mail slot of the office door. (Threet represented Mr. Kennedy's ex-wife in the divorce case). It contained four photographs of a nude child. A letter in the envelope stated, "D.L. Roberts, (his address), Joe Arpaio is an asshole for prosecuting C. Shank, Save Chris or keep him from implicating us. Trade Spencer D's Oregon, Portland, trophies for Garrett and Landon sleep over friends' pic's, Enjoy Little Boy Blue, S.R. Threet." RT-8/17/06 at 56 & 62). (This letter was the only suggestion child pornography was involved).

Sabrina Walker, crime lab specialist, testified, she analyzed fingerprints on evidence found in 1999. She compared two latent prints with Mr. Kennedy's fingerprints. There was no match. RT-8/17/06 at 91-92. Police officer Kelly Boyer testified, on September 18th, 1999, she went to Judge Robert's home to pick

up three typewritten stickers his neighbors found and gave to him.

Detective Lignoski testified, in September 1999 he was assigned to the "Threats Management Unit" of the Sheriff's office. He assisted Det. Tucker in the investigation of the harassment of Judge Roberts. They worked on the case from 1999 for a year. The investigation was closed, because they did not have enough evidence against Kennedy to move forward. RT-8/17/06 at 155.

3. Trial Day Five

Glen West testified, in 1999 he found a typed sticker. It said, David Lucifer Roberts is a supporter of Satan. He threw it away. RT 8/21/06 at 13. Sherry Sanders testified, in 1999 she worked for Bank One First USA in the credit card department. The Prosecutor showed her a turndown letter Judge Roberts received, and an Application for credit. She compared a number code on both, and they matched. RT 8/21/06 at 30. The name on the application was Judge Robert's, with his address. The application was mailed to "Able Family Dentistry," and signed by Bradley K. for Robert Family Trust. RT 8/21/06 at 32. In cross examination, Ms. Sanders admitted she could not tell who sent out the application, because "we use different venders to send out applications to millions of individuals, businesses, and homes."

Lt. Tucker testified, he submitted two items for fingerprint and DNA analysis. Alan Kreitl, a forensic document examiner, determined none of the typed notes came from the typewriter taken from Mr. Kennedy's home, and he could not determine if Kennedy's handwriting matched the exemplars pro-

vided. RT 8/21/06 at 64-65. Stacie Raymond, a forensic scientist, testified, she tested samples of hair and concluded Kennedy 'could be excluded' as a contributor to the DNA collected from evidence. RT 8/21/06 at 82-83. Scott Milne, a criminalist, testified, he analyzed an envelope on June 20th, 2006, and Kennedy 'was excluded' from being a possible contributor to the DNA on the envelope. RT 8/21/06 at 103.

Lt. Tucker testified. During questioning by the Prosecutor, he diverted to another case. He testified, . . . the name GGG was on a sticker found by a person in 1999. The prosecutor asked, " . . . that's an investigation that is was being handled by Detective Giesel of the Mesa Police Department." He answered, "That's correct." The Prosecutor asked, "Are you familiar with who (GGG) is." He responded, "I was not a participant in that investigation, but based on the media attention and my conversations with Mesa Police Department, I am." The prosecutor asked, "How are you familiar with that." He responded, "I learned both from the media attention and from the Mesa Police Department, that (GGG) was a young female child who disappeared and has not been found nor seen. Presumed homicide victim, I understand." RT 8/21/06 111-112.

4. Trial Day Six

Lt. Tucker continued testifying. He said the last photographs were found on November 29th, 1999, in an envelope that also contained a writing. The writing created a suspicion, attorney Threet and Judge Roberts were trading child pornography. RT 8/22/06 at 26. He said, "The investigation was ultimately discontinued,

because no direct link to Kennedy was ever found." RT 8/22/06 at 35.

5. Trial Day Seven

Wendy Dutton, a forensic interviewer and counselor at St. Joseph's Childhelp Children's Center, testified, On February 14th, 2003, she interviewed the son of Joann Kennedy, (Kennedy's step-son). RT 8/24/06. He was 7 years old at the time of the interview, and 4 years old at the time the incidents, in 1999. She questioned him about photographs that may have been taken of him while he was naked. She was asked, "Did he give you disclosure about any memory of having any photographs taken of him being naked." She said, "No, he did not." RT 8/24/06 at 16. Dutton was asked, "Did he give you any disclosure about any inappropriate touching or of sexual nature by his father." Dutton answered, "No, he did not." RT 8/24/06 at 17.

