No. _____

IN THE
SUPREME COURT OF UNITED STATES

Isidro Sauceda, Petitioner,

v.

David Shinn, Director of Arizona Department of Corrections, and the Attorney General of the State of Arizona, Respondents

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Sandra Slaton, *Counsel of Record*
HORNE SLATON PLLC
6720 N. Scottsdale Road, Suite 285
Scottsdale, Arizona 85253
Telephone: (480 518-2154
slaton@horneslaton.com

February 21, 2021

QUESTIONS PRESENTED FOR REVIEW

I.

Whether Review Is Warranted Because The Ninth Circuit Utilized An Unduly Burdensome Certificate Of Appealability Standard That Contravenes This Court And Ninth Circuit Precedent In Refusing To Issue A Certificate Of Appealability. Even Though Reasonable Jurists Could Debate That Petitioner Was Denied His Constitutional Rights Where Petitioner's Trial Counsel Admitted That He Failed To Object To The Lack Of A Lesser-Included Offense Instruction?

II.

Whether Review Is Warranted Because The Ninth Circuit Utilized An Unduly Burdensome Certificate Of Appealability Standard That Contravenes This Court's, and Ninth Circuit Precedent, On The Denial Of A Certificate Of Appealability, Even Though Reasonable Jurists Could Debate That Petitioner Was Denied His Constitutional Rights Where His Trial Counsel Failed To Object To The Lack Of A *Willits* Instruction Allowing The Jury To Make A Negative Inference Against The State?

III.

Whether Review Is Warranted Because The Ninth Circuit Utilized An Unduly Burdensome Certificate Of Appealability Standard Which Contravenes Unanimous Precedent In Denying A Certificate Of Appealability, Even Though Reasonable Jurists Could Debate That Petitioner Was Denied His Constitutional Rights When His Trial Counsel Failed To Duly Investigate Exculpatory Evidence And Witnesses?

IV.

Whether Review Is Warranted Because The Ninth Circuit Imposed An Unduly Burdensome Certificate Of Appealability Standard In Denying A Certificate Of Appealability, Which

Contravenes This Court's Precedent, Even Though Reasonable Jurists Could Debate Whether Petitioner Was Factually Innocent?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, filed on November 2, 2020, is reprinted in the Appendix ("App.") attached hereto, page 2.

The Order of the Ninth Circuit denying Petitioner's Panel Rehearing, filed November 23, 2020, is reprinted in the App. hereto, page 1.

The Order of the United States District Court for the District of Court for the District of Arizona of April 29, 2020, denying Petitioner's Habeas Corpus Petition is reported at *Sauceda v. Shinn*, 2020 WL 2064919, and is reprinted in the App. hereto, page 3.

The Report and Recommendation of the United States Magistrate Judge, the Hon. Camille D. Bibles, is reported at *Sauceda v. Shinn*, 2020 WL 2067012, and reprinted in the App. hereto, pages 4-29.

JURISDICTION

The jurisdiction of this Court to review the Order denying the Certificate of Appealability by the Ninth Circuit United States

Court of Appeals is invoked under 28 U.S.C. § 1254(1). Additionally, denial of a motion for certificate of appealability is reviewable by this Court on Petition for Writ of Certiorari. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

Sixth Amendment

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

Fourteenth Amendment

> … nor shall any State … deprive any person of life, liberty, or property, without due process of law[.]

28 U.S.C. § 2253

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State court;
>
> …
>
> (2) a certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

D. Facts Giving Rise To This Case

Petitioner, an innocent man, sits in prison, effectively for the rest of his life, after being convicted of (1) Count I, first-degree murder; (2) Count II, attempted first-degree murder; (3) Count III, attempted first-degree murder; (4) Count IV, aggravated assault; and (5) Count V, assisting a criminal street gang. (App., p. 184-85).

Petitioner's conviction stems from the events of December 13, 2003, when Petitioner was only 24-years-old. (App., p. 35). That day, Petitioner was spending time with friends, Kristopher Dominguez, Marcus Dominguez, and Steven DeLeon. (App., p. 153-54). All of them heard about a party and decided to attend. (*Id.*). When they arrived at the party, they were all searched for weapons, and none of them had any weapons on their person. (*Id.*).

While inside the party, Petitioner and the Dominguez brothers were approached by members of the Califas street gang. (*Id.*). All of a sudden shots rang out resulting in the murder of Kristopher. (*Id.*). Carlos Sanchez and German Borja were shot and injured inside of the house. (App., p. 154). Carlos was shot twice in

the head and the bullets remained there. Outside of the house, Jose Peter Razo was shot multiple times. (*Id.*),

Police interviewed all of the victims, Marcus Dominguez, and the host of the party Ivan Villagrana. (App., p. 94-95). None of those interviews resulted in Petitioner being named as the shooter. No gun was ever recovered. Petitioner was not arrested until almost a year-and-one-half later.

The State's entire case against Petitioner was built entirely on circumstantial evidence and the State's theory that he was wearing a lot of red making him a rival gang member of the victims of the crime. (App., p. 185).

The State relied on the color "red" and the use of the term "red rag" throughout the trial and is illustrative of the circumstantial evidence theory. The State argued it "red clothing" theory in opening statement, during the trial, and closing argument. (App., p. 185). The State based virtually all of its arguments on "gang" affiliation supported by specific color-coded clothing. (App., p. 185). The prosecution's argument hinged on "red" clothing and a "red rag." The State cherry-picked witnesses who testified that the

shooter was wearing "a lot of red" and a "red rag" to support its theory. The prosecutor argued that Marcus Dominguez testified: "[h]e said he was, the defendant, was wearing gray shoes with red stripes or laces … And then Marcus also said he was wearing a gray cap with red trim and a red bandana underneath the cap." (App, p. 191). The prosecutor further argued in closing:

> There's also clothing or color. We already heard from more than one person he was wearing red clothing. He had some kind of red shoelaces, red bandana. It's the night of the party, okay. As we heard from person after person, lay witnesses, we know about gangs – as well as detectives, okay. The red color associated is associated with the Phoeniquera gang, all right.

