

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES



DOUGLAS D. YOKOIS,

V.

PETITIONER,

DAVID C. SHINN, DIRECTOR,  
ARIZONA DEPARTMENT OF CORRECTIONS,  
REHABILITATION, AND REENTRY  
and  
MARK BRNOVICH, ATTORNEY GENERAL  
OF THE STATE OF ARIZONA

RESPONDENTS.



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



PETITION FOR WRIT OF CERTIORARI  
AND APPENDICES



Douglas D. Yokois ADC #240176  
ADCRR, ASPC Eyman, SMU I West  
P.O. Box 4000  
Florence, Arizona 85132  
*Petitioner In Propria Persona*

October 10, 2020

## **QUESTIONS PRESENTED**

Whether the Ninth Federal Circuit Court of Appeals improperly denied Petitioner’s Motion for Issuance of 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 United States District Court for the District of Arizona issued a 4-page final Order (**Doc.28**), adopting the August 5, 2019 9-page Magistrate’s Report and Recommendation (**Doc.17**) (*see Doc.28*, at page 4, line 15) and denying Petitioner’s request for a **COA** (*see Doc.28*, at page 4, lines 17-19). Upon application to the Ninth Federal Circuit Court of Appeals, the Ninth Circuit issued a 1-page Order summarily denying Petitioner a **COA** (**Dkt.5**) on July 13, 2020 (“*The request for a certificate of appealability (Docket Entry No. 4) 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.5*, at page 1, ¶ 1. Importantly, there is an underlying question of whether the miscarriage of justice exception to an untimely habeas corpus petition should be subject to an interpretation applying to conviction and sentencing such as occurred in this case.

## **PARTIES TO THE PROCEEDING**

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

Douglas D. Yokois, ADCRR # 240176, Petitioner on Certiorari, was the petitioner-appellant in the Ninth Circuit Court of Appeals and the U.S. District Court.

David C. Shinn, Director of the Arizona Department of Corrections, Rehabilitation and Reentry (**ADCRR**), and Mark Brnovich, Attorney General of the State of Arizona, were the Respondents-Appellees in the Ninth Circuit Court of Appeals and the U.S. District Court.

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**In The**  
**SUPREME COURT OF THE UNITED STATES**

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner Douglas Yokois respectfully petitions for a writ of certiorari 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.

**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 Report and Recommendation is unreported and a copy is attached hereto as **Appendix C**. Petitioner's Objections to the Magistrate's Report and Recommendation is unreported and a copy is attached hereto as **Appendix D**.

**JURISDICTION**

The unpublished decision of the Ninth Circuit Court of Appeals was filed July 13, 2020, (Dkt.5). 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 Tuesday, October 13, 2020, 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 filed<sup>1</sup> pursuant to **28 U.S.C. § 2101(c), Rule 13.1, and Rule 30.1**.

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. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U.S.C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a

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<sup>1</sup> 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.**

Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

**Rule 30.1 of the Rules of the Supreme Court of the United States.**

Here, the 90<sup>th</sup> day falls on a Sunday, 10/11/2020; the following Monday is a federal holiday, Columbus Day, 10/12/2020; the following Tuesday, 10/13/2020, is the next day that is not a day on which the Court building is closed.

**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.

## **INTRODUCTION**

This case presents the Court with the issue of whether the virtually complete denial of representation at every stage of state court criminal proceedings, including the refusal to investigate evidence of actual innocence presented to a defendant's counsel, denial of advice about fundamental constitutional rights critical to decisions to be made, denial of trial — twice — and unquestionably unconstitutional sentencing constitutes an alternative form of miscarriage of justice that excuses the untimely filing of a federal petition for habeas corpus relief.

