No. 20-6630

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ALEJANDRO S. ESTRADA — PETITIONER
(Your Name)

vs.

DAVID SHINN, etc. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALEJANDRO S. ESTRADA
(Your Name)

PO Box 8400
(Address)

Florence, AZ 85132
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

I Whether or not the lower courts should be sanctioned from imposing and protecting the unconstitutional imposition of void and obsolete statute that does not exist, automatic addition of a class 4 infamous crime at sentencing, and automatic enhancement and aggravation of sentences.

II Whether or not the procedural default or certificate of appealability (COA) should be used simply to obstruct the evidentiary hearing or the official proceeding regardless of the fact.

III Whether or not fundamental miscarriage of justice, actual innocence, cause and prejudice, lack of subject matter jurisdiction, error of constitutional magnitude, significant change in the law, and/or newly discovered material fact is inapplicable to excuse procedurally defaulted claim to simply obstruct the evidentiary hearing or the official proceeding regardless of the fact.

LIST OF PARTIES

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

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

Lee Phillips	Public defender
H. Allen Gerhardt	Public defender
William P. Rino	State attorney
David W. Rozema	State attorney
Jana Zinman	Assistant attorney general
Joseph T. Maziarz	Chief counsel
Mark Brnovich	Attorney general

RELATED CASES

STATE v. ESTRADA	No. CR-2008-0671, Superior Court
STATE v. ESTRADA	No. 1 CA-CR 18-0314 PRPC, AZ Court of Appeals
ESTRADA v. RYAN etc.	No. CV-18-08360-PCT-SPL-MHB, U.S.D.C, AZ.
ESTRADA v. SHINN etc.	No. 20-15393 U.S. Court of Appeals, 9th Circuit

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts**:

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Superior court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 18, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 14, 2020, and a copy of the order denying rehearing appears at Appendix A.

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

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was August 7, 2018. A copy of that decision appears at Appendix C.

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

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

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

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STATEMENT OF THE CASE

Petitioner Alejandro Estrada agreed to plead guilty to one count of sexual conduct with a minor (SCM), a class 2 felony, committed on 8/5/08. On 2/19/10, the court sentenced him to an illegal, unconstitutional, enhanced and aggravated sentence of 25 years of imprisonment, and additional class 4 infamous crime under the void and obsolete statute, A.R.S § 13-604.01.

A.R.S. § 13-604.01 was held unconstitutional as applied by STATE v. DAVIS because it is lengthy, flect and consecutive. Section 13-604 in its entirety was recognized as unconstitutional in 2008. As a result, the AZ Sentencing Guidelines were overhauled, amended, repealed, and renumbered, including § 13-604. On 1/1/09, § 13-604.01 no longer exists. At the time of the sentencing on 2/19/10, A.R.S. § 13-604 dangerous and repetitive offenders, 01 DCAC has long since been repealed for a period of more than one year. AZ legislature's repeal of statute § 13-604.01 creating substantive offense upon which Estrada's plea and sentence were predicated rendered his sentences void and could not be the legal cause of imprisonment.

The State, however, continued to impose the statutes that do not exist indefinitely to thousand of prisoner, including Estrada, as if they are in full effect.

Through inmates' information, Estrada discovered that the § 13-604 was overhauled, amended, repealed and renumbered without a saving clause for its uncontitutionality, including § 13-604.01. For these reasons, Estrada sought to affirm the conviction, but have the illegal and unconstitutional sentences vacated, and impose a legal or an applicable sentence under § 13-701 or § 13-702 as agreed in the plea agreement.

Estrada raised the illegality and unconstitutionality of the enhanced and aggravated sentences under the void and obsolete statute, court's lack of subject matter jurisdiction, ineffective assistance of appellate counsel for failing to raise ineffective assistance of counsel or any colorable issue, and exception to procedural bar under significant change in the law, newly discovered material facts (NDMF), fundamental miscarriage of justice, actual innocence, cause and prejudice, fundamental and jurisdictional defect, and error of constitutional magnitude. However, Estrada's claims were simply time barred by both the state and the federal courts. He sought a certificate of appellability to the Ninth Circuit Court of Appeals (NCCOA) but was also denied without any evidentiary hearing. He filed a petition for rehearing en banc but was also denied.

REASONS FOR GRANTING THE PETITION

The Supreme Court of the United States should grant the writ to sanction all courts from imposing void and obsolete statute that does not exist, automatically adding any infamous crime at sentencing, and automatically enhancing and aggravating the sentences without any fact alleged in the indictment or information, submitted to a jury or a judge, and proven beyond a reasonable or by preponderance of the evidence.

The state courts, the Ninth Circuit Court of Appeals (NCCOA) and the en banc decisions in using procedural default or certificate of appealability (COA) to simply obstruct the evidentiary hearing or the official proceeding are in conflicts with the decisions of the US Supreme Court, the NCCOA itself, and all the circuit courts in the United States of America and, in doing so, has departed sharply from the analytical framwork prescribed by the NCCOA itself and this Court in: MILLER-EL v. COCKRELL, 537 U.S. 322 (2003) for the standards for issuance of a COA; BAREFOOT v. ESTELLE, 463 U.S. 880 (1983) for testing whether the resolution of the constitutionality is "debatable"; JENNINGS v. WOODFORD, 290 F.3d 1006, 1010 (9th Cir. 2002) for a "relatively low" standard; SLACK v. McDANIEL, 537 U.S. 322 (2003) for a constitutional and procedural components test; LAMBRIGHT v. STEWART, 220 F.3d 1022, 1026 (9th Cir 2000), PETROCELLI v. ANGELONE, 248 F.3d 877 (9th Cir 2001), VALERIO v. CRAWFORD, 306 F.3d 742 (9th Cir. 2002) for the standard for the dismissal of a habeas petition on procedural grounds.

The NCCOA has overlooked or misapprehended the demonstration of the "substantial showing of the denial of a constitutional right" pursuant to the: 6th Amendment's Notice and the 5th Amendment's Grand Jury Indictment Clause for failure to allege any fact or element of separate legal offense in the grand jury indictment or information for the purpose of enhancing and aggravating Estrada's sentences; 6th Amendment's right to Jury Trial and the 14th Amendment's right to Due Process for failure to perform the constitutional requirement that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt; 5th Amendment's Double Jeopardy Protection for receiving multiple punishment for the same offense; 8th Amendment's Cruel and Unusual Punishment Protection for receiving grossly disproportionate punishment to the severity of the offense; and 6th Amendment's right to counsel for conflict of interest, etc.

The lower courts' decisions further conflict with the decisions of the U.S. Supreme Court in: APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000), BLAKELY v. WASHINGTON, 542 U.S 296, 303-04 (2004), US v. BOOKER, 543 U.S. 220, 226, 244 (2005), ALLEYNE v. US, 133 S.Ct. 2151 (2013), and IN RE WINSHIP, 397 U.S. 358, 364 (1970) for failure to perform the constitutional requirement that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt; U.S. v. DiFRACESCO, 499 U.S. 117, 129 (1980) and BLOCKBURGER v. US, 284 U.S. 299 (1932) for multiple punishment for the same offense;

SOLEM v. HELM, 463 U.S. 292 (1983) for the grossly disproportionate punishment to the severity of the offense; and STRICKLAND v. WASHINGTON, 466 U.S. 668, 692 (1984), EVITTS v. LUCEY, 469 U.S. 387, 396-99 (1985) and CUYLER v. SULLIVAN, 466 U.S. 335, 350 (1980) for ineffective assistance of both trial and appellate counsels.

In addition, the petition raises questions of exceptional importance, or calls attention to a rule of law which appears to have been generally ignored to simply obstruct the evidentiary hearing or official proceeding. A.R.S §13-604, a sentence enhancer statute, was amended, repealed and renumbered, and ceased to exist on 1/1/09. However, the lower courts continued to impose the statute to thousands of inmates until now, as if it is in full effect. This Court is the only court that can stop it.

Therefore, the Supreme Court of the United States should affirm and extend its current holdings to the NCCOA and the lower courts, or somehow make them follow the analytical framework prescribed by this Court.

I WHETHER OR NOT THE LOWER COURTS SHOULD BE SANCTIONED FROM IMPOSING AND PROTECTING THE UNCONSTITUTIONAL IMPOSITION OF VOID AND OBSOLETE STATUTE THAT DOES NOT EXIST, AUTOMATIC ADDITION OF A CLASS 4 INFAMOUS CRIME AT SENTENCING, AND AUTOMATIC ENHANCEMENT AND AGGRAVATION OF SENTENCES

Estrada should be granted writ to sanction the lower courts' imposition and protection of the illegal and unconstitutional void and obsolete statute that no longer exists, automatic addition of a class 4 infamous crime at sentencing, and automatic enhancement and aggravation of sentences.

A. Imposition of Void and Obsolete Statute that Does Not Exist.

The Laws

At common law, the repeal of a criminal statute abated all prosecutions which had reached final disposition in the highest court authorized to review them. BRADLEY v. U.S. 410 U.S. 605, 607-08 (1973).

Arguments

In 2008, A.R.S §13-604 in its entirety was recognized as unconstitutional for violating the BOOKER, BLAKELY, and APPRENDI's doctrine. Appendix (App) K p.5. As a result, the AZ legislature overhauled, amended, repealed and renumbered the Sentencing Guidelines including §13-604 without a saving clause. App K pp. 1-3. On 1/1/09 A.R.S § 13-604 dangerous and repetitive offenders, 01 DCAC no longer exists. Without the saving clause the repeal ended the prosecution of § 13-604, or abated non final prosecutions under § 13-604.01. See e.g. GONZALEZ v. ABBOTT, 967 F.2d 1499 (11th Cir. 1992). When Estrada was sentenced on 2/19/10, §13-604.01 no longer exists. However, according to the State, §13-604.01 "is in full effect" until now, and all lower courts agreed.