(App., p. 191). The State continued arguing in its closing: "[e]ven people who did not point him out described the person who was doing the apologizing with the gun and the red bandanas, okay." (App., p. 191). The State's argument focused on one single thing, the color "red." The State prevailed on this tenuous theory of gang retribution and transferred intent. (App., p. 187)

At trial there was nothing more than inconsistent testimony identifying Petitioner as the shooter. Marcus Dominguez, the brother of the deceased victim and friend of Petitioner, testified

inconsistently. Mr. Dominguez initially testified: "They [the shots] were coming from Isidro from up here, from on top." (App., p. 206). However, Mr. Dominguez's testimony changed on cross-examination when he stated that he ***never saw Petitioner shoot***. (App., p. 206)). Again, on re-direct, Mr. Dominguez's testimony changed. (App., p. 206) This was the only witness to ever identify Petitioner as the shooter, and even his identification was re-canted during cross examination at trial.

Ivan Villagrana admitted on cross-examination that when police interviewed him the night of the shooting, he could not identify the shooter. (App., p. 206). Mr. Villagrana was asked at trial: "You don't know who the shooter was, correct" to which he responded, "Correct." (App., p. 206).

Jose Peter Razo, a victim, also failed to make any in-court identification of the shooter. Instead, Mr. Razo testified describing that the shooter was wearing: "Looked like a lot of red." (App., p. 206). Mr. Razo also responded "No" when asked if the person who shot him was in the courtroom. (App., p. 206).

German Borja told the police when he was interviewed after the shooting that he ***did not even know*** that Petitioner was at the party. (App., p. 207). During a later interview, Mr. Borja confirmed that he did not recall that Petitioner was even at the party on the night in question. (App., p. 207). Finally, at trial, Mr. Borja was asked: "Now isn't it true you didn't know it was Cheeto[1] at the time?" to which Mr. Borja responded: "I still don't know." (App., p. 207).

The State was able to secure a conviction on one inconsistent identification testimony based solely upon their theory that Petitioner was wearing red colored clothing, and a "red rag" on the night in question. No gun was produced or ever found that was linked to this crime.

On October 16, 2009, following the State's withdrawal of its intent to seek the death penalty, Petitioner, now 30-years-old, was sentenced to life without the possibility of parole until 25 years

[1] Petitioner was known as Cheeto by the people involved in this incident.

after the conclusion of sentences on counts two through four. (App., p. 173-74).[2]

Petitioner timely appealed, but his convictions were affirmed by the Arizona Court of Appeals and review was denied Following the direct appeal process, Petitioner timely filed a Rule 32 Petition for Post-Conviction Relief ("PCR"). Petitioner's appointed counsel pursuant to A.R.S. § 13-4031, filed a "no-issue" claim. (App., p. 198). Therefore, Petitioner was forced to proceed on his PCR claims *pro se*.

Petitioner's trial counsel signed an affidavit which stated the following:

> 3. During the jury trial of this case, I submitted a memorandum to the court requesting lesser-included offense instructions of attempted second degree murder for Counts II and III, which both charged attempted first degree murder.
>
> 4. As the Court of Appeals memorandum decision in this case noted, there is no on-the-record discussion of the request for the lesser-included instructions nor is there an on-the-record denial of the request for the attempted second degree murder instructions. Further,

[2] Petitioner was sentenced to 13.5 years on Count II, 13.5 years on Count III to run consecutive to Count II, 10.5 years on Count IV to run consecutive to Count III, and 7.5 years to run concurrently to Count II. (App., p. 174).

> there is no objection by defense counsel when these instructions were not read when the jury was instructed on the law.
>
> 5. The most likely explanation for this is that there was an off-the-record discussion about these particular instructions and the court denied them. It was my responsibility as trial counsel to object and make the necessary record so that the denial of these lesser-included instructions would be preserved for appeal. Assuming this is what happened, I failed to object and make the necessary record.

(App., p. 212-13). Despite trial counsel's sworn admission that he failed to object to the lack of a lesser-included offense instruction, PCR counsel filed a "no issue" claim.

Petitioner's initial PCR was denied, and, on review, the appellate court granted jurisdiction but denied relief. (App., p. 176). Additionally, the Arizona Supreme Court denied review of the Arizona appellate court's refusal to grant relief. (*Id.*).

While Petitioner's appeal was pending on the initial PCR, he, discovered Dr. Zacher's[3] medical report regarding the surgery performed on Carlos Sanchez just after the incident had occurred. (App., p. 215). Dr. Zacher's report stated that the two bullets, or

[3] Dr. Zacher was the emergency surgeon who handled the surgery on Carlos Sanchez when he was brought to the hospital after being shot.

fragments thereof, that were removed from Mr. Sanchez's skull were "sent to the authorities via the standard protocol." (App., p. 215).

Additionally, during the interim, counsel undersigned was able to discover two witnesses that were never called to testify during the jury trial: Sherise Ulibarri and Stephen DeLeon. Both Ms. Ulibarri and Mr. DeLeon provided affidavits about what they would have testified about had they been subpoenaed during the trial. (App., p. 217-24).

Subsequent to Petitioner's initial PCR, he timely filed a second PCR regarding the new evidence and lack of effective assistance of counsel at the initial PCR stage. (App., p. 178). Petitioner's second PCR was denied, and again Petitioner appealed. (App., p. 138). On March 26, 2018, the Arizona appellate court again accepted jurisdiction but denied relief. (App., p. 138). On July 10, 2018, a mandate issued. (App., p. 138).