A year later, on March 17th, 2004, Dutton interviewed the boy a second time. The interview was requested by a police officer, after Joann told the officer, "Her son said things about his father." Dutton said, before the interview she reviewed a video of her first interview of the boy, and a transcript of defense counsel's interview of the boy. In the second interview he said, "There was something he needed to tell you about my dad." She said, "He basically told me that he had a memory of his father . . . taking pictures of him." "He described the camera as being a camera that had a handle where the pictures pop out." RT 8/24/06 at 18-19; 41. The Prosecutor asked Dutton, "Did you ask him how he knew about the photographs if he was asleep." Dutton said, "Yes, I did. He said,

" . . . he saw the flashes." In cross-examination Dutton testified," . . . the child told her about a lot of things he had done . . . and then, all of a sudden, out of the blue, he said, "I also need to tell you something about my dad." RT 8/24/06 at 34,. She said, he never disclosed this information in the first interview. RT 8/24/06 at 38. Defense counsel said, "You've got concerns about that don't you." Dutton answered "Yes." "About what mother is telling the boy." Dutton said, "Yes." She asked him, "Did your mom tell you what to say," he said, "yeah." Dutton said, she thought either the child had been coached or the information could have been out of a source monitoring problem. RT 8/24/06 at 42-43.

Brandi Payne, (daughter of Kennedy's wife Joann who lived with them) testified, at the time of the incident in 1999, she was 15 years old and her brothers were 4 and 7; Kennedy's son from a previous marriage lived with his mother in Utah, and would spend summers with them; Joann and Kennedy were married in November 1994, and had two children. RT 8/24/06 at 62-65. She was asked if Kennedy ever expressed any opinions or attitudes about Judge Roberts while his son was living with them. She answered, "Not that I can remember." RT 8/24/06 at 68. She testified, her mother had problems with drugs and alcohol. RT 8/24/06 at 76. In cross-examination she testified, prior to the police contacting her in 2003, her mother was planning to divorce Kennedy. RT 8/24/06 at 115 & 126; Joann filed for divorce on February 21st 2003; She said, "There was no question Joann wanted full custody of the children, and would do anything to get the kids." RT 8/24/06 at 129.

Judge Roberts testified. He said he handled the divorce case of the Kennedy's for 2 years, starting in 1998; He ordered Kennedy to pay attorney's fees; The ruling was appealed, and the appellate court found Kennedy was in arrears of child support; He ordered Kennedy to produce his bank statements to determine his ability to pay, (Kennedy had paid $11,000.00 towards the $26,000.00 he owed); When he did not produce the bank statements, he ordered him to jail. RT 8/24/06 at 142-146.

On September 18th, 1999, Judge Roberts contacted the Mesa Police Department about typewritten stickers people in his neighborhood gave him. The writing on the stickers stated, "David Lucifer, L Roberts, gave his home address, phone number, Social Security number, date of birth, white male, age 64, white Suburban, license number, Buick four-door."

6. Trial Day Eight

Sgt. Allen Romer testified, on January 26th, 2003, he became involved in the investigation of Kennedy; He worked on the case with Sgt. Steve Bailey and Lt. Ray Jones; He was contacted by ASU (Arizona State University) officials, in reference to Kennedy having a gun in his possession while in the Arizona State University Library; He arrested him. (Even though Kennedy had a permit for the gun). On January 30th, 2003, He, Det. Whitney, and Lt. Jones met with Joann Kennedy (Kennedy's wife at that time), and Kennedy's attorney, Mr. Forshey, at his office. They did not mention the investigation or photographs at the meeting. RT 8/24/06 at 36. After the meeting, Joann invited the officers to her home, and gave them a tour.

Sgt. Romer stated, on February 3rd, 2003, He, Det. Tucker and Det. Bailey arranged a second meeting with Joann, at Forshey's office. At the meeting they told Joann about the investigation, and showed her the pictures collected in 1999. Joann became visibly shaken and crying. Mr. Forshey ended the meeting, and told Joann to find an attorney. He recommended Alan Simpson. RT 8/24/06 at 45-46.

After leaving Forshey's office, they decided to talk to Brandi. The officers found out about her from a photograph in Joann's home. At the meeting, they discussed general topics, but did not mentioned the investigation or photographs. RT 8/24/06 at 44-45. On February 14th the officers went to Joann's house a second time. Sgt. Romer stated, "We were invited by Joann Kennedy's counsel, Alan Simpson, to go to her home and pick up items she had collected." She gave them a Polaroid camera, and typewriter Kennedy used in his dental practice. RT 8/24/06 at 45-46. The Polaroid camera was sent to the Polaroid company for analysis. RT 8/24/06 at 75. (No evidence was obtained from the Polaroid Company). Sgt. Romer was asked, "If Brandi had contact with her mother before they interviewed her." He said, "Brandi had informed me that she had a phone call from her mother prior to us finding her . . . " RT 8/24/06 at 79.

Sgt. Romer stated, during their second visit with Joann at her house, "Joann's demeanor was very open and receptive . . . I would say it would be fair . . . from the last time I saw her, she looked like she was stunned when we showed her the pictures, . . . she looked very upset and had been crying . . . So when we went to see her this time it was completely different. Well composed lady at that time . . . " RT 8/24/06 at 80-81.