## **STATEMENT OF THE CASE**

In CR 2007-155558, Petitioner was convicted by plea agreement.<sup>2</sup>

At the state court proceeding — the first bench trial in CR2007-155558 — for determination of guilt on the underlying offenses — *i.e.*, the 02/10/2009 Change of Plea Hearing, Petitioner's attorney Joseph Saienne initially provided the factual basis for the offenses. *See* Reporter's Transcript, 12/10/2009

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<sup>2</sup> **Two Trials, One for Guilt, One for Determination of Aggravating Factors.** The first trial in this case — for a determination of guilt — was a bench trial with a stipulated outcome of guilt based on statements / testimony by Petitioner on the record of the proceedings, pursuant to an unconstitutionally-induced plea agreement. Petitioner contends that the 02/10/2009 Change of Plea Hearing was in fact a bench trial with a stipulated outcome of guilt, based upon the signed statement by Petitioner that was accepted in open court (referred to herein as Petitioner's state court Plea Agreement, found at USDC Habeas Appendix Item 1). The second trial in this case — for the determination of aggravating factors that subjected Petitioner to sentencing greater than the statutorily established presumptive term — was again a bench trial, at which Petitioner (1) did not testify and (2) did not make any verbal or written admissions for purposes of sentencing.

(USDC Habeas Appendix Item 2), from page 13, line 17, to page 14, line 21.

The defense attorney's factual basis for the plea as stated on the record contained no statement of fact, factual allegation, or factual admission by Petitioner constituting an aggravating factor for purposes of sentencing.

*See* USDC Habeas Appendix Item 2.

The signed statement by Petitioner that was accepted in open court (referred to herein as Petitioner's state court Plea Agreement, found at USDC Habeas Appendix Item 1) contained no statement of fact, factual allegation, or factual admission by Petitioner constituting an aggravating factor, and contained no stipulated aggravating factor for purposes of sentencing.

*See* USDC Habeas Appendix Item 1, at page 2, paragraph # 2 (stipulation).

At the second trial — for determination of aggravating factors and sentencing — Petitioner did not stipulate to or testify about any fact/factor to be used by the Court to impose an aggravated term of imprisonment and did not testify about or admit any aggravating fact or factor for purposes of sentencing.

Petitioner's trial level attorney failed to inform Petitioner of any constitutional rights, obligations, and requirements associated with aggravating factors or aggravated terms of imprisonment at any time during the entire period of trial court representation. *See* Personal Affidavit of Petitioner (USDC Habeas Appendix Item 3), at ¶ 7.

Petitioner's trial level attorney knowingly induced Petitioner to agree to

an unconstitutional (and therefore invalid) decision to agree to the state's offered plea agreement after refusing to investigate evidence of actual evidence presented to him by Petitioner. Petitioner's trial level attorney knew that the plea agreement (USDC Habeas Appendix Item 1) contained no language expressly informing Petitioner that, with regard to the fundamental constitutional right to a jury trial for the determination of aggravating factors, the constitutionally required standard of proof was that of beyond a reasonable doubt. *See* USDC Habeas Appendix Item 1, at page 2, second sentence of last paragraph. Further, knowing that the plea agreement (USDC Habeas Appendix Item 1) contained no such language, Petitioner's trial level attorney failed to inform Petitioner of those constitutional rights. *See* Personal Affidavit of Petitioner (USDC Habeas Appendix Item 3), at ¶ 7.

Trial level counsel failed to inform Petitioner that he had a right to a jury trial for aggravating factors using the constitutionally required standard of proof of beyond a reasonable doubt. *See* USDC Habeas Appendix Item 3.

The significance of the constitutional errors identified above was amplified by the fact that Petitioner's trial level attorney knew that the plea agreement expressly required Petitioner to stipulate to an aggravated term of imprisonment — without identifying any aggravating factor that would subject Petitioner to sentencing greater than the presumptive term and without informing Petitioner that he had a federal constitutional right to have any aggravating factor determined by the standard of proof of beyond a reasonable doubt. *See* USDC

Habeas Appendix Item 2 (Change of Plea Proceeding), at page 9, lines 4-6 (“*In Paragraph 2, the stipulation is on Count 26 that you shall be sentenced to the Department of Corrections for an aggravated term to range anywhere from 20 to 24 years*”).