E. District Court Case

On February 19, 2019, after having exhausted all of his state court remedies, Petitioner timely filed his Petition for Habeas

Corpus. (App., p. 173-83). Petitioner alleged he received ineffective assistance of counsel, that there were newly discovered facts which would have had a strong likelihood of altering the verdict, finding, or sentence if known at the time of trial, and that he was actually innocent. (App., p. 178-79).

On May 21, 2019, the State filed a limited answer to Petitioner's Petition, asserting that the Petition should be dismissed because it was time barred based upon the AEDPA's time limitation. (App., p. 152-169). Aside from the State's timeliness argument, the State failed to respond to any of Petitioner's claims raised in the Petition. On June 20, 2019, Petitioner filed a reply to the State's timeliness argument establishing that pursuant to *Celaya v. Stewart*, 691 F. Supp. 2d 1046 (D. Ariz. 2010) *aff'd* 497 Fed. Appx. 744 (9th Cir. 2012), Petitioner's Petition was timely filed as the date for when a PCR petition is no longer pending in Arizona is the date the mandate issues. (App., p. 137-51).

On April 13, 2020, Magistrate Judge Camille D. Bibles filed her Report and Recommendation, adopted by the district court, which ruled that the Petition had, in fact, been timely filed. (App.

p. 10-11). The Report and Recommendation, adopted by the district court, also recommended that Petitioner's petition be denied and that any request for a Certificate of Appealability also be denied. (App., p. 28-29).

On April 29, 2020, the District Court, The Honorable Neil V. Wake adopted the Magistrate's Report and Recommendation and denied all relief requested in the Petition, including a Certificate of Appealability. (App., p. 3). On May 28, 2020, Mr. Sauceda filed a timely Notice of Appeal. (App., p. 116-17).

F. The Ninth Circuit

On June 29 2020, Petitioner filed a timely Motion for Certificate of Appealability in the United States Court of Appeals for the Ninth Circuit. (App., p. 80-115). On November 2, 2020, the Ninth Circuit denied Petitioner's Motion for Certificate of Appealability. (App., p. 2). On November 16, 2020, Petition filed his Motion for Reconsideration/Panel Rehearing. (App., p. 55-79). On November 23, 2020, the Ninth Circuit denied that motion and closed the case, ruling that no further filing would be entertained. (App., p. 1). On December 7, 2020, Petitioner filed a Petition for

Rehearing En Banc. (App., p. 30-54). The Ninth Circuit has made no ruling on such Petition as of the time of this filing.

This Petition for Certiorari timely follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Petitioner has been denied a Certificate of Appealability ("COA") which prevents the Ninth Circuit from ever having jurisdiction to review the merits of his case. "Until the prisoner secures a COA, the Court of Appeals ***may not rule on the merits of his case***. *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003*)." Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Furthermore, this Court has held that a determination of whether a COA should be issued is not a decision on the merits of the underlying arguments. *Miller-El*, 537 U.S. at 336; *Buck*, 137 S.Ct. at 773 (2017); *Slack v. McDaniel,* 529 U.S. 473, 481 (2000). Here, without a COA Petitioner will never have the chance to have his appeal heard on the merits.

Pursuant to 28 U.S.C. § 2253, the Ninth Circuit lacks jurisdiction because it determined that Petitioner "has not made a 'substantial showing of the denial of a constitutional right.' 28

U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)." (App., p. 2).

However, that Order not only conflicts with this Court's well-settled precedent, but also conflicts with other Circuits, including prior Ninth Circuit decisions in similar cases.

The Sixth Amendment also guarantees that Petitioner should have received effective assistance of counsel for his defense. However, since trial counsel, by his own sworn admission, failed to object to, or even create a record on, the lack of lesser-included offense instructions, he was denied this constitutional right. Moreover, trial counsel failed to object to the lack of *Willits* instruction based upon lost, destroyed, or misplaced evidence, that prevented trial counsel from ever testing two bullets removed from one of the victim's skull to establish alternative defenses that there was a second gunman. Finally, the Ninth Circuit's decision conflicts with clear precedent in that same Circuit, together with all of the other Circuits, and this Court that failure to investigate exculpatory evidence and witness testimony is ineffective assistance of counsel.

This Court should accept review where the outcome is debatable among jurists of reason (*Miller-El*, 533 U.S. at 327). Cases similar to Petitioner's case have had COAs issued. Therefore, by definition, it is debatable among jurists of reason whether Petitioner was denied a constitutional right. Here, trial counsel admitted that his performance fell below the objectively reasonable standard. Further, while prejudice is not per se, it is hard to imagine in what way the Petitioner was not prejudiced. Justice Stevens in *Beck* announced that the "third option" of a lesser included offense instruction guarantees the reliability in the reasonable doubt standard. Here, Petitioner did not receive that "third option" and the jury was left with the convict or acquit scenario.

The lack of a lesser-included offense instructions directly conflicts with precedent of this Court, and other circuits in similar situations, that a COA should have issued. Petitioner calls upon this Court's supervisory powers as the Ninth Circuit's denial of a COA so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power.

United States v. Hasting, 461 U.S. 499, 505 (1983) (supervisory powers are used to "preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury").

Further, this Court should also accept review where trial counsel fails to investigate exculpatory evidence and witness testimony. The Ninth Circuit, together with all of the Circuits[4] and this Court[5] have held that where an attorney fails to investigate exculpatory evidence a COA should have issued. Here, two witnesses who were with the Petitioner on the night in question were never called to testify during the guilt phase of the trial. Such a decision conflicts with clear precedent from this Court and other Circuits, together with the Ninth Circuit's own precedent.