Therefore, Estrada's writ should be granted to sanction all the lower courts from imposing and protecting void and obsolete statute that does not exist to thousands of prisoners.

B. Automatic Addition of a Class 4 Infamous Crime at Sentencing

1. The Laws

The 5th Amendment provides in relevant part that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The Supreme Court has defined "infamous crime" as those crimes "punishable by imprisonment in a penitentiary," MACKIN v. U.S, 117 U.S 348, 354 (1986), or by "imprisonment for a term of years at hard labor." EX PARTE WILSON, 114 U.S. 417, 429 (1885). The Sentence that the law may impose, not the sentence that actually is imposed, determines whether a grand jury indictment is required. U.S. v. MORELAND, 258 U.S 433, 441 (1992). Because persons convicted of offense punishable by imprisonment for more than one year may be confined in a penitentiary, 18 U.S.C § 4083 (1994), any crime so punishable is infamous. U.S. v. COACHMAN, 752 F.2d 685, 689 n.24 (D.C. Cir. 1985).

Arguments

Registration is a class 4 infamous crime that carries an endless, repeated penalty range of 2.5 years, § 13-701(C), to 6 years imprisonment. § 13-702.02(B)(4), for life. This is by far worse than the core crime it self because it does not only carry a higher punishment, but it is also punishable, over and over again, for life. Since registration is considered an "infamous crime," Estrada thus entitled to the presentment of the essential element for cumulative offense, but the State failed to do so. An indictment not charging the offense constituted "jurisdictional defect" and can be challenged at any time. See e.g. U.S. v. HENRY, 288 F.3d 657, 660 (5th Cir. 2002).

2. The Laws

The double jeopardy clause of the 5th Amendment guarantees that no person shall "be subjected for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The prohibition of double jeopardy applies not only to "life or limb" but to prison sentence and criminal fines as well. See JEFFERS v. U.S, 432 U.S. 137, 155 (1997) (plurality opinion). The double jeopardy clause also provide protection against multiple punishments for the same offense. See U.S. v. DIFRANCESCO, 449 U.S. 117, 129 (1980).

Arguments

Estrada only agreed to plead guilty to one count of SCM, but he received multiple punishment for the same offense: 25 years for SCM, and lifetime for registration. This is prohibited by the double jeopardy clause. However, the court automatically added the class 4 infamous crime of registration at sentencing.

Therefore, Estrada's petition for writ of certiorari should be granted to sanction all the lower courts from automatically adding a class 4 infamous crime at sentencing.

C. Automatic Enhancement and Aggravation of Sentences

The Laws

The 5th Amendment's Due Process Clause and the 6th Amendment's Notice and Jury Trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. See JONES v. U.S., 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1991); APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000); BLAKELY v. WASHINGTON, 542 U.S. 296, 303-04 (2004); U.S. v. BOOKER, 543 U.S. 220, 226, 244 (2005); ALLEYNE v. U.S., 133 S.Ct. 2151 (2013); and IN RE WINSHIP, 397 U.S. 358, 364 (1970).

Arguments

The core crime, SCM, is a class 6 felony that carries a statutory maximum of one year imprisonment. A.R.S. §§ 13-1405(B) and 13-701(C). However, because of "a child under fifteen years of age," the legislature increased the felony classification from a class 6 to a class 2 felony which is punishable to a statutory maximum of 5 years of imprisonment. However, the court automatically enhanced the 5 years statutory maximum to 20 years enhanced statutory maximum and then aggravated it to 25 years of imprisonment under the statute that does not exist without any fact of § 13-604 dangerous and repetitive offenders, or DCAC alleged in the indictment or information, submitted to a jury or a judge, and proven beyond a reasonable doubt or by preponderance of the evidence.

Therefore, the petition for writ of certiorari should be granted to sanction the lower courts from automatically enhancing or aggravating sentences without any fact alleged in the indictment or information, submitted to a jury or a judge, and proven beyond a reasonable doubt or by preponderance of the evidence.

II WHETHER OR NOT THE PROCEDURAL DEFAULT OR COA SHOULD BE USED SIMPLY TO OBSTRUCT THE EVIDENTIARY HEARING OR THE OFFICIAL PROCEEDING REGARDLESS OF THE FACT

Pursuant to the analytical framework prescribed by the U.S Supreme Court, Estrada is entitled to a COA under MILLER-EL, SLACK, and BAREFOOT.

Legal Standard for Issuance of COA

In MILLER-EL v. COCKRELL, supra, this Court clarified the standard for issuance of a COA:

A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." 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.

Id. 123 S.Ct. 1034, citing SLACK v. McDANIEL, supra. Reduced to its essentials, the test is met where the petitioner makes a showing that "the petition should have been resolved in a different manner or that the issue presented were 'adequate to deserve encouragement to proceed further.'" Id at 1039, citing BAREFOOT v. ESTELLE, supra. This means that the petitioner does not have to prove that the district court was necessarily "wrong" just that its resolution of the constitutional claim is "debatable".

We do not require the petitioner to prove, before the issuance of a COA, that some jurist would grant the petition for habeas corpus. Indeed a claim can be debatable even though every jurists of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail. As we stated in SLACK, where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straight forward. The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Applying the above standard for granting a COA, the NCCOA has acknowledge that the standard is "relatively low." JENNINGS v. WOODFORD, supra, (citing SLACK at 183). Moreover, because the COA ruling is not an adjudication of the merits of the appeal, it does not require a showing that the appeal will succeed. MILLER-EL, 537 U.S. at 337. Finally, doubts about the propriety of a COA must be resolved in the petitioner's favor. LAMBRIGHT v. STEWART, supra.

In SLACK v. McDANIEL, this Court explained that determining whether a COA should be issued where a habeas corpus petition has been dismissed on procedural grounds has "two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holdings." 529 U.S. 473, 485 (2000).

A. Procedural Component

The appropriate inquiry is "whether jurists of reason could conclude that the District Court's dismissal on procedural grounds was debatable or incorrect. SLACK, 529 U.S. at 485.

In this case, the lower courts conceded that Estradas claims are excused from procedural default because:

1. penalty under the sentence enhancer statute which was repealed without a saving clause or does not exist is void and cannot be the legal cause of imprisonment notwithstanding any procedural default pursuant to GONZALEZ v. ABBOTT supra, and BRADLEY v. U.S., supra. Therefore, habeas relief for void and obsolete statute that does not exist is not procedurally barred by his failure to assert the claim at an earlier stage pursuant to MURRAY v. CARRIER,

and WAINRIGHT v. SYKES. Under MURRAY v. CARRIER, WAINWRIGHT v. SYKES, US v. BRADLEY, and GONZALEZ v. ABBOTT, the District Court's dismissal with prejudice on procedural grounds was fundamentally flawed at its core, or at least debatable pursuant to SLACK;

2. Court's lack of jurisdiction over the subject matter maybe raised at anytime, including on appeal pursuant to STATE v. VARGAS-BURGOS. Failure to charge an offense maybe raised for the first time in a §2255 petition because such an error divests the sentencing court of jurisdiction pursuant to U.S. v. HARPER, and U.S. v. PRINCE. Therefore, under STATE v. VARGAS-BURGOS, U.S v. HARPER, U.S. v. PRINCE, etc., the District Court's dismissal with prejudice on procedural grounds was fundamentally flawed at its core, or at least debatable pursuant to SLACK;

3. in MARTINEZ, the Court applied the equitable exception to Arizona prisoner because the State law did not allow them to raise IAC claims on direct appeal. MARTINEZ allows new claims of trial-counsel ineffective assistance asserted for the first time on federal habeas, even if state PCR counsel properly raised other claims of trial counsel ineffectiveness. DETRICH v. RYAN.
Therefore, under PRUETT, MARTINEZ, and DETRICH, the District Court's dismissal with prejudice on procedural grounds was fundamentally flawed at its core, or at least debatable pursuant to SLACK;

4. ineffective assistance of counsels and interference by the government officials constitute "cause". As a result, the officials actions resulted in 20 more years of imprisonment and addition Class 4 felony crime punishable up to 6 years of imprisonment for life, rather than 5 years statutory maximum for a class 2 felony crime. In addition, had the PCR counsel raised these obvious and significant habeas claims, Estrada's claim would not have been procedurally defaulted. Cause and prejudice excused procedural default pursuant to MURRAY v CARRIER, BANKS v. DRETKE, MARTINEZ v RYAN, etc;
Therefore, under MURRAY v. CARRIER, BANKS v. DRETKE, MARTINEZ v. RYAN, etc., the District Court's dismissal with prejudice on procedural ground was fundamentally flawed at its core, or at least debatable pursuant to SLACK.

5. Estrada is factually and actually innocent of any class 4 felony crime added automatically at sentencing, and §13-604 dangerous and repetitive offenders, OI DCAC that does not exist pursuant to MURRAY v. CARRIER, SCHLUP v. DELO. Not hearing the claims would result in a fundamental miscarriage of justice.
Pursuant to MURRAY v. CARRIER, SCHLUP v. DELO, HOUSE v. BELL, etc., the District Court's dismissal with prejudice on procedural grounds was fundamentally flawed at its core, or at least debatable pursuant to SLACK.

6. the significant change in the law was retroactively applicable to his case because the new law was established prior to the final judgment pursuant to TEAGUE v. LANE. Pursuant to TEAGUE, the District court's dismissal with prejudice on procedural grounds was fundamentally flawed at its core, or at least debatable under SLACK.