The significance of the constitutional error identified above was heightened even more by the fact that the transcript of the change of plea proceeding reflects the Court asking Petitioner in front of defense counsel if Petitioner understood and agreed to waive a number of constitutional rights associated with entering into the plea agreement and its stipulated aggravated sentencing, while the court simultaneously **(1)** did not inform Petitioner that an aggravated term of imprisonment could not be imposed in the absence of one or more properly determined aggravating factors, **(2)** did not identify any aggravating factor that would justify an aggravated sentence, and **(3)** did not inform Petitioner of his constitutional right to have any aggravating factor determined by the standard of proof of beyond a reasonable doubt. *See* USDC Habeas Appendix Item 2, from page 10, line 20 to page 11, line 18.

By pleading guilty, Petitioner waived his statutory right to a direct appeal but retained his state constitutional right to an appeal, and he 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<sup>3</sup> 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, (9<sup>th</sup> 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)**.

Even though requested to do so, Petitioner’s attorney of record did not file a notice of post conviction relief or a petition for post conviction relief. Petitioner suffered ineffective assistance of counsel at time of the collateral proceeding for failure of counsel to file for post conviction relief upon request from Petitioner, even though requested to do so.

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 adopting the Magistrate Judge’s Report and Recommendation. Petitioner was denied habeas corpus relief and denied a certificate of appealability by the District Court. In the Ninth Circuit Court of Appeals, Petitioner was summarily denied a certificate of appealability.

This Petition follows.

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<sup>3</sup> **Rule 32, Arizona Rules of Criminal Procedure**, governing state court collateral challenges; now **Rule 33** for pleading defendants.

## **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 MAKES A "SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT;" AND THEREFORE THE PRESENTATION OF THOSE GROUNDS WAS AT LEAST "ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER"**

A certificate of appealability may be granted only on an issue-by-issue basis. *Morris v. Woodford*, 229 F.3d 775, 779 (9<sup>th</sup> Cir. 2000). Petitioner presented five issues to the United States District Court and to the 9<sup>th</sup> Circuit Court of Appeals. 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, 123 S.Ct. 1029, 1039 (2003). Accordingly, a reviewing court is to limit its examination to a threshold inquiry into the underlying merit of the claims. *Miller-El*, 537 U.S. at 327.

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 (9<sup>th</sup> 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***, 537 U.S., at 327.

The determination to be made, in accord with the holding of ***Miller-El, 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.

## **II. PETITIONER'S ASSERTION OF ERRORS IN THE DISTRICT COURT'S ORDER AND JUDGMENT**

### **A. Overly Rigid Approach to Certificate of Appealability Rejected**

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 the state court criminal conviction and appeal for the petitioner in *Holland*, 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. The ***Banks v. Dretke*** 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).

### **1. The Issue of the Timeliness of the Habeas Petition**

Petitioner’s Objection stated quite clearly that the Petition was untimely, but also argued that the untimely petition was submitted pursuant to this Court’s miscarriage of justice exception to untimeliness.

United States District Court Judge David Campbell ruled that the miscarriage of justice exception was limited to one and only one instance, namely, a claim of actual innocence, and ruled that Petitioner failed to make a credible showing of actual innocence. *See* 08/05/2019 R & R (**Doc.17**), at page 4, lines 5-8.

Petitioner presented the District Court with the merits of his claim of a fundamental miscarriage of justice his habeas Petition, in his habeas Reply, and in his Objection to the R & R, which was subsequently summarized by U.S.

District Court Judge David Campbell as follows:

Petitioner demonstrated with clarity that he was denied a jury trial in the state court system, knowingly induced to enter a plea of guilty without investigation of specific information provided by Petitioner to his defense attorney, duped into unwitting (and therefore unconstitutional) waiver of fundamental constitutional rights, subjected to aggravated sentencing without constitutionally acceptable determination of aggravating factors, and ignored when he requested appellate review.

Petitioner argues that the claim of structural error, the challenge to aggravated sentencing, the challenge to the plea stipulation to an aggravated term of imprisonment, and the claim of an involuntary plea is sufficient to invoke the miscarriage of justice exception to the standard time frame for filing a federal habeas petition.

**08/05/2019 R & R (Doc.17), at page 6, lines 11-17.**

**a) The Miscarriage of Justice Exception to the Untimeliness of a Petition**

Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default. We have recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639 91 L.Ed.2d 397 (1986); *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

*Dretke v. Haley*, 541 U.S. 386 (2004), 541 U.S. 386, 388 (2004).

