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

APPENDIX

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February 21, 2021

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISIDRO SAUCEDA, Petitioner-Appellant, v. DAVID SHINN, Director, Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-16038 D.C. No. 2:19-cv-01132-NVW District of Arizona, Phoenix ORDER

Before: TALLMAN and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant 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).

Any pending motions are denied as moot.

DENIED.

FILED

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U.S. COURT OF APPEALS

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Isidro Sauceda,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-19-01132-PHX-NVW

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Debra D. Lucas
Acting District Court Executive/Clerk of Court

April 29, 2020

By s/ Rebecca Kobza
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Isidro Sauceda, Petitioner, v. David Shinn,[1] Attorney General of the State of Arizona, Respondents.	No. CV 19-01132 PHX NVW (CDB) **REPORT AND RECOMMENDATION**

TO THE HONORABLE NEIL V. WAKE:

Petitioner Isidro Sauceda, who is represented by counsel in this matter, filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on February 19, 2019, challenging his state court convictions on one count of first-degree murder, two counts of attempted first-degree murder, and one count each of aggravated assault and assisting a criminal street gang. Respondents docketed a Limited Answer to Petition for Writ of Habeas Corpus, (ECF No. 10), and Sauceda replied to the answer to his petition (ECF No. 11). Sauceda contends he is entitled to habeas relief because he was denied his right to the effective assistance of counsel and he has discovered new facts establishing his actual innocence. Respondents contend the petition is not timely and Sauceda's newly discovered facts do not establish his actual innocence.

[1] Effective October 21, 2019, David Shinn replaced Charles Ryan as Director of the Arizona Department of Corrections. Pursuant to Federal Rule of Civil Procedure 25(d), Shinn is automatically substituted as the party of record.

I. Background

A. State court proceedings

A grand jury indictment returned May 6, 2005, charged Sauceda with one count of first-degree murder, two counts of attempted first-degree murder, one count of aggravated assault, and one count of assisting a criminal street gang. (ECF No. 10-1 at 3-6).[2] The State noticed its intent to seek the death penalty and also filed a notice of aggravating factors. (ECF No. 10-1 at 8-9). "Prior to trial, [Sauceda] moved to dismiss the indictment, claiming it was obtained with false testimony from the investigating officer at the grand jury proceedings. The trial court summarily denied the motion." *State v. Sauceda*, 2011 WL 2517250, at *1 (Ariz. Ct. App. June 23, 2011). The motion to dismiss the indictment was filed July 16, 2007, more than two years after the grand jury indictment was returned. *See* Appellee's Answering Brief, *State v. Sauceda*, 2010 WL 9446084, at *18 (Ariz. Ct. App. 2010).

Citing portions of the trial transcript, Respondents have summarized the testimony presented at Sauceda's trial as follows:

> On December 13, 2003, David and several friends held a party at his Glendale home while his parents were away. (Exh. D, at 108-11.) To ensure the party was "safe," partygoers were patted down and asked if they had weapons. (*Id.* at 49-50.) While this was not intended to be a gang party, many members of rival gangs attended. The first to arrive were three members of the Phoeniqueras, a local gang known for wearing red clothes. (Exh. F, at 138-39.) The three were Sauceda, Marcus, and Marcus' brother, Khris. (*Id.*)[3] At trial, four witnesses identified Sauceda as a member of the

[2] Sauceda was not arrested until seventeen months after the shooting, which occurred in the early morning hours of December 14, 2003. Appellant's Brief, *State v. Sauceda*, 2010 WL 3391172, at *10 (Ariz. Ct. App. July 14, 2010). "No one was apprehended despite extensive interviews immediately following the shooting and no one would identify who was the shooter at the party." *Id.* at *8.

[3] The Arizona Court of Appeals noted:

> Our review of the record finds there was substantial information developed by the Detective during his investigation of the shooting that would permit him to testify that Defendant was a member of the Phoeniqueras. This information included witness statements that: (1) Defendant claimed the Glendale gang and threw up signs and said "Glendale," which is a "gang type of thing;" (2) Defendant arrived at the party with other documented members or associates of the