7. the legal basis of the claim was not reasonably available because the state conspired with state court and public defender to conceal the fact from Estrada that the statute was repealed or no longer exists. In fact, the claim was not reasonably available at the time of the default because the lower courts, including the NCCOA, U.S. District Court, and state courts agreed with the state to believe that the statute that does not exist is still in full effect until now. By law, newly discovered material fact (NDMF) excused a procedural default pursuant to 28 U.S.C.A §2244 (b)(2)(B)(ii).

It is abundantly clear that the lower court's decision on procedural ground or COA is used simply to obstruct the evidentiary hearing or the official proceeding regardless of the fact in order to protect the unconstitutional and illegal conduct. Therefore, the lower courts decisions on procedural ground is fundamentally flawed at its core, or at least debatable.

B. The Underlying Constitutional Claims Component

Although the district court conceded that the underlying constitutional component of SLACK had been satisfied, the court nevertheless denied a COA on the basis that Estrada "has not made a substantial showing that denying the petition as untimely under these facts would deny him a constitutional right." The court, however, used a fundamentally wrong standard in determining whether the the constitutional claims component had been satisfied in this case, where the district court dismissed the petition solely on procedural grounds. In such circumstances, the court must look solely to whether, for each claim, Estrada "facially alleged the denial of a constitutional right." See LAMBRIGHT, 220 F.3d 1026. By failing to apply this required test, the lower courts clearly erred in finding that each of the claim set forth in the petition failed to satisfy the constitutional claims component of SLACK.

In this case, the sole basis of the district court's dismissal with prejudice order was that all claims raised in the petition were "untimely." App B pp.1-8. Accordingly, prior to the judgment of dismissal with prejudice, neither the magistrate nor the district court ever addressed the merits of the constitutional claims and consequently the merits were never briefed by either side or the claims examined in the context of an evidentiary hearing. Thus, Estrada's case presents the precise issue addressed for the first time in LAMBRIGHT v. STEWART, supra.

> Frequently, as in this case, the district court has dismissed a claim on procedural ground without providing the petitioner an opportunity to develop its factual or legal basis through full briefing and an evidentiary hearing. In such cases, we need not remand for full briefing to determine whether a COA can be issued. Rather, as two other circuits have recently held, we will simply take a "quick look" at the face of the complaint to determine whether the petitioner has "facially alleged the denial of a constitutional right," and assuming the district court's procedural ruling is debatable, we will grant a COA.

Id at 1026. Further, the LAMBRIGHT court goes on to state that:

> When a claim is denied on a procedural ground, all of the inferences that govern a Rule 12(b)(6) motion apply to this situation. Thus, we take the petitioner's facial allegations as true and the non-moving party is entitled to the benefit of all reasonable inferences.

Id. fn.5.

The rules set out in LAMBRIGHT for determining whether habeas claims which were dismissed on procedural grounds have satisfied SLACK's constitutional claims component have been consistently followed. In PETROCELLI v. ANGELONE, 248 F.3d 877 (9th Cir 2000), a case in which the district court had dismissed a habeas petition on procedural grounds, the court first found that "jurist of reason would find it debatable whether the district court was correct in its procedural ruling." The court then proceeded to second part of the COA analysis under SLACK, "namely whether jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id at 885, citing SLACK, 529 U.S at 1600-01. At that point the PETROCELLI court fully approved the LAMBRIGHT holding, and applied it to grant a COA as to every claim in the petition that had alleged the violation of a constitutional right.

PETROCELLI, in turn, was fully approved and applied in VALERIO v. CRAWFORD, 306 F.3d 742 (9th Cir 2002), a carefully reasoned en banc decision which similarly considered a district court dismissal of a habeas petition on procedural grounds: this decision similarly found the procedural determination sufficiently debatable among reasonable jurists to satisfy the procedural component of SLACK, and similarly addressed the constitutional rights component of SLACK test by "simply tack[ing] a 'quick look' at the face of the component to determine whether the petitioner has 'facially alleged the denial of a constitutional right.'" Id at 767. Applying that standard, the VALERIO court held: "Because all three claims facially alleged violation of constitutional rights, the substantive component of SLACK is clearly satisfied. Id at 767-68.

In sum, LAMBRIGHT, PETROCELLI, and VALERIO make up a trio of cases uniformly applying a straight forward rule in determining whether the constitutional claims has been satisfied in cases where the district court's dismissal of habeas corpus petition grounds is found to be debatable among jurists of reason: The reviewing court accepting all allegations in the petition as true, simply takes a quick look at the of the petition to determine whether petitioner has alleged the denial of a constitutional right.

Applying that rule in this case, it is apparent that all Estrada's claims in the petition satisfy the constitutional claims component of SLACK. As proven below, each ground clearly violated his constitutional rights.

Ground for Relief

1. The Illegality and Unconstitutionality of the Enhanced and Aggravated Sentences Under the Void and Obsolete A.R.S § 13-604.01

a) The Illegality or Inapplicability of A.R.S. §13-604.01

As a first-time offender, Estrada is entitled to relief and to be resentenced under § 13-701(C) because his penalty was enhanced and aggravated under the void and obsolet statute that no longer exists.

i) Void and Obsolete Statute

§ 13-604.01 was held unconstitutional as applied by STATE v. DAVIS, 206 Ariz 377, 79 P.3d 64 (2003) (en banc), because it was lenghty, flat and consecutive. §13-604 in its entirety was recognized as unconstitutional in 2008 by STATE v. HEAD, an unreported AZ case. As a result, the AZ legislature overhauled, amended, repealed, and renumbered the Sentencing Guidelines, including § 13-604, on 1/1/09. So when Estrada was sentenced on 2/19/10, §13-604.01 no longer exists. Thus, §13-604.01 was illegal or inapplicable because he could not possibly be sentenced legally under the statute that has long been repealed back in 2009 be[illegible]se of its unconstitutionality.

ii) Inapplicability of Void and Obsolete Statute

The main starting Sentencing Guidelines provides in relevant part that "Except as provided in Section 13-604 the term of imprisonment for a felony shall be determined as follows for a first offense:

1. For a class 2 felony, five years." A.R.S §13-701(C)

To determine the term of imprisonment, the court goes to §13-701(C) and decides whether it is the defendant's first offense or not. If it is the defendant's first offense, the law mandates a specific sentence of 5 years for a class 2 felony, which may be increased or decreased depending on mitigating or aggravating factors pursuant to §13-702. The only exception to the statute is if a defendant is a dangerous and repetitive offender which opens §13-604 and its subsections. §13-604 is the governing statute for its entire subsection, including §13-604.01 DCAC.

To qualify as "dangerous" the state must allege and prove to the jury beyond a reasonable doubt that Estrada's case involved "the intentional or knowing inflection of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." See e.g. §13-604(F). To qualify as "repetitive offender" the State must also allege and prove to the jury beyond a reasonable doubt or the judge that he had "a historical prior felony conviction." In a plain language, "children" does not mean one child rather it means two or more children. Thus, it is very clear that §13-604 dangerous and repetitive offenders, 01 DCAC could not be legally applied to Estrada's case.

Therefore, this court review is warranted to determine whether the void and obsolete A.R.S. §13-604 dangerous and repetitive offenders, 01 DCAC is illegal and inapplicable to Estrada as a first-time offender convicted of committing a crime against a child using neither a deadly weapon nor a dangerous instrument during the commission of the offense and resentence him to 5 years of imprisonment under A.R.S §13-701(C) or time served.

b) The Unconstitutionality of Void and Obsolete A.R.S§ 13-604.01

i) Notice and Grand Jury Indictment Violations.

Under the 6th Amendment's Notice and the 5th Amendment Grand Jury Clause, Estrada is entitled to relief and reversal of his sentences with respect to "jurisdictional defect" for failure to allege any fact or element of separate legal offense in the grand jury indictment for the purpose of enhancing his sentence a second time under the void and obsolete statute §13-604.01.

The Laws

The 5th Amendment provides in relevant part that "no person shall be held to answer for a pital or otherwise infamous cr. . unless on a presentment or indictment of a Grand Jury." US Const. Amend. V. The Supreme Court has defined "infamous crime" as those crimes "punishable by imprisonment in [a] penitentiary." MACKIN v. U.S., 117 U.S. 348, 354 (1886), or by "imprisonment for a term of years at hard labor." EX PARTE WILSON, 114 U.S. 417, 429 (1885). The sentence that the law may impose, not the sentence that actually is imposed, determines whether a grand jury indictment is required. U.S. v. MORELAND, 258 U.S. 433, 441 (1922). Because persons convicted of offense punishable by imprisonment for more than one year may be confined in a penitentiary, 18 U.S.C. § 4083 (1994), any crime so punishable is infamous. U.S. v. COACHMAN, 752 F.2d 685, 689 n.24 (D.C. Cir. 1985).

Arguments

The core crime, SCM, is a class 6 felony that carries a statutory maximum of one year of imprisonment. A.R.S §§ 13-1405(B) and 13-701(C). However, because of "a child under fifteen years of age," the legislature automatically increased the felony classification from a class 6 to a class 2 felony which is punishable to a statutory maximum of 5 years of imprisonment. This enhancement alone raises constitutional concern because it is 400% more imprisonment than the core crime itself. Nevertheless, the legislature twice enhanced the sentencing guidelines to DCAC based solely on "double counting" "a child under fifteen years of age." § 13-604.01(M). As a result, Estrada was sentenced to a 25-year aggravated term of imprisonment, and lifetime registration. This is 2400% more time imprisonment than the core crime itself without any fact or element of a separate legal offense alleged in the indictment.