[T]he *Schlup* standard is demanding. The gateway should open only when a petition presents “evidence of innocence so strong that a court cannot have confidence in

*the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.”<sup>4</sup>*

***McQuiggin v. Perkins***, 569 U.S. 383, 401 (2013).

The argument that Petitioner presented below and now presents in this Court is that the state court criminal proceedings presumptively precluded presentation of evidence of actual innocence and was conducted in a manner that was the polar opposite of being “*free of nonharmless constitutional error*,” in that **a**) Petitioner’s trial level attorney knowingly induced Petitioner to agree to an unconstitutional (and therefore invalid) decision to agree to the state’s offered plea agreement after refusing to investigate evidence of actual evidence presented to him by Petitioner; **b**) the plea agreement contained no language informing Petitioner that, with regard to the fundamental constitutional right to a jury trial for the determination of aggravating factors, the constitutionally required standard of proof was that of beyond a reasonable doubt; **c**) knowing that the plea agreement contained no such language, Petitioner’s trial level attorney failed to inform Petitioner of those constitutional rights; **d**) trial level counsel failed to inform Petitioner that he had a right to a jury trial for aggravating factors using the constitutionally required standard of proof of beyond a reasonable doubt; **e**) trial level attorney knew that the plea agreement expressly required Petitioner to stipulate to an aggravated term of imprisonment — without identifying any aggravating factor that would subject Petitioner to sentencing

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<sup>4</sup> The ***McQuiggin*** Court’s reference to “*the Schlup standard*,” was to ***Schlup v. Delo***, 513 U.S. 298 (1995).

greater than the presumptive term and without informing Petitioner that he had a federal constitutional right to have any aggravating factor determined by the standard of proof of beyond a reasonable doubt (“*In Paragraph 2, the stipulation is on Count 26 that you shall be sentenced to the Department of Corrections for an aggravated term to range anywhere from 20 to 24 years*”); and f) the court did not inform Petitioner that an aggravated term of imprisonment constitutionally could not be imposed in the absence of one or more properly determined aggravating factors, did not identify any aggravating factor that would justify an aggravated sentence, and did not inform Petitioner of his constitutional right to have any aggravating factor determined by the standard of proof of beyond a reasonable doubt.

**b) It Is Correct that *Martinez v. Ryan*, 566 U.S. 1 (2012) is Inapplicable to the Petition in this Case, but Petitioner Cited *Martinez* for an Ancillary Purpose**

Petitioner cited the District Court to *Martinez v. Ryan*, 566 U.S. 1 (2012), to address the possibility that the District Court Judge might make a separate finding, *i.e.*, that Petitioner failed to exhaust state remedies and therefore federal habeas relief was unavailable. The citation and invocation of *Martinez v. Ryan* eliminated that possibility, because *Martinez* excuses the failure to exhaust state remedies (*i.e.*, the procedural default). The District Judge’s Order expressly addressed Petitioner’s argument regarding the exhaustion of state remedies (“*Yokois notes that he cited Martinez to address the possibility that*

*this Court ‘might make a separate finding that [he] failed to exhaust state remedies and therefor federal habeas relief is unavailable.’ Doc.21 at 5.” See 02/10/2020 Order (Doc.28), at page 4, lines 9-11. Judge Campbell expressly stated that “*The Court makes no such finding.*” *Id.*, at line 11.*

## **B. The District Court’s Conclusions Were Incorrect**

Because the 9<sup>th</sup> Circuit Court of Appeals issued an Order summarily denying Petitioner a Certificate of Appealability, it is necessary for this Court to examine the claims asserted in the United States District Court.

In this case, the Magistrate Judge filed a Report and Recommendation (“R & R”), recommending that habeas corpus relief be denied and the Petition be dismissed. *See 08/05/2019 R & R (Doc.17)*. Petitioner filed an **Objection** to the **R & R (Doc.21)**. Upon review of the **R & R** and Petitioner’s Objection, District Court Judge David Campbell issued his **02/10/2020 Order (Doc.28)** (1) adopting the R & R, (2) denying a Certificate of Appealability (“COA”) and (3) directing final judgment.