Joann Kennedy testified. She is still married to Kennedy; She met him on November 11th, 1994; Three weeks later they were married; She has two children from a previous marriage, one of them was Brandi; Brandi was born in 1984; She had a son from a prior marriage; Kennedy had one son from a prior marriage that lived in Utah with his mother; His son would stay with them for extended periods of time; Kennedy and her had two children, a boy and a girl; The boy was born on September 2nd, 1995, and was 4 years old at time of the incident in 1999. RT 8/24/06 at 89-93. When she was married to Kennedy, he was involved in a child support case with his previous wife; Judge Roberts handled the support case; Kennedy filed complaints against Judge Roberts. RT 8/24/06 at 98-104; Kennedy was in a motorcycle accident, and she decided not to leave him at that time, because of his injuries. RT 8/24/06 at 105; She filed for divorce on February 21st, 2003.

In cross examination, Joann admitted to abusing drugs and alcohol, and stealing drugs from Kennedy's dental supplies. When asked, "Have you ever lied to anybody to support your drug and alcohol abuse," she said, "Of course." Joann admitted, "She was convicted of felony endangerment of her children, and CPS (Child Protective Services) placed her children with a relative." RT 8/24/06 at 162-163. She said, she was seeking full custody of the children along with all the property. RT 8/24/06 at 176.

7. Trial Day Nine

Sgt. Bailey, case agent in the Sheriff's office Threats Management Unit, testified. He was at the first meeting with Joann, at attorney Forshey's office.

When Joann was told about the investigation and saw the photographs, "she immediately became emotional, put her hands to her face, was visibly shaken . . ."

After the meeting the officers interviewed Brandi. She told them, "I know about the photographs . . . Polaroids," The officers had not told her about the investigation or showed her the photographs. On February 12th, 2003, they interviewed Brandi a second time. This time they showed her the photographs. RT 8/28/06 at 94-103. She said they looked similar to pictures her mother had showed her. (Joann had testified she destroyed picture she said she found in 1999). Testimony of several witnesses described the various depictions in pictures Joann said she found.

On February 14th, 2003 Joann took two of her children to Childhelp Children's Center, to be interviewed by a forensic counselor, (Wendy Dutton). On February 26th, 2003 Joann contacted the officers and told them Kennedy had made admissions about the photographs she found. On June 29th, 2004 they went to Joann's house again to pick up more items she found while moving.

8. Trial Day Ten

Rhonda Kennedy (Kennedy's sister) testified, Joann had shown her photographs she found (in 1999). RT 8/29/06. Defense counsel, after showing her the photographs in evidence, asked her, "Have you ever seen those before." Rhonda said, "No that I am aware of, no." She then stated, "One thing that is in my head is that she (Joann) had told me different things she saw as a witness, . . . she created an image in my head." RT 8/29/06 at 37-38. She said Joann was

talking to her before the trial, and "She described to me things she had seen, So that's what makes it more confusing for me." RT 8/29/06 at 38. Joann told her about the photographs the police showed her in 2003, and said, "that is where she got her information." RT 8/29/06 at 43. Rhonda said, "the photographs she showed her were a lot further away and did not appear to be pornographic to either her or anyone in her family." RT 8/29/06 at 46, 49-50. Rhonda said, "The way I remember it is more kind of far away like a child sleeping and maybe a picture was taken, not like anything you'd think of say pornographic or in that category." RT 8/29/06 at 40-41. When Rhonda was asked, "Did you know it was a boy because you could see a penis in the photographs you saw in 1999," she responded, "Yeah that would be right." RT 8/29/06 at 41. Rhonda stated, "Joann has been putting images in her head about the description of the photos, what they look like." "She went as far as to tell me in one of the pictures the little boy had an erection." RT 8/29/06 at 45). When asked, "What else did she tell you about the pictures," Rhonda answered, "She described the different positions they were in," and "I just believed her because she was the mom." RT 8/29/06 at 45-46. Rhonda also stated, in response to the question, " . . . and as you sit here today and you look at those photos, those aren't the ones that she showed you." Rhonda answered, "I do not recognize those." RT 8/29/06 at 46.

Sgt. Bailey continued his testimony. He testified, at Brandi's first interview, "she popped-up and said, I know about the photograph." He asked what photographs, and she said, "the Polaroids." RT 8/29/06 at 58. When he asked her to describe what was in the

photographs she responded, "it was pictures of her brother covered up with a dark blanket, with his head covered up." RT 8/29/06 at 59. On February 12th, 2003, Brandi went to the Sheriff's office, where Sgt. Bailey showed her the photographs. She told them, "her mom had called her that day. RT 8/29/06 at 74. Sgt. Bailey asked her how she knew it was her brother in the photograph, she said, "My mom told me." RT 8/29/06 at 75.