The 5th Amendment's Due Process Clause and the 6th Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. See JONES v. U.S., 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). The 14th Amendment imposed the same commands when a state statute is involved. See APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000). An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) imprisonment for more than one year. Fed. R. Crim. P. 7(a)(1). Obviously, a 25-year enhanced and aggravated sentence, and lifetime registration entitled Estrada to a "presentment or indictment of a grand jury" pursuant to the U.S. Const. amend V; MACKIN v. US, supra; EX PARTE WILSON, supra; and U.S.C. § 4083 (1994).

The AZ statute had created four grades of crime or four separate offenses calling for separate penalties from the core crime: ① SCM, a class 6 felony; ② SCM, a class 2 felony; ③ SCM, a DCAC; and ④ SCM registration, a class 4 felony. The essential element of a a class 6 felony that carries a statutory maximum of one year of imprisonment is the age of a minor being over fifteen years of age. The element of a greater offense for a class 2 felony which is punishable to a statutory maximum of 5 years of imprisonment is the age of a minor being under 15 years of age. The element of sentence enhancer under §1. .14.01 punishable to a presumptive . years of imprisonment is the age of a minor being under 15 years of age and labeling the crime as DCAC. And the essential element for the cumulative offense of registration is the age of the victim. Accordingly, the applicable element must be stated with such certainty and precision so that the defense may prepare its case, and that there may be no doubt as to the judgment which should be given for the conviction.

In the indictment, the facts of the core crime as well as the age of a minor under 15 years of age were alleged. DCAC, however, was only accused in the caption. There were no allegation of facts made supporting §13-604 dangerous and repetitive offenders, 01 DCAC. According to BISHOP, "an accusation which lacks any particular fact which the law makes essential to the punishment is... no accusation within the requirements of the common law, and it is no accusation in reason." 1 BISHOP Criminal Procedure §87 at 55. Thus, the element and the fact of DCAC were not alleged in the indictment.

The judge's role in sentencing is constrained at its outer limits by the fact alleged in the indictment and found by the jury. APPRENDI, 530 U.S. at 483. The fact of the core crime and the enhancing factor of "under fifteen years of age" together constituted an enhance crime. Thus, the judge could legally enhance the sentence from a class 6 to a class 2 felony based on these elements presented in the indictment, but not to §13-604.01 Sentencing enhancer. Therefore, the statutory maximum the judge could have legally imposed was 5 years of imprisonment under §13-701(C), but not the 25 years of imprisonment under the DCAC sentencing enhancer.

A.R.S. chapter 13, section 604 dangerous and repetitive offenders, subsection 01 DCAC, is a sentence enhancer within the sentencing provisions of the criminal code. In this case, the already enhanced core crime was again enhanced automatically to DCAC with the aggravative term of 25 years of imprisonment. It can hardly be said that sky-rocketing Estrada's sentence - from one year to five and then 25 years - has no more than a nominal effect. Indeed, the effect of AZ's sentencing "enhancement" here is unquestionably to turn a class 6 felony offense into a first degree offense, under the State's own criminal code. Thus, he is entitled to the presentment of the element of a greater offense in the indictment to justify greater and additional punishment under §13-604.01 but the State failed to do so. This omission of fact was "jurisdictional defect" and in direct violation of his rights to notice and Grand Jury Indictment. See U.S Const. amend V.

In addition, registration is a class 4 felony that carries and endless, repeated penalty range of 2.5 years, §13-701(C), to 6 years imprisonment. §13-702.02 (B)(4), for life. This is by far worse than the core crime itself because it does not only carry a higher punishment but it is also punishable, over and over again, for life. Because person convicted of offenses punishable by imprisonment for more than one year may be confined in a penitentiary, 18 U.S.C. §4083 (1994), any crime so punishable is infamous. U.S. v. COACHMAN, supra. Since registration is considered an "infamous crime," Estrada this entitled to the presentment of the essential element for cumulative offense, but the

State failed to do. An indictment not charging the ... ise constituted "jurisdictional defect" and can be challenged at any time. See e.g. US v HENRY, 288 F.3d 657, 660 (5th Cir 2002).

"[T]he indictment must allege whatever is in law essential to the punishment sought to be inflicted." 1 BISHOP Law of Criminal Procedure 50 (2d ed 1872). "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offense, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale; Pleas of the Crown]." Archbold, Pleading and Evidence in Criminal Cases, at 51. Thus, the law mandates that the indictment must contain the allegation of every fact that Estrada had committed §13-604 dangerous and repetitive offenders, 01 DCAC with certainty and precision. As defined by the legislature, repetitive offenders are those who have one historical prior felony conviction, and dangerous means using a deadly weapon or a dangerous instrument. Children means 2 or more children in a plain language. Nevertheless, none of these elements legally essential to the punishment to be inflicted were averred in the indictment.

Therefore, the court's review is warranted to consider whether an unconstitutional omission of fact in the indictment to twice enhance Estrada's punishment under the void and obsolete statute §13-604-01 voilated his rights to Notice and Grand Jury Indictment as guaranteed by the U.S. Constitution.

ii) Trial By Jury and Due Process Rights Violation

Taken together, the 6th Amendment right to trial by jury and the 14th Amendment right to due process entitled Estrada to relief because the State failed to perform the constitutional requirement that any fact that increases the penalty of a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. APPRENDI v. NEW JERSEY, 530 US. 466, 467 (2000); IN RE WINSHIP, 397 U.S. 358, 364 (1970).

The Laws

The 6th Amendment provides in relevant part that "the accused shall enjoy the right to a... public trial, by an impartial jury of the State and district within the crime shall have been committed, which district shall have been previously ascertained by law." U.S Const amend. VI. The 6th Amendment right to a jury trial applies to state criminal proceedings. See DUNCAN v. LA., 391 U.S. 145, 149 (1968). The Due Process Clause of the 5th Amendment to the U.S. Constitution provides in relevant part that "no person shall... be deprived of life, liberty, or property without due process of law." U.S. Const. amend. XIV. The 6th Amendment mandates that any fact that increases a defendant's sentence beyond the statutory maximum must be proven to the jury beyond a reasonable doubt. APPRENDI, 530 at 490. In BLAKELY, the Court expanded the APPRENDI doctrine and struck down Washington State's sentencing guidelines, finding that for Sixth Amendment purposes the "statutory imon" is the maximum sentence ifendant may receive under the Guidelines. BLAKELY v. WASHINGTON, 542 U.S. 296, 303-04 (2004).

In U.S. v. BOOKER, the Supreme Court held the mandatory provisions of the U.S. Sentencing Guidelines unconstitutional. 543 U.S. 220, 226, 244 (2005). The Court found that the Sentencing Guidelines regime, under which a judge could enhance a defendant's sentence based solely on his or her "determination of a fact [neither] found by the jury [n]or admitted by the defendant," violates the Sixth Amendment trial-by-jury right unless that fact is a prior conviction. Id. BOOKER explicitly extended the Court's holding in BLAKELY v. WASHINGTON to Federal Sentencing Guidelines. Id at 237-40, 244. Thus, in order to use a fact to increase a defendant's sentence beyond the Guidelines' range, jury must now find such facts beyond a reasonable doubt: a preponderance of the evidence standard is no longer sufficient. Id. The maximum penalty that a sentencing judge may therefore assign to any given defendant under such circumstances is the statutory maximum for the offense as it would have been determined based solely on those facts: (1) "reflected in the jury verdict"; (2) admitted by the defendant; (3) contained in the defendant's guilty plea; or (4) that are prior conviction.

Arguments

In AZ, the statutory maximum is the presumptive term for the purpose of BLAKELY v. WASHINGTON's rule. STATE v. MOLINA, 2005 WL 2077730 (Ariz. App. Div. 1). See also STATE v. BROWN, 209 Ariz. 200, ¶12, 99 P.3d 15, 18 (2004) (the "maximum sentence" under APPRENDI is the presumptive sentence). The statutory maximum sentence Estrada should have received was 5 years for the class 2 felony pursuant to §13-701(C). Nonetheless, he received another enhanced and aggravated sentenced of 25 years of imprisonment under the void and obsolete statute §13-604 dangerous and repetitive offenders, 01 DCAC based solely on the assumption and labeling the crime as DCAC without any fact alleged in the indictment, submitted to the jury, nor proven beyond a reasonable doubt that Estrada was a dangerous and repetitive offender, and had committed crimes against two or more children using a deadly weapon or a dangerous instrument.

The right to a jury trial exists in prosecutions for serious crimes, as distinguished from petty offenses. See BLANTON v. N. LAS VEGAS, 489 U.S. 538, 542 (1989). In determining whether a crime is "serious" for Sixth Amendment purposes, courts look to the severity of the maximum authorized penalty. See LEWIS v. U.S., 518 U.S. 322, 325-26 (1996). The U.S. Supreme Court has held that any crime punishable by a prison sentence greater than six months triggers the right to a jury trial regardless of the sentence ultimately imposed. See BLANTON, 489 U.S. at 556. Clearly, the 25 years enhanced and aggravated sentence that Estrada received entitled him to the right to a jury trial as guaranteed by the U.S. Constitution.

The AZ's void and obsolete statute §13-604.01 which authorized another increase in maximum prison sentence based on double counting a minor under fifteen years of age and labeling the crime as DCAC violated Estrada's rights to both the due process and ju... rial for the following reasons:

First, it is unconstitutional for a legislature to remove from the jury the assessment of facts, other than the fact of prior conviction, that increases the prescribed range of penalties to which a defendant is exposed and such must be established by proof beyond reasonable doubt. U.S.C.A. Const. Amend. 14. A.R.S.§13-604 dangerous and repetitive offenders, 01 DCAC is assumed whenever a minor is under fifteen years of age. §13-604.01(M). The very fact that the age of a victim triggerd the provision of §13-604.01 caused the statute that increased the felony class to become superfluous. As explained in MUNINGER, using a single element to twice enhance a sentence would also double count that element. MUNNINGER, 104 P.3d at 215. Thus, double counting a minor under 15 years of age to remove from the jury the assessment of facts or essential elements of §13-604.01 violated the U.S. Constitution.