The Magistrate Judge had made three findings. **First**, the Magistrate found that *Martinez v. Ryan*, 566 U.S. 1 (2012) was inapplicable. *See R & R (Doc.17)*, at page 6, lines 22-23. That matter has been addressed immediately above. **Second**, the Magistrate found that the Petition was untimely and should be dismissed on that basis in the absence of equitable tolling. *See R & R (Doc.17)*, at page 4, lines 16-24. The challenge to that finding was presented in Petitioner’s Objection in the District Court, his COA motion in the 9<sup>th</sup> Circuit Court of

Appeals, and in this Petition for Certiorari in this Court. **Third**, the Magistrate found that:

While Petitioner's conclusory arguments may challenge the plea process, fairness of his sentence, and the adequacy of the procedures that led to his sentence, Petitioner fails to argue or point to any new reliable evidence of actual, factual innocence. Therefore, Petitioner has not demonstrated that there is evidence of actual innocence such that the fundamental miscarriage of justice exception entitles him to review of his time-barred claims.

**R & R (Doc.17)**, at page 8, lines 1-5.

**1. Petitioner's Presentation Was Not Merely  
“Conclusory”**

The Magistrate Judge characterized Petitioner's presentation of his claims for habeas corpus relief under the fundamental miscarriage of justice exception as “*conclusory*.” *See R & R (Doc.17)*, at page 8, lines 1-2 (“*While Petitioner's conclusory arguments....*”). Even a cursory look at the averments of the Petition in this matter will confirm that Petitioner's claims in the U.S. District Court were grounded in facts and those facts are supported by the record of the state court proceedings and by the Appendix to the habeas petition, which consisted of the plea agreement (Habeas Appendix Item 1), the reporter's transcript of the change of plea proceeding (Habeas Appendix Item 2), the personal affidavit of the Petitioner (Habeas Appendix Item 3), and the reporter's transcript of the sentencing hearing (Habeas Appendix Item 4).

Petitioner demonstrated with clarity that he was denied a jury trial in the state court system, knowingly induced to enter a plea of guilty without

investigation of specific information provided by Petitioner to his defense attorney, duped into unwitting (and therefore unconstitutional) waiver of fundamental constitutional rights, subjected to aggravated sentencing without constitutionally acceptable determination of aggravating factors, and ignored when he requested appellate review.

## **2. Petitioner's Presentation of Fundamental Flaws**

In his USDC Petition seeking federal habeas relief, Petitioner expressly acknowledged a distinction between traditional clear evidence of actual innocence on the one hand, and Petitioner's clear demonstration of fundamental flaws in the state criminal justice process as applied to him at every stage of the state court criminal proceedings in this case.

The fundamental flaws that permeated the entire case at the state court level included (1) an unknowing and uninformed inducement to entering an admission of guilt without investigation of evidence of actual innocence, (2) imposition of a sentence that exceeded the statutory maximum in the absence of either a) a knowing admission of aggravating facts or b) the formal determination of aggravating factors by the standard of beyond a reasonable doubt, and (3) the utter absence of effective assistance of counsel at every stage of the state court criminal proceedings.

The U.S. District Court Habeas Petition in this matter asserted that Petitioner had provided to his trial level attorney a set of handwritten notes identifying exculpatory facts clearly undermining the State's claims of guilt

and the State's theory of the case — however, Petitioner's trial level attorney accepted the notes but adamantly refused to engage in discussion with Petitioner of any of the facts set forth by Petitioner in the notes. The attorney, who had been retained by Petitioner's spouse, informed Petitioner that he was not interested in discussing jury trial representation, only representation at a bench trial with a stipulated outcome of guilt (plea), based on his contract for representation. This representation constituted ineffective assistance of counsel at time of trial and simultaneously constituted the basis for a claim of actual innocence:

**15.b. GROUND TWO: Violation of Petitioner's 14<sup>th</sup> Amendment Right to Due Process of Law as a Result of Ineffective Assistance of Counsel (IAC) at Time of First Trial (as to Guilt on Underlying Offenses) for Failure to Investigate Petitioner's Innocence.**

**15.b.1. Facts Material to Ground Two (IAC at Time of First Trial for Failure to Investigate Petitioner's Innocence):**

**15.b.1.1.** Petitioner's trial level attorney failed to investigate Petitioner's claims of innocence and failed to investigate the facts Petitioner provided to his trial level attorney in writing. *See Personal Affidavit of Petitioner (Appendix Item 3)*, at ¶ 5 & 6.