Sgt. Bailey was asked questions from the jury. Question (1), "How did you determine Little Boy Blue was a reference to child pornography." Sgt. Bailey answered, "Prior to my—if I can answer this, prior to my employment with the Maricopa County Sheriff's office, I worked for United States Postal Inspection Service where I assisted on a number of child pornography cases. In those cases, offenders will normally at some point refer to or consistently refer to child pornography as a slang term that the two of them understand. They don't write letters to each other saying I am sending you these nude photos of this boy, I hope you don't get caught. They use nursery rhymes sometimes or vague descriptions that those two know what they're talking about, and a lot of times it's talked about over the internet." Question (2), "The second part was, the blue, in reference to the color of the blanket in the photo?" Sgt. Bailey answered, "I originally considered that when I looked at it, but the blue in my opinion, when I look at that, was not prominent enough in the picture to fit that, and because of my experience earlier, I believe Little Boy Blue was a direct reference to child pornography." RT 8/29/06 at 151-152. Question (3) (Related to Kennedy's statements, Joann said he made to her). Sgt.

Bailey said, "I originally talked to her on the 11th, and then again on the 13th. She had two conversations with the defendant, one before my telephonic interview with her on 2/26, where she mentioned specifically the magic marker that he had stated. Prior to my second interview, I believe she had a chance to discuss this with the defendant, where he mentions taking the photographs, and they were of their son." RT 8/29/06 at 154-155. Question (4), "Was it before or after February 21st, when Joann filed for divorce?" Sgt. Bailey answered, " . . . at that time, my sole focus was the child pornography, where they had been disseminated, if any child at that point was in danger, and my responsibility to superior court judges that were listed in a number of those documents. I tried to maintain my focus on the photographs, the boy and the charges that would ultimately be charged." RT 8/29/06 at 155-156. The prosecutor asked, "You're saying then that this Little Boy Blue designation is from a nursery rhyme." Sgt. Bailey answered, "Little Boy Blue would be common terms that pedophiles or people who exchange child pornography would use." The Prosecutor continued, "But, I mean, it's from the Little Boy nursery rhyme and it is a code word for what you're calling pornographers, child pornographers, not in reference to the color of the bag." Sgt. Bailey: "I didn't believe that, no." RT 8/29/06 at 157.

The parties entered into the following stipulations:

1. The pictures of the child found in 1999, could not have been taken by the camera found in Bradley Kennedy's home in 2003.

2. Dr. Burgoyne, psychiatrist, suffered from Alzheimer's disease and had passed away. Any

records he may have had regarding Joann Kennedy had been destroyed.

3. Sue Lindley did a video interview of Kennedy's son from a prior marriage at Childhelp Children's Center when he was 13 years old. Based on her interview, she would testify: The child would visit Brad (Kennedy) on different occasions. He stated, "Things are good with dad, and described all the things they would do together, and the good advice he gave him. He denied any bruises. Brad would do dental work on him. He did not like it when Brad got into arguments with his stepmother Joann. If he did something wrong, Brad would either send him to his room or give him a swat. He said his dad had never talked to him about something that made him feel uncomfortable, and, Brad has not wanted to teach him about something that seemed odd.

The State rested. No witnesses were presented by the defense.

No physical evidence presented at trial was connected to Kennedy, and no testimony at trial directly connected Kennedy to the evidence presented at trial.

Defense counsel made a motion for a Directed Verdict on the Sexual Exploitation of a Minor charges. RT 8/29/06 at 168-194. Defense counsel argued the person in the photographs was not doing any sex act or anything of a sexual nature. That there was no sexually suggestive pose, no inappropriate attire, no suggestion of a willingness to engage in sexual activity,

and no sexually suggestive setting. He also argued the photographs were not intended "for the sexual stimulation of the view." RT 8/29/06 at 168-171. He argued, the state's theory throughout the trial has been that the pictures were meant to disgust someone and harass or intimidate and threaten someone, not to sexually stimulate them. RT 8/29/06 at 172.

The Court asked counsel, "Is it your position that sexual stimulation must be positive. You asked every witness if they were disgusted by it, and they all said they were-had a response stimulated by the pictures. You're arguing that sexual stimulation has to be a pleasurable positive stimulation?" Defense replied, "I am." RT 8/29/06 at 181-182.

The State responded, "Under defense counsel's argument . . . but a photograph of an adult male having sexual intercourse with a three-year old child would not be pornography, as long as it doesn't fall into the hands of a pervert. That's what he's saying; that we have to prove that the person who saw the photograph was sexually stimulated by the photograph. So, under that argument, as long as that photograph doesn't fall into the hands of somebody who gets sexually stimulated in a positive excited manner, then it's not child pornography, and that would mean that the grossest, most disgusting images of sexual acts with children would not be child pornography, and I guarantee you that is not what the case law says." RT 8/29/06 at 182-183. "The fact that the child has an erection shows the willingness to engage in sexual activity." RT 8/29/06 at 185. "The state's theory of this case and the evidence shows these photographs were found in four different places. There were four different places in which these thirteen photographs were