Second, the mere fact that the AZ legislature placed its DCAC sentence enhancer within the sentencing provisions of its criminal code does not mean that the finding of §13-604 dangerous and repetitive offenders, 01 DCAC is not an essential element of
The relevant inquiry in determining whether §13-604.01 is an essential element of the offense
the offense which must be decided by the jury beyond a reasonable doubt, is one not of form, but of effect, namely whether the required finding exposes the defendant to greater punishment than that authorized by the jury's verdict. See APPRENDI, 530 U.S. at 494-95. Thus, it does not matter how the required finding is labeled. The fact that it exposes Estrada to a greater and additional punishment than that authorized by the jury's verdict, as does the sentencing "enhancement" here, §13-604 dangerous and repetitive offenders, 01 DCAC is an essential element of the offense.

Pursuant to the 5th and 6th Amendments, all elements of the crime must be alleged, proven to the jury and, under WINSHIP, proven beyond a reasonable doubt. APPRENDI, 530 U.S. at 500, in order for the court to impose the increased punishment. See id at 506. Thus, the fact that Estrada was sentenced under the void and obsolete statute §13-604.01, gave him the rights to be alleged of, tried by the jury for, and proved beyond a reasonable doubt for, being a dangerous and repetitive offender who committed crimes against two or more children using a deadly weapon or a dangerous instrument. Thus, applying the void and obsolete statute §13-604.01 to his sentence without making any factual determination, nor submitting to the jury and proving beyond reasonable doubt the essential elements of §13-604 dangerous and repetitive offenders, 01 DCAC violated his rights as guaranteed by the U.S. Constitution.

Third, registration is a class 4 felony that carries a penalty range of 2.5-to-6 years of imprisonment. The fact that it is a felony and could be punished longer than the already enhanced core crime makes registration an "infamous crime" by definition. In addition, the fact that registration could be punished repeatedly for life, is far worse than a murder crime that could only be punished once. And the fact that registration is a "serious crime" punishable by a prison sentence greater than six months triggered Estrada's right to a jury trial regardless of the sentence ultimately imposed. Thus, automatically adding another felony crime without making any allegation, nor submitting to the jury and proving beyond a reasonable doubt any essential element of registration, violated his rights as guaranteed by the U.S. Constitution.

Therefore, the court's review is warranted to consider whether applying the void and obsolete statute §13-604 dangerous and repetitive offenders, 01 DCAC to twice enhance Estrada's punishment without any fact alleged in the indictment, submitted to the jury, nor proven beyond a reasonable doubt that he had one historical prior felony conviction who committed crimes against two or more children using a deadly weapon or a dangerous instrument violates his rights to Due Process and Jury Trial as guaranteed by the U.S. Constitution.

iii) Violation of Double Jeopardy Protection

Under the 5th Amendment Double Jeopardy Protection, Estrada is entitled to relief with respect to multiple punishments that he received for the same offense. See U.S. v. DiFRANCESCO, 449 U.S. 117, 129 (1980).

The Laws

The double jeopardy clause of the 5th Amendment guarantees that no person shall "be subjected for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The 14th Amendment's due process clause extends the double jeopardy clause protection to state prosecutions. See BENTON v. MARYLAND, 395 U.S. 784, 794 (1969). The prohibition of double jeopardy applies not only to "life or limb" but to prison sentence and criminal fines as well. See JEFFERS v. U.S., 432 U.S. 137, 155 (1997) (plurality opinion). The double jeopardy clause also provide protection against multiple punishments for the same offense. See U.S. v. DiFRANCESCO, supra.

Arguments

SCM is a class 6 felony that carries a statutory maximum of one year of imprisonment. However, because of "a child under fifteen years of age, the legislature significantly increased the classification from a class 6 to a class 2 felony which is punishable to a statutory maximum of 5 years of imprisonment. This enhancement alone raises constitutional concern because this is 400% more than the core crime. It does not just double the punishment but quintuples the punishment, just like committing 5 counts of SCM against 5 different minors. Quintuple punishment for one count of SCM because "a child is under fifteen years of age" should violate the double jeopardy protection due to the fact that it, at least, doubles the punishment for the same offense. The double jeopardy clause should limit the legislature in adding enhanced sentences to less than 100% of the crime, no matter what the aggravating factor is, to avoid doubling the punishment for the same offense.

If granting a 400% greater increase of the punishment is perfectly legal and does not implicate the double jeopardy protection, how many times can the legislature double the punishment from the core crime? Would a 2400% increase from the core crime s[illegible]e to violate the double jeopardy p[illegible]ection?

Without double jeopardy limitation, the AZ legislature turned a class 6 felony to the equivalent of committing murder in the guise of sentence enhancement. For example, after enhancing a class 6 to a class 2 felony because of a minor under fifteen years of age, the legislature double counts "a minor under fifteen years of age" to twice enhance the punishment under the void and obsolete statute 13-604.01. As a result, Estrada was sentenced to 25 years of imprisonment which is equivalent to committing murder. This is 2400% enhanced sentence compared to the core crime itself and should violate the double jeopardy protection pursuant to DiFRANCESCO. The legislature further added a lifetime registration, a class 4 felony crime, that carries a penalty range of 2.5 to 6 years of imprisonment over and over again. Thus, his right to double jeopardy protection was violated.

Therefore, the court's review is warranted to consider whether a 2400% enhanced sentence and lifetime registration punishable over and over again implicated Estrada's right to double jeopardy protection as guaranteed by the U.S. Constitution.

iv) Violation of Cruel and Unusual Punishment Protection

Under the 8th Amendment cruel and unusual punishment protection, Estrada is entitled to relief because the punishment he received was grossly disproportionate to the severity of the offense pursuant to SOLEM v. HELM, 463 U.S. 277, 292 (1983).

The Laws

The 8th Amendment provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The prohibition against cruel and unusual punishment is applicable to the States through the Fourteenth Amendment. See ROBINSON v. CALIFORNIA, 370 U.S. 660, 666-667 (1962).

Arguments

1. The Gravity of the Offense with the Harshness of the Penalty.

A core crime punishable to one year that was enhanced to 25 years of imprisonment is arguably grossly disproportionate because it represents a 25 times, or 2400% increase from the core crime itself. On top of the 2400% increase, was another indefinite punishment for class 4 felony registration which was added automatically. This could also be contended as grossly disproportionate due to the fact that it could punished again and again indefinitely for life, far worse than the core crime of SCM itself.

Turning a core crime with one year to 25 years of imprisonment and automatically adding indefinite punishment for life is a good example of what Montesquier De L'Spirit Des Lois mentioned in 1748, "There is no more cruel tyranny than that which is exercised under cover of law, and with the colors of justice." U.S. v.

JANNOTTIE, 673 F. 578, 614 (3d Cir. 1982). Thus, the gravity of the offense was grossly disproportionate with the harshness of the penalty.

2. Intra-Jurisdictional Comparison.

In comparing a single element enhancer or aggravating factor, the average enhanced sentence AZ has is less than 100% more than the core crimes. A.R.S. § 13-702. SCM, however, was enhanced by 1900% using a single element of a minor under 15 years of age. §§ 13-1405(B) and 13-604.01. This is by far a grossly disproportionate enhanced sentence.

In BARTLETT and DAVIS, the Supreme Court concluded that the comparison of the punishments imposed for other crimes in AZ revealed this disproportionality with which the defendants were sentence under § 13-604.01. See STATE v. BARTLETT, 164 Ariz. 229, 236-37, 972 P.2d 692 (1990); STATE v. DAVIS, 206 Ariz. 377, 385-87, 79 P.3d 64 (2003). The Court in DAVIS stated that little has changed since this court conducted a similar analysis in 1990 in BARTLETT I. It continues to be the case that those guilty of more serious crimes, such as second degree murder, sexual assault, or continued sexual abuse of a minor under fifteen years of age received the same presumptive sentence that DAVIS did. See A.R.S § 13-604.01(C). It also remains that other DCAC crimes such as kidnapping, child abuse, aggravated assault, or commercial sexual exploitation of a child, all seemingly more dangerous crimes than DAVIS, carry a lesser presumptive sentence and, with mitigation, those who commit such crimes are eligible for a ten-year minimum sentence for each count, less than the thirteen-year minimum sentence for each count for DAVIS's crime. A.R.S. § 13-604.01(D). DAVIS, 206 Ariz at 385-86.

Additionally, other serious felony offenses not involving children receive significantly less severe sentences in AZ. Those guilty of kidnapping a person older than fifteen, A.R.S § 13-1304 (2001), sexual assault of a victim older than fifteen, A.R.S. § 13-1406 (2001), first degree burglary of a residential structure, A.R.S § 13-1508 (2001), and arson of an occupied structure, A.R.S. § 13-1704 (2001), are eligible for far more lenient sentences, and the sentencing judge may order that multiple sentences be served concurrently. See A.R.S § 13-708 (2001). Id at 386.

3. Inter-Jurisdictional Comparison

The court in BARTLETT also examined the punishment imposed for the crime in other jurisdictions pursuant to SOLEM, 463 U.S. at 292, 103 S.Ct at 3010, and concluded that the mandatory minimum sentence imposed on a defendant for his first offense was disproportionate to the sentences received by similarly situated defendants in other jurisdiction. BARTLETT, 164 Ariz at 237-39; see also DAVIS, 206 Ariz at 387.