**15.b.1.2.** Petitioner's trial level attorney expressly informed Petitioner that he was not interested in discussing jury trial representation, but rather representation for negotiating a plea by which Petitioner would agree to a bench trial with a stipulated outcome of guilt. Petitioner asserts that the plea agreement in his case amounted to bench trial with a stipulated outcome of guilt based on Petitioner's statements under oath in open court — which is still a trial. *See Personal Affidavit of Petitioner (Appendix Item 3)*, at ¶ 4.

**15.b.1.3.** Petitioner's trial level attorney accepted Petitioner's hand-written notes identifying exculpatory facts clearly undermining the State's claims of guilty and theory of the case, but declined to engage in discussion of any of the facts set forth by Petitioner in the notes. *See Personal Affidavit of Petitioner (Appendix Item 3)*, at ¶ 5 & 6.

**Petition for Writ of Habeas Corpus (Doc.1)**, from page 8, line 20, to page 9, line 12 (bold print in original).

Put succinctly, Petitioner was **(1)** subjected to ineffective assistance of counsel that resulted in the denial of a jury trial, **(2)** subjected to ineffective assistance of counsel at time of bench trial that resulted in a stipulated outcome of guilt, and **(3)** subjected to ineffective assistance of counsel resulting in the denial of both a jury trial and a bench trial for the determination of the facts that increased Petitioner's sentencing exposure from the presumptive term of 17 years applicable to the prison offense to a statutorily aggravated range of 20 to 24 years (the actual sentence was 22 years).

**3. Petitioner's Presentation Addressed an Alternative Form of Clear Evidence of Actual Innocence, Which Included a Claim of Structural Error**

Petitioner argued that the claim of structural error, the challenge to aggravated sentencing, the challenge to the plea stipulation to an aggravated term of imprisonment, and the claim of an involuntary plea, in combination, were sufficient to invoke the miscarriage of justice exception to the standard time frame for filing a federal habeas petition. In addition, Petitioner argued structural error in the Petition, as follows:

¶ 18 Because there was no waiver, we have to determine whether the error was trial error or structural error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 17, 115 P.3d 601, 607 (2005) (distinguishing between trial error and structural error); *State v. Ring*, 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (same). Trial errors are characterized as those “‘which occur [ ] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.’” *Ring*, 204 Ariz. at 552, ¶ 45, 65 P.3d at 933 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Trial errors are subject to either harmless error or fundamental error review to determine whether reversal is warranted. *Henderson*, 210 Ariz. at 567, ¶ 17, 115 P.3d at 607.

¶ 19 Structural errors, however, are subject to automatic reversal. *See Fulminante*, 499 U.S. at 309-10, 111 S.Ct. 1246; *see also State v. Hickman*, 205 Ariz. 192, 199 n. 7, ¶ 29, 68 P.3d 418, 425 (2003). Structural errors are defined as those errors which affect the “entire conduct of the trial from beginning to end.” *Fulminante*, 499 U.S. at 309-10, 111 S.Ct. 1246. The United States Supreme Court has designated only a few limited errors as structural, including a complete failure to provide trial counsel and denial of a public criminal trial. *Ring*, 204 Ariz. at 552-53, ¶ 46, 65 P.3d at 933-34. Just as those errors qualify as structural errors, we find that so too does the complete failure of the trial court to notify and explain to a defendant the right to a jury trial and to obtain a knowing, intelligent and voluntary waiver of that right. ¶ 19 *See State v. Maldonado*, 206 Ariz. 339, 342, ¶ 12, 78 P.3d 1060, 1063 (App.2003) (stating that the right to forego a jury trial is reserved to the defendant personally until a knowing, intelligent, and voluntary waiver). The right to a jury trial “affect[s] the framework within which the trial proceeds,” *Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246, and the failure to personally advise a defendant of that right results in a violation of the Arizona and United States Constitutions.