---

[4] *Rivera Alicea v. United States*, 404 F.3d 1, 3 (1st Cir. 2005); *Ryan v. Rivera*, 21 F. App'x 33, 34 (2d Cir. 2001); *Gregg v. Rockview*, 596 F. App'x 72, 76 (3d Cir. 2015); *United States v. Runyon*, 983 F.3d 716, 721 (4th Cir. 2020); *Smith v. Dretke*, 422 F.3d 269, 276 (5th Cir. 2005); *Cobble v. Smith*, 154 F. App'x 447, 450 (6th Cir. 2005); *Carter v. Duncan*, 819 F.3d 931, 939 (7th Cir. 2016); *Harris v. Bowersox*, 184 F.3d 744, 756 (8th Cir. 1999); *Roberts v. Champion*, 18 F. App'x 674, 677 (10th Cir. 2001); *Ojeda v. Sec'y for Dep't of Corr.*, 279 F. App'x 953, 954 (11th Cir. 2008).

[5] *Buck v. Davis*, 137 S. Ct. 759, 780 (2017); *Banks v. Dretke*, 540 U.S. 668, 705 (2004).

Finally, Petitioner has demonstrated a convincing claim of actual innocence. Petitioner is an innocent man condemned to effectively spend the rest of his life in prison for a crime which he did not commit. This Court's supervisory powers should be used to ensure that innocent individuals are set free. It is a travesty of justice when an innocent individual is forced to spend his life in prison. That is precisely what happened to Petitioner.

COAs, while not intended to be universally granted, were intended as a gate-keeping method only to weed out those frivolous attempts to appeal the denial of habeas relief. *Miller-El*, 537 U.S. at 337. Petitioner's case is anything but frivolous, and presents a compelling case where an innocent man has been condemned to life imprisonment.

Moreover, the Fifth and Sixth Circuits have determined that a blanket denial of COAs is improper. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001); *Haynes v. Quarterman*, 526 F.3d 189, 194 (5th Cir. 2008). Here, as in *Murphy,* the district court denied any COA before any request could even be made by Petitioner. Such a blanket denial is improper and the Ninth Circuit should have

remanded the case for the district court to determine whether a COA should be granted for each individual issue contained in Petitioner's habeas petition.

Indeed, the peremptory denial of all of Petitioner's requests for COAs drastically departs from the norm in other circuits where very few, if any cases denied COAs on all claims.

The statute for determining if a COA should be issued sets forth a two-step process: "An initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). The only determination in the first step is whether a claim is reasonably debatable, no decision on the merits should ever be made as the appellate court is without jurisdiction to consider the merits.

Finally. the Fifth and Sixth Circuits have determined that blanket denial of COAs is improper. *Haynes v. Quarterman*, 526 F.3d 189, 194 (5th Cir. 2008) (citing *Slack*, 529 U.S. at 483*); Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). Here, the district court denied any COA prior to such request by Petitioner. Moreover, the Ninth Circuit's denial was one sentence. No individualized

consideration was given to each claim. Just as in *Murphy*, here, the district court denied any COA prior to such request. Such a blanket denial is improper this Court should remand with instructions to provide individualized consideration to each claim.

Review by this Court is necessary because Petitioner has presented important questions regarding the fact that the Ninth Circuit's decision to deny a COA conflicts with this Court's precedent and previous precedent from the Ninth Circuit as well as other Circuits. Moreover, this Court has supervisory powers that allow for it to grant review when issues are presented that establish that the conviction does not rest on the fact that the jury was presented with all of the necessary information. This is Petitioner's last available attempt to have his conviction reviewed by a court on the merits. Petitioner has maintained his innocence throughout this entire process, and was only convicted because of weak circumstantial evidence without more. Therefore, this Court should remand the matter back to the Ninth Circuit with instructions to grant COAs so that Petitioner can have his case reviewed on the merits.

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT UTILIZED AN UNDULY BURDENSOME CERTIFICATE OF APPEALABILITY STANDARD THAT CONTRAVENES THIS COURT AND NINTH CIRCUIT PRECEDENT IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY. EVEN THOUGH REASONABLE JURISTS COULD DEBATE THAT PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE PETITIONER'S TRIAL COUNSEL ADMITTED THAT HE FAILED TO OBJECT TO THE LACK OF A LESSER-INCLUDED OFFENSE INSTRUCTION:

Well-established Supreme Court precedent establishes that the lack of a lesser-included offense instruction in capital cases is a denial of the constitutional right to the reasonable-doubt standard. *Beck*, 447 U.S. at 634 ("providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard"). Petitioner was convicted in a capital case (the only reason why he was not sentenced to death was because the state removed the request). However, not only was the jury never presented with a lesser-included offense instruction, Petitioner's trial counsel, by his own sworn admission, also failed to object or even create a record on the lack of those instructions.

In the present case, Petitioner's trial counsel failed to not only object to the lack of a lesser-included offense instruction, but also failed to make any record regarding the request and denial of such instructions. The lack of a lesser included offense instruction is unconstitutional violating the reasonable doubt standard under the Fifth Amendment. *Beck*, 447 U.S. at 634. Therefore, it is debatable among reasoned jurists whether Petitioner has been denied the constitutional right to lesser-included offense instructions.

This Court has held that it is a denial of a defendant's due process and the reasonable doubt standard when they are convicted, and the jury is not permitted to consider a lesser included offense instruction. *Beck*, 447 U.S. at 634-35; *United States v. Hernandez*, 476 F.3d 791, 801 (9th Cir. 2007) (reversing a conviction for possession with intent to distribute because no lesser-included offense instruction was provided to jury); *United States v. Gibbs*, 904 F.2d 52, 54–55, 59 (D.C.Cir.1990) (holding it was reversible error to fail to provide a lesser-included offense instruction to the jury). In *Beck,* Justice Stevens opined: "providing the jury with the 'third option' of convicting on a lesser-included

offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Id.* at 634. In so opining, Justice Stevens relied on Justice Brennan's reasoning in *Keeble v. United States*, 412 U.S. 205, 208 (1973):

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction-in this context or any other-precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."

Beck, 447 U.S. at 634.