In DAVIS, the court stated that "we cannot, however, uphold a sentence that becomes unconstitutionally disproportionate to the crimes committed because the sentences are mar[illegible] orily lengthy, flat, and conse[illegible]ve." Id. Therefore, the court's review is warranted to determine whether a class 6 felony that was enhanced by 25 times or 2400% greater imprisonment, and automatically adding mandatory indefinite punishment for life, together violated the proscription against cruel and unusual punishment as guaranteed by the U.S. Constitution.

2 THE COURT ACQUIRES NO SUBJECT MATTER JURISDICTION TO IMPOSE THE VOID AND OBSOLETE STATUTE § 13-604.01

Under the 6th Amendment Notice and the 5th Amendment Grand Jury Clause, Estrada is entitled to relief and reversal of his sentences with respect to "jurisdictional defect" for imposing the void and obsolete statute, and uncharged registration, and for failing to allege any fact or element of separate legal offense in the grand jury indictment for the purpose of enhancing his sentence a second time under the void and obsolete statute § 13-604.01. See U.S. v. GIVENS, 767 F.2d 574, 584 (9th Cir.) cert. denied, 474 U.S. 953, 106 S.Ct. 321, 88 L.Ed.2d 304 (1985).

The Laws

An indictment's failure to charge an offense constitutes a jurisdictional defect. U.S. v. HENRY, 288 F.3d 657 (5th Cir. 2002). It is the settled law of AZ that in criminal case the court acquires no jurisdiction of the subject matter of an alleged offense unless the jurisdictional facts constituting the offense are set forth in the information, and where the court is without jurisdiction of the subject matter a judgment of conviction will be reversed in this court even on a plea of guilty, for jurisdiction cannot be conferred by consent. See STATE v. SMITH, 66 Ariz. 376, 189 P.2d 205 (1948).

Arguments

§ 13-604.01 was held unconstitutional as applied by STATE v. DAVIS, 206 Ariz. 377, 79 P.3d 64 (2003) (en banc), because it was lengthy, flat, and consecutive. § 13-604 in its entirety was recognized as unconstitutional in 2008 by STATE v. HEAD, an unreported AZ case. As a result, the legislature amended § 13-604.01 in 2008 and repealed it on January 1, 2009. So, when Estrada was sentenced on 2/19/10, § 13-604.01 no longer exists or was void and obsolete. Thus, the court acquires no subject matter jurisdiction to impose the void and obsolete statute § 13-604.01 that has long been repealed back in 2009 because of its unconstitutionality.

Registration is a class 4 felony crime that carries and endless, repeated penalty range of 2.5 years, § 13-701(C), to 6 years imprisonment, § 13-702, for life. However, Estrada was never charged nor indicted with a class 4 felony crime of registration. Thus, the court is without jurisdiction to impose a class 4 felony crime under the void and obsolete statute § 13-604.01.

Estrada w. harged with a violation of § 604 dangerous and repetitive offenders, 01 DCAC. The State, however, failed to allege any fact in the indictment, submit any fact to the jury, and prove any element beyond a reasonable doubt that he was a dangerous and repetitive offender, and had committed crimes against two or more children using a deadly weapon or a dangerous instrument. This omission of fact was "jurisdictional defect" and in direct violation of his rights to notice and grand jury indictment. Thus, the court acquires no subject matter jurisdiction to impose an enhanced sentence under the void and obsolete statute §13-604.01.

Clearly, the court had no jurisdiction of the subject matter because the indictment was absent, insufficient, and so defective. There were no statutory or essential elements of §13-604.01, and class 4 felony crime, or enhancing factor as mandated by the 5th and 6th Amendments. "An indictment's failure to charge an offense constitutes a jurisdictional defect." U.S. v. CABRERA-TERAN, 168 F.3d 141, 143 (5th Cir. 1999).

The court in a criminal case acquires no jurisdiction to subject matter of an alleged offense unless jurisdictional facts constituting the offense are set forth in the information. Ariz. Const. Art. 2 §30. STATE v. SMITH, supra. "Because an indictment is jurisdictional, defendants at any time may raise an objection to the indictment based on failure to charge an offense, and the defect is not waived by a guilty plea." CABRERA-TERAN, 168 F.3d at 143.

Indictment's failure to charge an offense may be raised for first time in prisoner's petition to vacate, set aside, or correct his sentences, as such error divests sentencing court of jurisdiction. 28 U.S.C.A. §2255. U.S. v. HARPER, 901 F.2d 471 (1990). The court is without jurisdiction of the subject matter, a judgment of conviction will be reversed even on a plea of guilty, since jurisdiction cannot be conferred by consent. STATE v. SMITH, supra.

Therefore, Estrada is entitled to relief and vacate, set aside, or correct his sentences to 5 years or time served.

3 INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Under the 6th Amendment right to counsel, Estrada is entitled to relief and reversal of his sentence as a consequence of ineffective assistance of appellate counsel pursuant to EVITTS v. LUCEY, 469 U.S. 387, 396-99 (1985), and CUYLER v. SULLIVAN, 446 U.S. 335, 350 (1980).

The Laws

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosec. ...ns. McMANN v. RICHARDSON, 3[illegible]S. 759, 771 n.14 (1970). The right to effective assistance applies to both retained and appointed counsel. CUYLER, 446 U.S at 344-45. The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel on a first appeal. EVITTS v. LUCEY, supra.

The right to effective assistance is abrogated when defense counsel operates under a conflict of interest because "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." STRICKLAND v. WASHINGTON, 466 U.S. 668, 692 (1984). In CUYLER v. SULLIVAN, the Supreme Court held that a defendant can demonstrate a SIXTH AMENDMENT violation by showing that 1) defense counsel was actively representing conflicting interests, id at 350, and 2) the conflict had an adverse effect on specific instances of counsel's performance. Id at 348.

Arguments

Here, the judge, the prosecutor, and the defense counsel knew full well that A.R.S. § 13-604.01 was repealed or no longer exists. However, they colluded and conspired to impose the void and obsolete statute against Estrada. There is no way to explain why he was allowed to be sentenced under the void and obsolete statute. Thus, the conflict had an adverse effect by the counsel's performance.

The 5th Amendment Due Process Clause and the 6th Amendment's Notice and Jury Trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt pursuant to JONES v. U.S., APPRENDI v. NEW JERSEY, BLAKELY v. WASHINGTON, and U.S. v. BOOKER. Then why within reason would an attorney be allowed by the State to enhance Estrada's sentences without any element essential to the punishment charged in the indictment, submitted to a jury and and proved beyond a reasonable doubt?

The fact that A.R.S § 13-604.01 was void and obsolete at the time of Estrada's conviction and sentences, then why in the world would an attorney allow Estrada to be sentenced under the void, illegal and obsolete statute? In a different circuit court, it has been found that counsel's failure to understand the sentencing guidelines was unreasonable.

In the prejudice prong, the defendant must show that counsel's errors were prejudicial and deprived him of a "fair trial, a trial whose result is reliable." STRICKLAND, 466 U.S at 687. This burden is easily met by showing that the outcome of the proceeding would have been different but for counsel's error. See WILLIAMS v. TAYLOR, 529 U.S. 362, 391-93 (2000). For example, had Estrada's counsel presented any of these case laws: APPRENDI, BLAKELY, BOOKER, etc., that alone would have created the reasonable probability of a different result, or 20 years less imprisonment.

In a different circuit court, it has also been decided that counsel's ignorance of Sentencing Guidelines was prejudicial. A 6-month to 21-month increase in a petitioner's sentence was considered prejudicial in GLOVER v. U.S. Thus, the 20 years increase of imprisonment because of counsel's deficient performance prejudiced Estrada, resulting in an unreliable or fundamentally unfair outcome of the proceeding.

Error under APPRENDI requires reversal if a defendant's sentence exceeds the statutory maximum. Thus, Estrada had ineffective assistance for allowing him to receive a sentence beyond the statutory maximum under the void and obsolete statute.

The evidence is clear that Estrada's attorney at the time of the plea and he was sentence, acted below "an objective standard of reasonably effective assistance under prevailing professional norms." There is no way to explain why Estrada was allowed to enter into a plea agreement that was void and obsolete statute that has long since been repealed. A competent criminal defense would not have allowed Estrada to be sentenced under the illegal, void and obsolete statute that does not exist. Thus, Estrada's appellate counsel was ineffective for failure to raise IAC, Jurisdictional Defect, and the Illegality and Unconstitutionality of the Enhanced and Aggravated Sentences Under the Void and Obsolete A.R.S. § 13-604.01

The only remedy is to set aside the illegal and unconstitutional sentences under the void and obsolete statute and resentence him under the applicable law.

4 WHETHER THE STATE ENGAGED IN CONDUCT INVOLVING DISHONESTY, DECEIT, OR MISREPRESENTATION OF THE LAW AND THE FACT.

Estrada's Genuine Issue Of Material Facts (GIMF)	State's Misconduct
There is no record that the following claims were raised before:	
a) Void and obsolete statute that does not exist used to enhance and aggravate his sentence was illegal and unconstitutional	The state lied that this claim was "addressed, refuted, and denied in the defendant's first PCR in 2010-11." Reply p. 4.
b) The court has no jurisdiction to impose the statute that no longer exists.	The State lied that the claim was "finally adjudicated on the merits on appeal or any previous collateral proceeding." Id.
c) Ineffective assistance of the appellate counsel (IAAC)	The same above. "Therefore, the claims the defendant's brings in the current PCR petition is precluded."