*State v. Stephen Le Noble*, 216 Ariz. 180, ¶ 18-19, 164 P.3d 686 (App.,2007, Div.1) (trial for guilt, but also applicable to trial for aggravating factors).

It seems axiomatic that structural errors for which prejudice is presumed — *e.g.*, denial of jury trial; invalid waiver of fundamental constitutional rights; unconstitutional determination of facts required for aggravated sentencing — constitute a miscarriage of justice:

In this case, the constitutional violations and the intertwining of violations becomes extremely important. Standing alone, a flawed state court procedure that does not demonstrate actual innocence would not ordinarily suffice to qualify for a miscarriage of justice exception to untimeliness. However, in this case, the intertwining of the violations does suffice:

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 shows more than an error in proceedings where there might have been a difference in the outcome; Petitioner's claim involves the failure of an attorney to investigate specific evidence of innocence, combined with complete denial of a trial on the elements of the offense that subjected him to sentencing greater than allowed pursuant to the plea of guilty. There was an unknowing and uninformed inducement to entering an admission of guilt on the part of trial level counsel, followed by imposition by the court of a sentence that exceeded the statutory maximum — in the absence of either

knowing admission of aggravating facts or formal determination of any aggravating factor by the standard of beyond a reasonable doubt. Petitioner suffered the utter absence of effective assistance of counsel and failure of due process of law by the judge at every stage of the state trial court criminal proceedings.

Petitioner points out that this Court has recently spoken, in *Jae Lee v. United States*, 582 U.S. \_\_, 137 S.Ct. 1958 (2017). There, the Court drew a sharp contrast between two types of ineffective assistance, separating for increased scrutiny those instances in which the deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the complete forfeiture of a proceeding itself. The 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*, 582 U.S. at \_\_, 137 S.Ct. at 1965 (bold print added).

Here, Petitioner was constitutionally entitled to a trial by a jury on any aggravating factors the State of Arizona might assert to subject Petitioner to sentencing greater than the presumptive term. Petitioner was not informed of that

right by the Court, the State, or his defense counsel. Petitioner was induced to enter a plea of guilty that subjected him to a stipulated aggravated sentence, thereby unknowingly waiving his federal constitutional rights to a jury trial and to the right to a determination of aggravating factors by proof beyond a reasonable doubt.

Further, prejudice is unmistakable—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. Under the Court’s jurisprudence as set forth in *Jae Lee v. United States, supra*, Petitioner was entitled to federal habeas corpus relief.

For the miscarriage of justice exception to untimeliness to apply, Petitioner need not prove his innocence beyond all doubt in order to reach the safe haven of the miscarriage exception: it suffices that he can demonstrate beyond a doubt that he was denied the entire proceeding at which the trial on aggravating factors were to be determined by a jury (*i.e., Apprendi*’s “functional equivalent of elements of a greater offense”).<sup>5</sup> Prejudice cannot be more clear.

Here, the combination of multiple constitutional violations, beginning with the failure to investigate specific information supporting a claim of innocence and continuing through a monstrous series of failures to inform Petitioner of fundamental constitutional rights, ending with unknowing waiver

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<sup>5</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

and unconstitutional sentencing, constitutes a manifest miscarriage of justice that even included denial of a jury trial for the very facts that subjected Petitioner to aggravated sentencing.

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.

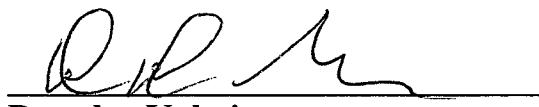
## **CONCLUSION**

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 direct review, his

counsel failed to file essential paperwork.

**WHEREFORE**, based upon the foregoing, Petitioner respectfully requests this Court issue an Order reversing the 9<sup>th</sup> Circuit Court of Appeals denial of a Certificate of Appealability (and allow Petitioner to file an appeal of the District Court decision) and /or summarily reverse the District Court's summary denial of relief (by Ordering that the District Court conduct an evidentiary hearing).

**Respectfully Submitted** this 9<sup>th</sup> day of October, 2020.



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***Petitioner In Propria Persona***