The *Beck* court reasoned: "For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the 'third option' of convicting on a lesser included offense

would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 635.

Further, it is well-established precedent that a defendant does not receive the effective assistance of counsel where that counsel's performance falls below an objective standard of reasonableness and, there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding could have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The *Strickland* court determined that "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Here, Petitioner's trial counsel admitted: "It was my responsibility as counsel to object and make the necessary record so that the denial of these lesser-included offense instructions would be preserved for appeal." (App., p. 212-13). Petitioner's trial counsel admitted that he had committed ineffective assistance of counsel in violation of the Sixth Amendment. However, neither the Arizona appellate court on direct review, nor the Arizona appellate

court's on PCR review, would accept that the failure of trial counsel caused any harm.

Ineffective assistance of counsel claims are not required to establish that there "would" be a changed outcome, but rather only require a "reasonable probability that the outcome would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Petitioner demonstrated that but for his trial counsel's failure to object, or even create a record, to the lack of a lesser-included offense instruction, there was a reasonable probability the outcome would have been different.

In *Lambright*, the Ninth Circuit granted a COA on the claim that the petitioner was denied a constitutional right when a lesser-included offense instruction was not included. The *Lambright* court stated: "Further, based on the face of the complaint, we conclude that Lambright has 'facially allege[d] the denial of a constitutional right.'" *Lambright*, 220 F.3d at 1028 (quoting *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000)).

In *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015), the Ninth Circuit affirmed the granting of a habeas corpus where trial

counsel failed to request a lesser included offense instruction on a third-strike attempted second-degree assault conviction. There, the *Crace* court stated:

> But it does not require a court to presume—as the Washington Supreme Court did—that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both. To think that a jury, if presented with the option, might have convicted on a lesser included offense is not to suggest that the jury would have ignored its instructions. On the contrary, it would be perfectly consistent with those instructions for the jury to conclude that the evidence presented was a better fit for the lesser included offense.

Id. at 847.

In the present case, Petitioner was convicted of first-degree murder of his best friend. Surely, it would be debatable to reasonable jurists as to whether Petitioner received ineffective assistance of counsel when his trial counsel admitted that he failed to object or even make a record regarding the lack of lesser-included offense instructions. The District Court relied on the Arizona appellate court's reasoning that because Petitioner intended to kill one person that intent transferred to all others. (App., p. 14). However as stated by the *Crace* court, a jury can convict on a lesser-

included offense instruction if the evidence warrants such. Here, the evidence as discussed herein warranted such a lesser included offense instruction.

The Sixth Amendment protects the right of all defendants to receive effective assistance of counsel. *See* U.S. const., amend. VI. In *Strickland*, writing for a majority of this Court, Justice O'Connor determined that the proper test to determine whether the person received effective assistance of counsel was: "First, the defendant must show that counsel's performance was deficient […] Second, the defendant must show that deficient performance prejudice the defense." *Strickland*, 466 U.S. at 697. In the present case, Petitioner's trial counsel admitted his performance was deficient. Moreover, Petitioner was prejudiced by the deficient performance because the jury did not receive the third option as explained by this Court in *Beck*. On direct appellate review of his conviction, because of the lack of objection, the appellate court was required to review based upon only the fundamental error standard.

As established by the Ninth Circuit itself, where counsel admits their own error, the effective assistance of counsel claim is

ripe for consideration. *United States v. Vargas-Lopez*, 243 F.3d 552 (9th Cir. 2000) (determining counsel's admitted failure to execute plea agreement was ineffective assistance of counsel resulting in vacating the conviction of the defendant).

Further, this Court has the supervisory power to implement a remedy for the violation of Petitioner's Sixth and Fourteenth Amendment rights. *Murphy*, 461 U.S. at 506; *see also Rea v. United States*, 364 U.S. 206, 222 (1956). This Court's supervisory powers also are available to ensure that a conviction rests on appropriate considerations validly before a jury. *Murphy*, 461 U.S. at 506; *Elkins v. United States*, 364 U.S. 206, 222 (1960). A defendant is not precluded from receiving a lesser-included offense instruction where an all-or-nothing defense is asserted. *United States v. Crutchfield*, 547 F.2d 496, 501 (9th Cir. 1977; *see also Beck*, 447 U.S. at 625. Therefore, any claim that the Arizona appellate court's determination that the transferred intent presented by the State made any conviction under a lesser included offense instruction unnecessary inapposite.

It is clearly debatable among jurists of reason whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel. Indeed, Petitioner's own trial counsel admitted to his ineffectiveness. Therefore, Petitioner should have received a COA regarding this issue.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT UTILIZED AN UNDULY BURDENSOME CERTIFICATE OF APPEALABILITY STANDARD THAT CONTRAVENES THIS COURT'S, AND NINTH CIRCUIT PRECEDENT, ON THE DENIAL OF A CERTIFICATE OF APPEALABILITY, EVEN THOUGH REASONABLE JURISTS COULD DEBATE THAT PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHERE HIS TRIAL COUNSEL FAILED TO OBJECT TO THE LACK OF A *WILLITS* INSTRUCTION ALLOWING THE JURY TO MAKE A NEGATIVE INFERENCE AGAINST THE STATE:

Contrary to the Magistrate's Report and Recommendation, adopted by the District Court, Petitioner could not be procedurally defaulted because he fully exhausted his state court claim by bringing this matter in his timely second PCR petition. (App., p. 123). Furthermore, the holding in *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), establishes that procedural default can be forgiven when there is a "substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no

counsel or counsel in that proceeding was ineffective." *See also Trevino v. Thaler*, 569 U.S. 413, 428 (2013) (affirming and expanding *Martinez*). In the present case, Petitioner had no counsel on his initial PCR petition. While counsel was technically appointed, that counsel filed a "no issue" claim leaving Petitioner to proceed *pro se*.