found. In three of those places, they were found attached to David Roberts mail. In the fourth place, there was a letter. That letter refers to Joe Arpaio failing to prosecute Chris Shank, a very highly publicized well-known prosecutor who was engaged in sexual exploitation of a minor and sexual conduct with a minor for that matter." "The language in that letter referred to 'Little Boy Blue' which is a reference to child pornography. The language in that letter refers to photographs of the children of Judge Roberts and Sterling Fleet." "It is obvious that the whole intent behind those photographs is to make it look like Judge Roberts was engaged in child pornography and that he was engaged in the exchange of that child pornography and that he was engaged in the exchange of the child pornography with Sterling Fleet." "The whole purpose was to make it look like he was doing it and making it look like he was the bad person." "Obviously, there's no way to show who was going to receive these photographs. They could have ended up in the hands of anybody, any pervert out there." "Like I said, under the defendant's argument, if that were true, then the worst, grossest acts we could imagine would not be child pornography as long as they don't fall into the hands of a pervert." "I use the word pervert instead of pedophile. From my experience as a sex crimes prosecutor, I know that not all child molesters are pedophiles, so I am not going to use the word pedophile; I am not going to use the word child molester, I am going to use the word pervert because I am referring to people who get off from looking at photographs of child pornography." "Obviously, the fact that the witnesses in this case were grossed out by the photographs, that they didn't want to look at them, points out the fact

that they felt that there was something different about these photographs. There was something worse than just being a photograph of a child." RT 8/29/06 at 185-187.

9. Trial Day Eleven

The court denied the Motion for a Directed Verdict, and Defense rested. RT 8/31/06 at 5, 23.

10. Closing Argument by the Prosecutor

"Revenge, retaliation, retribution. Was this defendant angry enough at Judge Roberts to actually sexually exploit his own child, absolutely." RT 8/31/06 at 35. "Defense counsel argued, the statute reads for the purpose of sexually stimulating the viewer." "This statute, . . . they have charged Bradley Kennedy under is a statute that is intended for one person who wants to send kiddie porn to another person so that one or both can be sexually stimulated. And you all are aware of those kind of situations. You have seen those before. I'm sure you have heard of them before. It doesn't fit in this case." RT 8/31/06 at 105. "This is a threatening and intimidating and harassment of a judge case. And these prosecutors and these detectives know it. But they are trying to sell you a bag of goods. Don't do it. Don't let them do it. It would be an abomination. It would be unjust and unfair." RT 8/31/06 at 105. "So in regards to threats for the purpose of sexually stimulation of the viewer," which are required elements set forth in A.R.S. § 13-3553 and § 13-3551(5). and intimidation of the judge, whether or not that was charged, is not something you are allowed by law to consider, and that's your jury instruction on page three. But I will tell you, the

State has never claimed that the defendant didn't threaten and intimidate Judge Roberts. That doesn't mean he is not guilty of sexually exploiting a child." RT 8/31/06 at 106-107.

Defense counsel's closing argument was consistent with his argument in the Motion for Directed Verdict.

Instructions were read, and the case went to the Jury.

Trial day TWELVE, The jury asked the following question: "Based on the definition of exhibition, do we have to find beyond a reasonable doubt that Brad Kennedy's 'intent' was for the purpose of sexual stimulation of the viewer?" The court responded, "Please rely on the jury instructions in answering this question."

The jury found Kennedy guilty on all seven counts of sexual exploitation of a minor, and the Forgery charge. The seven verdicts for Sexual Exploitation of a Minor, were based on seven photographs in evidence.

SENTENCING was held on November 17th, 2006. RT 11/17/06. The "Presentence Report" recommended the sentences on counts 1-7 (Sexual Exploitation of a Minor) run concurrent. The prosecution argued Kennedy is paranoid and has serious mental health problems, and sets out on a litany of allegations of harassment against herself and Joann Kennedy, and that Kennedy was a danger to society and Joann, and to "Keep him locked up as long as we possibly can." RT 11/17/06 at 48.

The court sentenced Kennedy to a total of 119 years in prison. Counts 1-7, 17 years, the presumptive, and ran the sentences consecutive. Count 8 Forgery,

2.5 years, concurrent with count 1. ROA-335; RT-11/17/06 at 66.

REASONS FOR GRANTING THE PETITION

I. KENNEDY'S PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 IS NOT BARRED BY THE AEDPA'S STATUTE OF LIMITATIONS.

Kennedy timely filed Direct Appeals in the Arizona courts, which were denied. After two court appointed attorneys failed to file a Post-Conviction Relief Petition on his behalf, Kennedy filed a document *pro se* that was construed as a Post-Conviction Relief Petition. The Petition was denied on June 6, 2013. Kennedy then filed a number of requests for various types of relief. The last request was filed on March 10, 2015. It was denied two years later, on February 15, 2017. This sequence of events left Kennedy with no meaningful consideration of the errors in his case, and spending the rest of his life in prison. Based on the errors set out herein, Kennedy deserves to have his case considered on the merits. The only barrier is the federal statutory limitations, that should be tolled, because the delays in his case were not caused by the lack of diligence, and the claims he presented are valid.