As raised in the Exceptions to the Preclusion of Remedy, the State conceded and waived its defense and arguments that "Under the rule of exceptions, Estrada is entitled to the court's review with respect to the"

a) "significant change in the law" "pursuant to Rule 32.1(e), ARCP." Notice of PCR (NPCR) pp 4, 8.	The State lied that Estrada have no grounds in any of these exceptions pursuant to Rule 32.1(d), (e), (f), (g), or (h). Reply p. 4
b) "newly discovered material fact NDMF" pursuant to Rule 32.1(g), ARCP, and TEAGE v. LANE, 498 U.S. 288 (1989). NPCR pp. 4, 8.	The State lied that Estrada have no grounds in any of these exceptions pursuant to Rule 32.1(d), (e), (f), (g) or (h). Reply p. 4

Estrada's GIMF	State's Misconduct
c) "fundamental miscarriage of justice pursuant to COLEMAN v. THOMPSON, 501 U.S. 722, 750 (1991)," or actual innocence pursuant to Rule 32.1 (h). See NPCR pp. 4. 11.	The State lied that Estrada have no grounds in any of these exceptions pursuant to Rule 32.1 (d), (e), (f), (g) or (h). Reply p. 4.
d) "fundamental error." NPCR pp. 4-6. e) "jurisdictional defect." NPCR pp 4. 6-7. f) "error of constitutional magnitude." NPCR pp 7-8. g) "cause and prejudice." NPCR pp. 4. 9-11.	The State lied that Estrada's claim rest exclusively on the ground set fort in Rule 32.1(a) (b) and (c), lied that these exceptions "also precluded under Rule 32.4(a)," and lied that they "are precluded twice over." Reply p. 5.

Pursuant to SOLEM v. HELM criteria, the AZ Supreme Court in BARTLETT and DAVIS concluded that the mandatory minimum sentence, e.g. 13 years of imprisonment, for each count of SCM under § 13-604.01 were:

a) grossly disproportionate in comparison to the gravity of the offense with the harshness of the penalty	The State lied that Estrada has no claim of disproportionate because DAVIS is distinguisable to Estrada's case. DAVIS 13 years of imprisonment is grossly disproportionate but Estrada's 25 years of imprisonment is not grossly disproportionate.
b) grossly disproportionate in intra-jurisdictional comparison to the sentences received by the other DCAC crimes.	Estrada has no claim of disproportionate because DAVIS is distinguishable to Estrada's case. 13 years of imprisonment is grossly disproportionate but not the 25 years of imprisonment in comparison to the sentences received by the other DCAC crimes.
c) grossly disproportionate in inter-jurisdictional comparison to the sentences received by similarly situated defendants in other jurisdiction.	Estrada has no claim of disproportionate because DAVIS is distinguisable to Estrada's case. DAVIS 13 years is grossly disproportionat but Estrada's 25 years is not grossly disproportionate in comparison to the sentences received by similarly situated defendants in other jurisdiction.

Indistinguisable factors:

a) Both Estrada and DAVIS were over 18 years of age.	The State lied that Davis is distinguisable to Estrada's case.
b) Estrada and DAVIS were both convicted of SCM.	DAVIS is distinguishable to Estrada's case.
c) Estrada and DAVIS were both sentenced under § 13-604.01.	The State lied that DAVIS is distinguishable to Estrada's case.
d) Victims were under 15 years of age.	DAVIS is distinguisable to Estrada's case.

Estrada's GIMF	State's Misconduct
Consecutive sentence	
a) Estrada was sentenced to 25 years of imprisonment and mandatory consecutive lifetime registration for class 4 felony crime.	The State lied that Estrada was not sentenced to lifetime mandatory registration for a class 4 felony crime.
Neither Congress nor any state shall pass an ex post facto law.	
b) §13-705 was enacted on 1/1/09 but Estrada's crime was committed on 8/5/08.	The State lied that Estrada's 2008 case is applicable to §13-705 2009 statute.
According to the House Bill 2207, chapter 301,	
a) "A. Section 13-604.01, Arizona Revised Statute, as amended by laws 2008, chapter 97 Section 1, is repealed."	The State lied that Estrada "is incorrect," and §13-604 is "still in full effect."
b) "B. Section 13-604.01. Arizona Revised Statute, as amended by laws 2008, chapter 97 section 1, is repealed."	The State lied that Estrada "is incorrect," and §13-604.01 is "still in full effect."
Repealed statute §13-604.	
a) Estrada argued that "when the AZ legislature repealed §13-604.01 prior to the final judgment the repeal ends the prosecution thereby effectively ending the ongoing prosecution." PPCR p. 2. See e.g. GONZALES v. ABBOTT, 967 F.2d 1499 (11th Cir. 1992); BRADLEY v. U.S., 410 U.S. 605 (1973) (At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them).	The State lied that the statute that no longer exists is "still in full effect." The State further lied that Estrada "is incorrect, and sites no case law"

JURISDICTIONAL DEFECTS

As the State conceded, "Under the jurisdictional-defect-exception, Estrada's claims are entitled to review de novo with respect to the absence or insufficiency of the indictment or information pursuant to U.S. v. GIVENS, 767 F.2d 574, 584 (9th Cir), cert. denied, 474 U.S 953, 106 S.Ct. 321, 88 L.Ed.2d 304 (1985)." NPCR pp 6-7. As the State admitted, an indictment's failure to charge an offense constitutes a jurisdictional defect. U.S. v. HENRY, 288 F.3d 657 (5th Cir. 2002). Id at 6. Thus, the AZ court acquires no jurisdiction of subject matter to the following offenses pursuant to A.R.S. Const. art. 2, §30:

a) Class 4 felony crime i) There was no Notice of the element of a class 4 felony crime registration.	The State lied that jurisdictional defect have no merit. Notice is not required for class 4 felony crime.

Estrada's GIMF	State's Misconduct
ii) There was no fact or any element of class 4 felony crime alleged in the indictment.	The State lied that jurisdictional defects have no merit and charging an offense in the indictment is not required.
b) SCM, DCAC	The State lied that jurisdictional defects have no merit, and Notice is not required to enhance the crime and sentences.
i) There was no Notice of the element of DCAC.	
ii) There was no fact or element of DCAC alleged in the indictment.	Jurisdictional defect have no merit. The State is not required to alleged the element of DCAC in the indictment.
c) Aggravated DCAC	The State lied that jurisdictional defects have no merit, and Notice is not required to aggravate any sentences.
i) There was no Notice of any element of aggravating factor	
ii) There was no fact or any element of the aggravating factor alleged in the indictment.	The State lied that jurisdictional defects have no merit, and the state is not required to charge any aggravating factor in indictment.

In addition, neither the court nor the prosecution has jurisdiction to:

a) reenact a statute that no longer exist	Jurisdictional defect have no merit.
b) imposed a void and obsolete statute that does not exists.	The State lied that jurisdictional defects have no merit
c) automatically add a class 4 felony crime without charging it in the indictment.	The State lied that jurisdictional defects have no merit.
d) automatically enhance the crime without alleging the element of separate legal offense in the Indictment.	The State lied that jurisdictional defect have no merit.
e) aggravate the sentence without any fact alleged in the indictment, submitted to a jury and proven beyond a reasonable doubt.	The State lied that jurisdictional defect have no merit.

Clearly jurisdictional defects have merit

a) The court in criminal case acquires no jurisdiction of subject matter of alleged offense unless jurisdictional facts constituting the offense are set forth in the information. A.R.S. Const. art. 2, §30.	The State lied that jurisdictional defects have no merit.
b) Where the challenge to the information is based upon an omission in the averments of an essential element of the crime, jurisdiction of the subject matter cannot be conferred by consent. STATE v. SMITH, 66 Ariz 376, 189 P.2d 205 (1948); see also C.J.S.. Criminal Law, § 1071 page 274; BURNS v. DAVIS, 46 Ariz 127, 46 P.2d 1084, 1086	The State lied that jurisdictional defects have no merit.

c) It is the settled law ... is state that in a criminal case the court acquires no jurisdiction of the subject matter of an alleged offense unless the jurisdictional facts constituting the offense are set forth in the information, and that where the court is without jurisdiction of the subject matter a judgment of conviction will be reversed in this court even on plea guilty, for jurisdiction cannot be conferred by consent. SMITH, 66 Ariz at 207.	The Sta[illegible]ed that jurisdictional defects have no merit
d) Failure to charge an offense may be raised for the first time in a §2255 petition because such an error divests the sentencing court of jurisdiction. U.S. v. HARPER, 901 F2d 471, 472-73 (1990). See U.S v. PRINCE, 686 F.2d 1379, 1383 (5th Cir) cert. denied, 493 U.S 932 (1989).	The State lied that jurisdictional defects have no merit.
e) "An indictment's failure to charge an offense constitutes a jurisdictional defect." U.S. v. HARPER, 288 F.3d 657, 660 (5th Cir 2002) citing U.S. v. CABRERA-TERAN, 168 F.3d 141, 143 (5th Cir. 1999).	The State lied that jurisdictional defects have no merit.

The genuineness of material facts and laws lead the State to concede and waive its defense and arguments that the enhanced and aggravated sentences under the statute that does not exist:

a) violated the Notice Right.	The State lied that it is not unconstitutional.
b) violated the Grand Jury Indictment Clause.	The State lied that it is not unconstitutional.
c) violated the Jury Trial Right.	The State lied that it is not unconstitutional.
d) violated the Due Process Clause.	The State lied that it is not unconstitutional.
e) violated the Double Jeopardy Protection.	The State lied that it is not unconstitutional.
f) violated the CUPP.	The State lied that it is not unconstitutional.

Neither the prosecutor, the defense counsel, nor the judge disclosed to Estrada that he was being prosecuted and sentenced under the statute that does not exist. In October 2017, however, Estrada discovered that his sentence was enhanced and aggravated under the statute that no longer exists. Nevertheless, the State misled the court that the discovery of undisclosed material fact which is material to guilt and punishment was not considered newly discovered material fact (NDMF).