Additionally, the Report and Recommendation, adopted by the District Court, discussed the merits of this claim after stating that Petitioner was procedurally defaulted from bringing it. In *Lambright*, the Ninth Circuit determined that a COA should have issued because the merits were also addressed along with the procedural bar. *Lambright*, 220 F.3d at 1028. There, when the district court denied the defendant's habeas petition for lack of a lesser-included offense instruction based upon a procedural bar, also "apparently addressed the merits of the claim." *Id.* at 1028. In the present case, the district court continued to examine the merits of the claim after concluding that the claim was procedurally barred. Here, Petitioner has made a facial allegation in his Petition

that he has been denied a constitutional right. Therefore, just as in *Lambright*, a COA should have issued.

In Detrich v. Ryan, 740 F.3d 1237, 1245 (9th Cir. 2013), the Ninth Circuit defined an "insubstantial claim" as one that "does not have any merit or … is wholly without factual support." The Ninth Circuit's order denying a COA is clearly at odds with this precedent, as well as other Circuit's precedents defining what an "insubstantial claim" is. *United States v. Ryan*, 215 F. App'x 331, 332 (5th Cir. 2007); *Buie v. McAdory*, 322 F.3d 980, 982 (7th Cir. 2003). Petitioner's claims are anything but the frivolous claims that the "gate-keeping" function of COA were intended to remove. Petitioner's claims not only have merit but should be granted.

In the present case, Petitioner's trial counsel failed to introduce the written report of Dr. Zacher, (the trauma surgeon that removed the bullets from Sanchez's head) at trial. Instead, trial counsel relied only on Dr. Zacher's testimony. The Arizona appellate court concluded that there was no error in not providing a *Willits* instruction because "when asked what happened to the fragments, the surgeon indicated such items are 'usually' given to

an officer waiting outside the operating room." (App., p. 23). Dr. Zacher specifically testified: "We handed those directly off to the police officers usually waiting right outside the operating room." (App., p. 21). Therefore, the Arizona appellate court was incorrect when it stated that bullet fragments were "usually" given to an officer. Instead, Dr. Zacher's testimony was that they were handed to the officer, and the use of the word "usually" was to describe where the officer was waiting.

Moreover, Dr. Zacher's written medical report indicated that the bullet fragments were turned over to the authorities. The medical report reads in pertinent part: "These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments." (App., p. 215). That medical report was created on, or about, the same day that the surgery took place, whereas Dr. Zacher's testimony was nearly five years after the event had taken place. Clearly, the written report establishes that the bullets were provided to the police.

In *Turner v. Calderon*, 281 F.3d 851, 874 (9th Cir. 2002), the Ninth Circuit has issued a COA when trial counsel failed to have

blood evidence tested. There, trial counsel failed to have blood evidence tested to support the defense that the defendant was high on meth. In the present case, Petitioner's trial counsel could not have the bullet fragments tested which were removed from Sanchez's skull because the fragments were not in the possession of the police. Therefore, failure to have the jury instructed on the lost, destroyed, or misplaced evidence is by analogy the same as not having such evidence tested.

A *Willits* instruction would have permitted the jury to make a negative inference against the state. What is clear is that Petitioner was unable to test or review the bullets recovered from Mr. Sanchez's head. Therefore, he was prejudiced because he could not establish his defense that there may have been another gun and that he was not the shooter.

The entirety of the State's circumstantial case centered around seven bullet wounds, seven casings, and seven bullets. However, Petitioner established that the State's theory was incorrect as there could have been a second gun or gunman involved.

Detective Lowe testified:

> Yes, just to clear up the matter. A went through the wall, struck the bathroom vanity. B was found inside of the wall of the cupboard. As I said, C went through the wall and divided. A piece was found in the bathtub and a piece was found in the wall underneath the toilet.

(App., p. 204). This testimony established that three bullets fired inside the house were recovered from the bathroom. Additionally, Kristopher Dominguez was shot once, and the bullet was found underneath his pant leg inside the house. The State had recovered four bullets total from inside the house. Finally, two of the bullets remained in Sanchez's head, totaling six bullets shot inside the house.

Reports from that night establish the following wounds, one bullet wound to Kristopher Dominguez, two bullet wounds to Sanchez, and four bullet wounds to Borja—a total of seven bullet wounds. The police recovered five bullets (or bullet fragments from inside the house) with two more bullets still inside Sanchez's head. In contrast, the police only recovered a total of seven casings from the scene of the crime, five inside the house, and two outside of the house. At first glance, the totals match up. However, this

calculation fails to consider that Razo was shot three times outside of the house in the front yard. Therefore, there would have been ten total shots, but the police only recovered 7 casings. Therefore, there is a discrepancy in the evidence.

	Inside the House	Outside the House	Total
Bullet Wounds	7	3	10
Bullets	5 + 2 inside Sanchez's head	3	10
Casings	5	2	7

Petitioner was prevented from testing the evidence removed from Mr. Sanchez's skull. Such evidence could have been used to establish the multi-gunman theory.

There is a clear precedent on the "substantial" claim requirement establishing that this case is not a frivolous appeal. Moreover, the Sixth Circuit has held that the blanket denial of a COA is improper. Therefore, reasonable jurists could debate whether the procedural default was proper, or whether Petitioner's

right to effective assistance of counsel was violated. This Court should issue a COA on this issue as well.