Kennedy acknowledges the AEDPA's limitation period began running on June 6, 2013 (the day after the court dismissed his PCR on June 5, 2013). *See* 28 U.S.C. § 2244(d). However, the AEDPA's limitation period should not expire one year later, because Kennedy is entitled to equitable tolling of the time

limitation from June 6, 2013 through his last filing on February 15, 2017.

The AEDPA's one-year statute of limitations is subject to equitable tolling in rare and exceptional circumstances. *Lopez v. Trani*, 628 F.3d 1228, 1229-30 (10th Cir. 2010). Rare and exceptional circumstances occur, when a prisoner is actually innocent, when an adversary's conduct—or other uncontrollable circumstances—prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period. *Id.* Petitioner must diligently pursue his federal habeas claims. *Id.* While equitable tolling is warranted only in "rare and exceptional circumstances," courts do not apply its requirements mechanistically. *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L. Ed. 743 (1946) (observing that "[e]quity eschews mechanical rules"). The exercise of a court's equity powers must be made on a case-by-case basis, mindful that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case. *Harper v. Ercole*, 648 F.3d 132, 136 (2nd Cir. 2011); *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). The "flexibility" inherent in "equitable procedure" enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices. *Holland v. Florida*, 560 U.S. 631, 649-50, 130 S.Ct. 2549, 2563 (2010). Courts of equity exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case. *Id.* Generally, a litigant seeking equitable tolling bears

the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Kennedy's case is one such case in which equitable tolling is appropriate. Exceptional circumstances in Kennedy's case.

Kennedy received ineffective assistance of counsel during his state post-conviction proceeding. Kennedy's state post-conviction proceeding was dragged out for years by two different appointed counsel that ultimately ended up not filing a petition on Kennedy's behalf; Kennedy's case was never reviewed on the merits; Kennedy's sentence amounts to a death penalty. Also, Kennedy diligently pursued his rights *pro se* in an effort to obtain review of his case, even though his filings were defective. The state court docket reflects, between June 6, 2013 (start of AEDPA limitation), and February 15, 2017, Kennedy filed documents attempting to right the wrong he was dealt.

After application of equitable tolling from June 6, 2013 to February 15, 2017, Kennedy's Habeas Petition filed on November 24, 2017 would be timely under the AEDPA. Therefore, Kennedy is entitled to equitable tolling, and having his case reviewed on the merits.

II. KENNEDY IS ENTITLED TO RELIEF PURSUANT TO THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT BECAUSE HE WAS CONVICTED WITHOUT ANY PLAUSIBLE PROOF OF A CRITICAL ELEMENT OF THE CRIME AND BECAUSE OF INADMISSIBLE PREJUDICIAL EVIDENCE.

The State did not present any plausible evidence to support the seven charges of Sexual Exploitation of a Minor. There was no physical evidence connecting Kennedy to the crimes, and no testimony directly connecting him to the crimes. The only evidence presented at trial was circumstantial evidence that proved a charge that was dismissed, Harassment. Also, inadmissible and highly prejudicial evidence was admitted to try and prove Kennedy was a Pedophile, and possibly a killer.

The photographs used at trial were of a child's rear end, and sometimes genitals, which did not alone, show any type of "exploitative exhibition or sexual conduct" required by the statute, and no evidence was presented to support a critical element of the crime,—that Kennedy had the intent to make and distribute the photographs, "for the purpose of sexual stimulation of the viewer."

Throughout the trial the prosecutor presented evidence and argued how terrible Kennedy was for harassing the Judge. Only one document in a letter, in an envelope, stuck in the door to an office, suggested child pornography was involved, and it did not mention Kennedy. During the trial the prosecutor intentionally presented inadmissible evidence that was inflammatory and prejudicial, to try and prove Kennedy was a pedophile, and could be the one who murdered a young girl. Excerpts from the trial record, presented herein,

show misconduct by the prosecutor throughout the trial. This coupled with mistakes by the Judge, created a situation where the trial was so infested with error, petitioner's Due Process rights were violated.

Clearly established Supreme Court precedent states that if a defendant is convicted when there is no 'genuine' evidence supporting a critical element of the offense charged, the defendant's fundamental due process rights are violated. *See Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974). The Fourteenth Amendment to the United States Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In criminal proceedings, this requires the state to "pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Kennedy was convicted of (7) counts of Sexual Exploitation of a Minor in violation of A.R.S. § 13-3553 (each count represents one photograph). A required element for a conviction of Sexual Exploitation of a Minor is that the photographs show a minor engaged in "exploitative exhibition" or other "sexual conduct." The photographs alone did not show any "sexual conduct" as defined in A.R.S. § 13-3551(10), and there was no evidence to suggest the photographs were for that purpose. Also, no evidence was presented to support another critical element of the charge,—The defendant's purpose for distributing the photographs was for the "sexual stimulating of the viewer."