5 THE AZ COURT'S DECISIONS WERE BOTH UNREASONABLE AND CONTRARY TO THE CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE U.S. SUPREME COURT

As raised, the State engaged in conduct involving dishonesty, deceit, or misrepresentation of the fact and the law. Nonetheless, the AZ court abused its discretion or simply adopted the State lies which is both unreasonable and contrary to the clearly established federal law, as determined by the U.S. Supreme Court.

ESTRADA'S CLAIM	THE AZ COURT'S VERSION

There is no evidence or any record at all to support that the following grounds for relief were raised in Estrada's first PCR.

a) Repealed statute that does not exist was used to enhance and aggravate his sentence.	The court misled its own tribunal that this ground for relief was precluded under Rule 32.2(a)(2) because it was finally adjudicated on the merits on appeal.
b) Jurisdictional defects. c) Ineffective assistance of appellate counsel (IAAC).	The court was dishonest that these grounds for relief were precluded under Rule 32.2(a)(2) because they were finally adjudicated on the merits on appeal or any previous collateral proceeding.

Clearly the AZ court was unreasonable or abused its discretion because the finding was unsupported by sufficient evidence or based on State lies. The court rendered its decision based on false factual conclusion rather than the legal conclusion that lack evidentiary support. The court's reason for its action that all 3 grounds for relief were raised in prior PCR are legally incorrect. The court acted without reference to any guiding rules and principle, and without consideration and in disregard of facts and circumstances of Estrada's case.

The AZ court's decision rejecting all 3 grounds for relief because they were raised in Estrada's first PCR was based on unreasonable determination of the facts in light of the evidence presented in the AZ court proceeding. First, the finding was unsupported by sufficient evidence. Second, the process employed by the AZ court was defective in so many material ways. For example, the AZ court made evidentiary finding without holding a hearing and giving Estrada an opportunity to present evi-evidence; The AZ court plainly misapprehended or misstated the record in making its finding. See TAYLOR v. MADDOX, 366 F.3d 992 (9th Cir 2004); etc.

Rule 32.4(a) states in relevant part that "Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)." The court, the prosecutor, and the defense counsel failed to disclose to Estrada that he was being persecuted and sentenced under the statute that no longer exists. In October 2017, however, Estrada discovered that the statute that does not exist was used to enhance and aggravate his sentence.

a) "e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Rule 32.1(e), ARCP.	The court misled its own tribunal that Rule 32.1(e) is precluded because it is untimely pursuant to Rule 32.4(a).

The court, the prosecutor, and the defense counsel failed to disclose to Estrada that A.R.S. § 13-604 in its entirety was amended and repealed in 2008, including § 13-604.01, and in 1/1/09 § 13-604.01 no longer exists.

b) "g. There has been significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence. Rule 32.1	The court misrepresented the law and the fact that Rule 32.1(g) is precluded because it is untimely pursuant to Rule 32.4(a).

The fact or essential element of class 4 felony crime registration and § 13-604 dangerous and repetitive offenders, 01 DCAC were not alleged in the indictment at all. Thus, Estrada is actually and factually innocent of class 4 felony crime and §13-604.01 crime. In addition, Estrada established that his conviction and sentence for the statute that does not exist is void and cannot be the legal cause of imprisonment - notwithstanding any procedural default. In effect fundamental miscarriage of justice had occurred because he was convicted and sentence for conduct that was not a crime or does not exist and that he is therefore "actually inno-innocent." See e.g. GONZALES v. ABBOTT, 967 F.2d 1499 (11th Cir. 1992).

a) "the amendments add a claim of actual innocence as an exception to preclusion." Comment to Rule 32.2(b).	The court was dishonest that actual innocence exception to preclusion is precluded because it is untimely pursuant to Rule 32.4(a).

The State conceded and waived its defense and arguments that Estrada's claims constituted

a) Fundamental error. NPCR pp. 4-6.	"The claims are not only untimely, they are also precluded under Rules 32.2(a)(2) and 32.4(a)."
b) Jurisdictional defects. Id at 6-7.	
c) Error of constitutional magnitude. Id at 7-8	"The claims are not only untimely, they are also precluded under Rules 32.2(a)(2) and 32.4(a)."
d) Cause and prejudice. Id at 9-11	
e) Fundamental miscarriage of justice. Id at 11	The claim is untimely and precluded.

The AZ court knew full well that the following grounds for relief are all colorable claims because:

a) The fact that Estrada was convicted, and his sentence was enhanced and aggravated, under the statute that does not exist, if proven true, would entitle him to relief.	This ground for relief was not deemed a colorable claim.
b) The fact the AZ court has no subject matter jurisdiction to any crime not charged in the indictment, and reenact or impose any repealed statute, if proven true, would entitle Estrada to relief.	Jurisdictional defect was not deemed a colorable claim.
c) The fact that the appellate counsel's failure to raise any claim constitutes IAAC, if proven true, would entitle Estrada to relief.	Ineffective assistance of appellate counsel (IAAC) was not deemed a colorable claim.

These AZ court's findings based on dishonesty, deceit, and misrepresentation of the fact and the law should constitute abuse of discretion. The AZ court's decision denying all claims based on dishonesty, deceit, and misrepresentation of the law and the fact were contrary to the clearly established state and federal law in: BRADLEY v. U.S., 410 U.S. 605 (1973) for repealed statute or statute that does not exist; A.R.S. Const. art. 2 §30, C.J.S. Criminal law §1671 page 274, U.S. v. PRINCE, 493 U.S. 932 (1989), for jurisdictional defects; ANDERS v. CALIFORNIA, 386 U.S. 738 (1967), EVITTS v. LUCEY, 469 U.S. 387, 396-99 (1985), CUYLER v. SULLIVAN, 446 U.S. 335, 350 (1980), for IAAC.

DEMAND FOR AN EVIDENTIARY HEARING

Pursuant to TOWNSEND, Estrada is entitled to an evidentiary hearing because the records showed that: 1) the merits of the factual dispute were not resolved in the state hearing; 2) the state factual determination is not fairly supported by the record as a whole; 3) the fact-finding procedure employed by the AZ court was not adequate to afford a full and fair hearing; 4) there is substantial allegation of newly discovered evidence; 5) the material facts were not adequately develop at the AZ court hearing; 6) for any reason it appears that the state trier of fact did not afford Estrada a full and fair hearing. See TOWNSEND v. SAIN, 372 U.S. 293 (1963).

An evidentiary hearing would fully develop the factual predicate of Estrada's claims that A.R.S §13-604 in its entirety was amended and repealed in 2008 and ceased to exist on 1/1/09 and would establish, support, and prove his claims for relief. The statute that does not exist would also establish, support and prove his innocence of the crime of §13-604 dangerous and repetitive offenders, 01 DCAC. In addition, a hearing is required because the primary facts or the GIMF are in dispute with the State and the AZ court's version of truth as illustrated above. As raised and clearly demonstrated, his GIMF underlying the claims would be sufficient to establish by clear and convincing evidence that but for the constitutional errors, no reasonable fact-finder would have found him guilty of the underlying offenses under the statute that does not exist.

In addition, an evidentiary hearing is required because the AZ court's finding was objectively unreasonable due to the fact that "the material facts were not adequately develop at the state-court hearing." See id at 313.

A petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of his claim and therefore satisfies 28 U.S.C.S. § 2254(e)(2). STANLEY v. SCHRIRO, 598 F.3d 612, 624 (9th Cir. 2011). See ESTRADA v. SCRIBNER, 512 F.3d 1227, 1235 n.7 (9th Cir 2008). Where a petitioner has not failed to develop the factual basis of his claim in state court, as required by 28 U.S.C.S. §2254(e)(2), an evidentiary hearing on a habeas corpus petition is required where the petitioner's allegations, if true, would entitle him to relief, and the petitioner has satisfied the requirement of TOWNSEND v. SAIN. STANLEY, 598 F.3d at 624. See INSYXIENMAY v. MORGAN, 403 F.3d 657, 670 & n.6 (9th Cir. 2005).

Therefore, demand for an evidentiary hearing should have been granted.

Returning now to the U.S. District Court and the NCCOA's order denying a COA to demonstrate how the lower courts erred, it becomes immediately apparent that the lower courts fundamentally misinterpreted SLACK by finding that all of the claims failed the constitutional component test, even though each facially alleged the denial of a constitutional right.

Moreover, the lower courts' post-card denial themself clearly violate the LAMBRIGHT-PETROCELLI-VALERIO rule by failing to consider what the petition facially alleges, by failing to take the allegations in the petition as true, and focusing instead on inapplicable rules that undermines the claims on the merits.

In short, the lower courts' analysis are fundamentally flawed at its core. Applying instead the required analysis from LAMBRIGHT-PETROCELLI-VALERIO, it is abundantly clear that each of the claims alleged satifies SLACK's constitutional component test.

Obviously, Estrada has not only satisfied the SLACK's test, but also proven the violation of his rights to the 5th Amendment's Due Process, Grand Jury Indictment, and Double Jeopardy Clauses, 6th Amendment's Notice, Jury Trial, Effective Counsel, 8th Amendment's Cruel and Unusual Punishment Protection, and 14th Amendment's Due Process Clause. He also showed his entitlement to an evidentiary hearing. However, as demonstrated, the government officials used unconstitutional and illegal conduct to obstruct the evidentiary hearing or official proceeding by any means necessary.

Therefore, the lower courts decisions on SLACK's tests were fundamentally flawed at its core in order to obstruct the official proceeding regardless of the fact, and protect the government officials' unconstitutional and illegal conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alejandro Estrada in Pro Se

Date: November 23, 2020