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT UTILIZED AN UNDULY BURDENSOME CERTIFICATE OF APPEALABILITY STANDARD WHICH CONTRAVENES UNANIMOUS PRECEDENT IN DENYING A CERTIFICATE OF APPEALABILITY, EVEN THOUGH REASONABLE JURISTS COULD DEBATE THAT PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS WHEN HIS TRIAL COUNSEL FAILED TO DULY INVESTIGATE EXCULPATORY EVIDENCE AND WITNESSES:

The Ninth Circuit has concluded that a COA is warranted where counsel fails to investigate exculpatory evidence and witness testimony. *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006); *see also Rios v. Rocha*, 299 F.3d 796, 799 (9th Cir. 2002). All of the other Circuits have concluded that failure by defense counsel to reasonably investigate witnesses warranted the issuance of a COA. (*Supra*, p. 15 fn. 4). This Court has also concluded that failure by defense counsel to reasonably investigate warrants a COA. (*Supra*, p. 15 fn. 5). Therefore, it is, by definition, debatable that reasonable jurists would disagree with the determination that

Petitioner was denied the constitutional right to effective assistance of counsel under these circumstances.

Here, Petitioner's trial counsel failed to duly investigate exculpatory witness testimony denying him his constitutional right to effective assistance of counsel. In *Strickland*, Justice O'Connor stated that attorneys have a duty to investigate, or to at least investigate to establish that strategic choices make reasonable investigation unnecessary. *Strickland*, 466 U.S. at 691. There, the *Strickland* court stated: "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. Here, Petitioner's trial counsel failed to duly investigate exculpatory testimony.

Petitioner's trial counsel's failure to investigate is, without question, a substantial claim for ineffective assistance of counsel. *Reynoso*, 462 F.3d at 1112; *see also Rios*, 299 F.3d at 799. In *Reynoso*, the failure to investigate was established by defense counsel failing to question witnesses about the expectation of reward money in return for their testimony inculpating the

defendant. *Id.* at 1118. There, had defense counsel investigated, she would have been able to provide the jury an explanation why the witnesses identified the defendant regardless of their lack of knowledge. *Id.* at 1118.

In *Rios*, defense counsel failed to adequately investigate witnesses that would have testified that the defendant was not the shooter. *Rios*, 299 F.3d at 800. There, the trial counsel failed to investigate numerous witnesses before settling on a trial strategy where he would not put forth any evidence on the identity of the shooter not being his client.

Rios is almost identical to the present case, as both cases involved a gang shooting at a party with multiple witnesses. Moreover, both trial counsel refused to put on evidence of eye-witnesses who would testify that the defendant was not the shooter. In the present case, trial counsel did not even offer to the jury the testimony of an eye-witness who attended the party with the defendant and was present when the shooting occurred. However, such a witness, Mr. DeLeon, existed, which was discovered after trial.

The Ninth Circuit held in *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999), that, "the failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." Similarly, in the present case, Petitioner's trial counsel failed to call, or even subpoena, Ms. Ulibarri, and Mr. DeLeon, both of whom would have provided exculpatory testimony.

Ms. Ulibarri would have testified to the following facts:

> 7. On that particular day, December 13, 2003, I personally bought Isidro a pair of Jordan tennis shoes as a Christmas present. The shoes were all black with black shoelaces.
>
> […]
>
> 9. I personally remember that Isidro was not wearing any garment that night which was red in color.
>
> 10. I remember that Isidro was dressed in jeans and a dark colored sweatshirt on the night in question.

(App., p. 218). Mr. DeLeon corroborated Ms. Ulibarri's affidavit stating:

> 5. I remember being with Isidro during the entire day on December 13, 2003 and into the early morning hours of December 14, 2003.
>
> 6. On that particular day of December 13, 2003, I specifically remember that Isidro was wearing dark blue or black clothing and a pair of brand new black colored

> 'Jordan' tennis shoes, who Isidro told me, were bought for him by his then girlfriend Cherise [sic] Ulibarri.

(App., p. 222-23).

The State's entire case was premised on the fact that Petitioner (the alleged shooter) was wearing "a lot of red" and a "red rag" on the night in question. The State's theory permeated its opening argument, its presentation of witness testimony, and its closing argument. Moreover, as quoted above, the State's closing argument specifically relied on this theory.

The testimony of Ms. Ulibarri and Mr. DeLeon would have had a reasonable probability of changing the outcome. As stated previously, the Marcus Dominguez was the only witness to identify Petitioner as the shooter. However, Marcus gave inconsistent testimony and even recanted his identification altogether on cross-examination. No other witness identified Petitioner as the shooter, including two of the victims. Therefore, had the jury been presented with clear, consistent testimony, from Ms. Ulibarri and Mr. DeLeon, that Petitioner was not in a gang, was not wearing red clothing, and never had a gun, together with the testimony of Mr.

DeLeon that Petitioner was not the shooter, would have had a reasonable probability of changing the outcome.

There is clear precedent from all Circuits that the failure of defense counsel to investigate exculpatory witness testimony warrants a COA. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit have all held that counsel's failure to investigate exculpatory witnesses should result in a COA. (*Supra*, p. 15 fn. 4). Moreover, the Ninth Circuit's decision to deny such a requests directly contradicts its own precedent and the precedent of all of the other Circuits. Furthermore, the blanket denial of a COA prior to any requests has been held to be improper. *Murphy*, 263 F.3d at 467. Just as in *Reynoso* and *Rios*, Petitioner should have received a COA allowing him to present this claim on the merits. It is, indeed, debatable, among jurists of reason that Petitioner has brought a substantial claim of the denial of his constitutional rights.

IV. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT IMPOSED AN UNDULY BURDENSOME CERTIFICATE OF APPEALABILITY STANDARD IN DENYING A CERTIFICATE OF APPEALABILITY, WHICH CONTRAVENES THIS COURT'S PRECEDENT, EVEN THOUGH REASONABLE

JURISTS COULD DEBATE WHETHER PETITIONER WAS FACTUALLY INNOCENT:

Petitioner presented a convincing claim of actual innocence and should have received a COA. In, [then the name of the case, this Court held that a claim of actual innocence defeated a claim that habeas issues should not be reviewed. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). The *McQuiggin* court opined:

> In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U.S., at 404, 113 S.Ct. 853.

Id. at 392.