Arizona's sexual exploitation statute provides definitions for the term 'exploitative exhibition' and sexual conduct, which limits the scope of child pornog-

raphy material to being distributed 'for the purpose of sexual stimulation of the viewer.' *State v. Hazlett*, 205 Ariz. 523, 531, ¶ 27, 73 P.3d 1258, 1266 (App. 2003). There was no evidence at trial the photographs were distributed for that purpose. The photographs were randomly distributed, and no witness testified they were "sexually stimulated" when they viewed them.

The State's own admitted theory of the case was the photographs were used to harass and intimidate a judge by implicate him in child pornography. The State argued this was done "for the purpose of getting revenge against the judge,"—who had ruled against Kennedy in a divorce case.

After reading the charges and admonitions to the jury, the Judge stated, "Bradley Kennedy is charged with possessing, distributing, transporting or exchanging Polaroid photographs of a nude, minor child which were placed at more than one location in Maricopa County." "The State is alleging that the Defendant did these things . . . to make it appear that the photographs . . . came from Judge Roberts, in an effort by defendant to embarrass, harass, humiliate, and/or tarnish the reputation of the Judge for adverse rulings that he had entered against the defendant, in 1999." The prosecutor's first words in opening argument were, "Revenge and retribution. This case is simply about retaliation against a Judge who made some adverse rulings . . . ."

In the recent case of *May v. Ryan*, 245 F.Supp.3d 1145 (D. Ariz. 2017) the Arizona District Court explained the necessary element of 'Sexual Intent,' when it addressed Arizona's child molestation laws, " . . . absent sexual intent, all the conduct within the

sweep of the statute is benign, and much of it is constitutionally protected. The language of the elements described benign and constitutionally protected behavior that could only become wrongful with sexual intent. For example, the statute criminalizes diapering and bathing infants and much other innocent conduct." The District Court concluded, "Sexual intent remains at the core of Arizona's child molestation law, and the State must prove that element. Otherwise, the law runs afoul of the Fourteenth Amendment's guarantees of due process and of proof of guilt beyond a reasonable doubt." (The 9th Circuit affirmed the *May* case on other grounds).

The evidence presented at trial did not prove the photographs had sexual content, let alone, that Kennedy had the required "sexual intent" to distribute the photographs for the purpose of sexual stimulation of the viewer,

Therefore, Kennedy's convictions on counts 1-7 are clear violates of the statute the convictions were based on, and violations of Due Process.

III. THE CUMULATIVE EFFECT OF VARIOUS TRIAL ERRORS SO INFECTED KENNEDY'S TRIAL WITH UNFAIRNESS AS TO MAKE HIS CONVICTION A DENIAL OF DUE PROCESS.

If a court determines that the cumulative effect of various trial errors, including admission of evidence, "so infected the trial with unfairness as to make the resulting conviction a denial of due process," the substantial and injurious effect standard is necessarily satisfied and the conviction must be reversed. *See Thomas v. Hubbard*, 273 F.3d 1164, 1179-80 (9th Cir. 2002) (quoting *Donnelly v. DeChristoforo*, 416 U.S.

637, 643 (1974)). The United States Supreme Court has held "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *See Shepard v. U.S.*, 290 U.S. 96, 104 (1933). Furthermore, evidence having a dual tendency, inadmissible and gravely prejudicial for one purpose but not objectionable for another if separately considered, should be excluded from the jury. *Id.* at 103.

Where there are multiple trial errors, a balkanized, issue-by-issue review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant. *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017). This is because the cumulative effect of multiple trial errors can violate due process even where no single error would independently warrant reversal. *Id.* The cumulative effect of the following trial errors so infected Kennedy's trial with unfairness as to make his resulting convictions a denial of due process:

A. Improper 404(b) Evidence.

The court allowed the State to present improper Rule 404(b) evidence at Kennedy's trial. The State filed "Motions for Admissibility of 404(b) Evidence," asking the court to allow it to introduce facts related to Kennedy's "hatred" of Judge Roberts, which allegedly motivated him to commit the crimes. The evidence consisted of stickers, envelopes, and letters, which the State's experts could not link to Kennedy, and did not support the charges of Sexual Exploitation of a Minor, and the Harassment charge had been dismissed. The evidence had no purpose other than to prove Kennedy "hated" the Judge, which was not relevant since the Harassment charge was dismissed.

The only reason the prosecutor could have for admitting this evidence would be to mislead and confuse the jury. The State also resorted to using inadmissible inflammatory and highly prejudicial testimony to try and prove the defendant was a Pedophile, and possibly a killer. *See* (D) below.