Actual innocence requires factual innocence, not mere legal insufficiency. *Sweger v. Chesney*, 294 F.3d 506, 523 (3d Cir. 2002). In *Majoy v. Roe*, 296 F.3d 770, 773 (9th Cir. 2002), the Ninth Circuit has held that actual innocence was a valid claim to establish that a petitioner could bring valid claims of constitutional violation.

In the present case, Petitioner is factually innocent and has established such as argued below. The State's entire case hinged

on a theory of circumstantial evidence, transferred intent, and inconsistent witness testimony.[6]

However, there is actual evidence, uncontroverted by previous inconsistent statements, that Petitioner was: (1) not wearing any red clothing of any kind; (2) was not in a gang; and (3) did not have a gun on the night in question.

First, as stated above, Petitioner was wearing dark colored clothing. Ms. Ulibarri and Mr. DeLeon, if they had been called to testify as witnesses, would have testified that Petitioner was wearing dark clothing, including jeans, a dark (navy or black) sweatshirt, and all black Jordan's. Furthermore, Ms. Ulibarri's affidavit states that Petitioner was not wearing any red on the

[6] The State relied on transferred intent from the motive to kill one, to include all of the victims. However, there was specific evidence that there was a struggle for the gun that resulted in the shot that killed Kristopher Dominguez. Borja testified that he heard two shots and saw Sanchez hit the floor. Borja then grabbed the gun and struggle ensued. Bullets struck Borja in the chin and wrist and another hit Kristopher killing him instantly. Therefore, there could not have been any premeditated transferred intent after the struggle ensued. In any event, there was no evidence to even establish that Petitioner was the shooter in the first place.

night in question. Mr. DeLeon's affidavit confirms Ms. Ulibarri's affidavit.

The State relied on inconsistent witness testimony. However, none of that testimony confirmed that Petitioner was wearing "a lot of red" on the night in question. Mr. Dominguez testified that Isidro was wearing a gray sweatshirt. Furthermore, Mr. Dominguez's in-court identification was inconsistent. First, Mr. Dominguez testified that the shots came from Isidro. However, that testimony was impeached by his cross-examination where he stated, on the night in question, he did not know if Petitioner was the shooter, or if he was just running from the shooter. (App., p. 48).

The State's other "eyewitnesses" all failed to provide an in-court identification of Petitioner as the shooter. Villagrana testified that he was unaware who the shooter was. (App., p. 48 ("Q. You didn't know who the shooter was correct? A. Correct."). Razo, did not make any in-court identification at all, and only testified that the unidentified shooter was wearing what "looked like a lot of red." (App., p. 48). Borja testified that he did not even know Petitioner was at the party. (App., p. 48). It must be noted that both Razo

and Borja were shot on the night in question. Neither of them identified Petitioner as the shooter. Moreover, Borja testified that he struggled with the shooter and still did not identify Petitioner as the shooter.

Additionally, the State relied on its theory that Petitioner was in a gang, thus making the shooting theory that the shooting a gang shooting between rival gang members. However, Ms. Ulibarri stated in her affidavit that "To my personal knowledge, Isidro Sauceda was never in a gang, and I never saw any indication of gang related activity or affiliation on his part." (App., p. 219). Mr. DeLeon stated in his affidavit that: "To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang." (App., p. 223).

Finally, Petitioner was searched at the door of the party for weapons, and no weapon was found on Petitioner's person. Indeed, Mr. DeLeon stated in his affidavit: "To my personal knowledge Isidro Sauceda did not have a gun on the night of December 13, 2003 because I personally saw the individual at the entrance of the party search Isidro, myself and others. I did not see any gun emerge

from the person of Isidro at that time." (App., p. 219). Ms. Ulibarri also confirmed in her affidavit: "Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my personal knowledge he did not own a weapon of [sic] of any type." (App., p. 223).

Without a gun, and with the Detective Lowe's misrepresentations that there were seven bullets and seven casings found, the State was able to receive a conviction. However, the evidence establishes that Petitioner was not wearing red, was not in a gang, and did not have a weapon of any kind on his person. The State's entire case was premised on the fact that the shooter was wearing a lot of red colored clothing and a "red rag." If Petitioner was not wearing red, by definition, he could not have been the shooter.

Further, as discussed above, this Court's supervisory power should be used to ensure that an actually innocent individual is set free. Petitioner has spent over a decade in prison for a crime that he did not commit. Trial counsel's failures together with the lack of evidence presented to the jury establishes that not only is

Petitioner innocent based upon the legal insufficiency, but also because he is factually innocent. By definition, a person who does not have a gun, who did not have a gun on him when he was searched, and who multiple victims could not identify as the shooter, establishes that Petitioner is factually innocent.

Petitioner has not only established that reasonable doubt exists, but also that he is actually innocent. Therefore, this Court should issue a COA to allow him to present this issue on appeal for the court to decide on the merits.

CONCLUSION

Therefore, based upon the foregoing, Petitioner respectfully requests that this Court accept his Petition for Certiorari and remand this matter back to the Ninth Circuit with directions to grant Petitioner a Certificate of Appealability on all of his issues.

Dated: February 21, 2021.

Respectfully submitted,

By: ▶ 
(SIGNATURE OF APPELLANT OR ATTORNEY)

Sandra Slaton, *Counsel of Record*
HORNE SLATON, PLLC
6720 N. Scottsdale Road, Suite 285
Scottsdale, Arizona 85253
Tel: (480) 518-2154
slaton@horneslaton.com
On behalf of Petitioner, Isidro Sauceda

CERTIFICATE OF COMPLIANCE

I, Sandra Slaton, do certify that the foregoing document complies with Rule 33.1 and Rule 33.1. The foregoing document contains 8,630 words pursuant to Microsoft Word 365. The word count is less than the 9,000 words permitted. The foregoing document is also in Century Schoolbook, double spaced, and font size of 14 point.

Dated: February 21, 2021

By: ▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)