The State's handwriting expert testified, there was no connection to Kennedy found in the documents submitted for examination. The State's DNA expert testified, the DNA found on photographs was not Kennedy's. Another State's DNA expert testified, he could not find a connection between DNA found on an envelope and Kennedy. The envelope contained the letter, the only document, suggesting pornography was being exchanged. A typewriter expert testified, none of the typed documents matched the typewriter taken from Kennedy's home. In other words,—None of the documents, stickers, or photographs were 'physically' connected to Kennedy. Also, no testimony directly connected Kennedy to these items, and only a letter made reference to child pornography being exchanged. The letter implicated two people, neither of which was Kennedy.

Arizona Rule of Evidence 404(b) prohibits introduction of "Evidence of other crimes, wrongs, or acts," unless they are: [1] Logical and legally 'relevant.' [2] The State proves by 'clear and convincing evidence' the defendant committed the alleged prior act; and [3] The court concludes the 'probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.' Before admitting evidence of extraneous criminal acts, the court must conclude the evidence is admitted for a proper purpose and be logically or 'legally relevant.' *See State v. Mills*, 196

Ariz. 269, 274, ¶ 24, 995 P.2d 705, 710 (App. 1999) (*citing State v. Hyde*, 186 Ariz. 252, 921 P.2d 655 (1996)). The State must also show by 'clear and convincing' evidence the defendant committed the alleged prior act. *See State v. Terrazaz*, 189 Ariz. 580, 582, 583-84, 944 P.2d 1194, 1196, 1197-98 (1997). *See also Mills*, 196 Ariz. at 275, ¶ 24, 995 P.2d at 711. The court must then conclude the 'probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.' *Mills*, 196 Ariz. at 274-75, ¶ 24, 995 P.2d at 710-11.

The evidence presented at trial demonstrates, the prosecutor intentionally subverted the entire trial, by misleading the court and jury, by introducing evidence that was inadmissible and highly prejudicial, and violated Rule 404(b).

B. Confusion of Judge.

The judge asked the defense attorney, "Is it your position that sexual stimulation must be positive? You asked every witness if they were disgusted by it, and they all said they were,—had a response stimulated by the pictures. You're arguing that sexual stimulation has to be a pleasurable positive stimulation?" Defense replied, "I am." RT 8/29/08, at 181-182.

C. Confusion of the Jury.

Jury question: "Based on the definition of 'exhibition,' do we have to find beyond a reasonable doubt that Brad Kennedy's 'intent' was for the purpose of sexual stimulation of the viewer?" The Court responded, "Please rely on the jury instructions in answering this question." RT 9/31/06, at 3-4. The jury

was left in limbo on a critical element of the crime that required a finding of beyond a reasonable doubt.

D. Prosecutor vouching.

The prosecutor stated: "I use the word pervert instead of pedophile. From my experience as a sex crimes prosecutor, I know that most all child molesters are pedophiles, so I am not going to use the word pedophile; I am not going to use the word child molester, I am going to use the word pervert because I am referring to people who get off from looking at photographs of pornography." RT 8/29/06 at 185.

E. Prosecutorial Misconduct.

The prosecutor introduce and or participated in the jury hearing inadmissible, highly prejudicial extraneous evidence, in two instances. The First instance is where Lt. Tucker testified. See his testimony on page 11, last para. The second instance is where Sgt Bailey testified in response to a question from the jury. See his testimony on page 19, first para.

IV. KENNEDY'S SENTENCE IS A VIOLATION OF THE 8TH AMENDMENT'S PROHIBITION AGAINST CRUEL & UNUSUAL PUNISHMENT.

The Arizona Court of Appeals and the Federal District Court, and 9th Circuit Court of Appeals rejection of Kennedy's Eighth Amendment claim, was contrary to clearly established Supreme Court precedent. Prior to sentencing, Kennedy moved the court to find that sentencing him to the mandatory consecutive sentences required by A.R.S. § 13-604.01 constituted cruel and unusual punishment, and asked the court to impose concurrent sentences. The Presen-

tence Report even recommended concurrent sentences. The trial court denied the request and sentenced Kennedy to a total of 119 years.

The Eighth Amendment "forbids . . . extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). In *Ewing v. Cal.*, 538 U.S. 11 (2003), the Supreme Court recognized, the Eighth Amendment contains a narrow proportionality principle that applies to noncapital sentences.' 538 U.S. at 20. The Supreme Court stated the Eighth Amendment's ban on cruel and unusual punishments . . . "prohibits sentences that are disproportionate to the crime committed," and the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.*, at 284, 286.

CONCLUSION

Even if it is assumed Kennedy did the photographs, envelopes, letters, and stickers, and placed them where they were found,—The photographs themselves did not depicted any type of sexual activity required for the crime, regardless of showing the child's genitals, and—There was no evidence, that when he distributed the photographs. he had the necessary intended or purpose of—sexual stimulation of the viewer. To the contrary, the only thing the evidence proved was that he harassed a Judge. Also, the prosecutor intentionally used inadmissible and highly prejudicial evidence to try and prove Kennedy was a pedophile, and could be a killer. Therefore, it is respectfully requested the Court grant Kennedy review.

Respectfully submitted,

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