> Phoeniqueras and remembered him wearing dark clothes and a red bandana. (Exh. C, at 62 (Marcus); Exh. E, at 27, 44, 47 (Ivan), 125, 133, 136 (Jose); Exh. G, at 50, 72-73 (German).) As Marcus remembered, Sauceda brought a gun inside the house. (Exh. C, at 65-66.)
>
> Later, members of the Califas, a local gang known for wearing blue clothes, also arrived at the party. (*Id.* at 143.) These included Carlos, Jose, German, and Ivan. (Exh. G, at 43.) One of David's cousins noticed the rival gang members wearing their colors and feared there might be trouble. (Exh. F, at 122, 123, 139, 141.) He warned Carlos it was a bad idea for the Califas to go inside because people were drunk and "everybody [didn't] know what they were doing." (*Id.* at 144.) But Carlos reassured him not to worry, that nothing bad was going to happen, and that they were there "to party, no big deal." (*Id.* at 144-45.) Inside, Sauceda and members of both gangs formed a circle. (Exh. G, at 60.) German and Carlos refused to shake hands with the Phoeniqueras and made an insult about the color red. (Exh. E, at 52-53; Exh. G, at 60-62.) In response, Sauceda began firing his gun. (Exh. C, at 81, 119.) One person identified Sauceda as the shooter to police, and he and two other witness identified Sauceda at trial. (*Id.* at 89, 119 (Marcus); Exh. E, at 55–57, 68–69 (Ivan), 133, 136 (Jose).) Sauceda shot Khris, and "went down to his knees, starting telling [sic] Marcus sorry." (Exh. E at 60.) Sauceda then exited the house and fired at least another five shots. (*Id.* at 63-64.) Ultimately, Sauceda shot Carlos in the forehead (Exh. H, at 25-26.); Jose in the chin, arm, and back (Exh. E, at 133-34, 137, 146-47.); German in the head and wrist (Exh. G, at 60-62.); and Khris in the forehead—killing him (Exh. J, at 5, 15, 23.). About a week after the shooting, Sauceda came to Marcus' house and apologized to him and his brothers, saying he was "sorry for what [he] did to [Marcus'] brother." (Exh. G, at 97, 131.)

(ECF No. 10 at 2-3). At trial the defense argued, *inter alia*, "that there could have been more than one person with a gun; and that person may have killed the victim and shot Sanchez." Appellant's Opening Brief, *State v. Sauceda*, 2010 WL 3391172, at *15 (Ariz. Ct. App. June 3, 2011). Defense counsel also challenged the testimony that the shooting was gang-related, and confronted the witnesses who testified Sauceda was the shooter with

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> Phoeniqueras, which is significant because in "gang culture," a person is judged "by the company he keeps," and accordingly, if an individual is "hanging out with Phoeniqueras [he's] pretty much considered an associate" of that gang; and (3) Defendant was wearing various items of red clothing to the party, the color associated with the Phoeniqueras.
>
> At trial, the Detective acknowledged that police records did not indicate Defendant was affiliated with any particular gang. . . .

State v. Sauceda, 2011 WL 2517250, at *2 (Ariz. Ct. App. June 23, 2011).

their prior statements that they had not seen or could not identify the shooter. Appellant's Brief, *State v. Sauceda*, 2010 WL 3391172, at *8-10 (Ariz. Ct. App. July 14, 2010).

At the conclusion of a three-week trial (ECF No. 10-1 at 82), the jury found Sauceda guilty as charged. (ECF No. 10-1 at 82-83). At the punishment phase the jury deadlocked with regard to the imposition of sentence on the charge of first-degree murder, and the trial court declared a mistrial as to the penalty phase on this count only. (ECF No. 10-1 at 86).[4] At the conclusion of a sentencing hearing conducted November 10, 2008, (ECF No. 10-1 at 88-93), Sauceda was "sentenced [] to life without the possibility of release for twenty-five years for first-degree murder, to be served consecutively to the concurrent and consecutive terms imposed for his other offenses, which totaled 37.5 years' imprisonment." *State v. Sauceda*, 2015 WL 3648019, at *1 (Ariz. Ct. App. June 11, 2015).

Sauceda appealed his conviction and sentence, asserting "the trial court erred by: (1) denying his motion to dismiss the indictment; (2) refusing his request for a *Willits* instruction; (3) improperly instructing on reasonable doubt; and (4) failing to instruct on a lesser-included offense in regard to the charges of attempted first degree murder." *Sauceda*, 2011 WL 2517250, at *1. The state appellate court denied all of these claims on the merits. (*Id.*). Sauceda sought review by the Arizona Supreme Court, which denied relief on January 10, 2012, (ECF No. 1 at 3), and he did not seek a writ of certiorari. (*Id.*).

Sauceda initiated an action for state post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure on February 13, 2012. (ECF No. 11 at 2). He was appointed counsel, who informed the state court they could find no colorable issue to raise on Sauceda's behalf. *Sauceda*, 2015 WL 3648019, at *1. Sauceda filed a pro se petition, asserting four claims of ineffective assistance of counsel:

> He argued trial counsel had been ineffective in: (1) failing to seek suppression of various in-court and out-of-court identifications; (2) failing to timely file a motion to dismiss based on purported perjury presented to the

[4] "A new jury was impaneled for the second penalty trial, however, on August 24, 2009, before evidence was presented to the jury the state dismissed the notice to seek the death penalty. (RT 08/24/09, pp. 3-4)." Appellant's Brief, *State v. Sauceda*, 2010 WL 3391172, at *3 (Ariz. Ct. App. July 14, 2010).

> grand jury and to seek special action relief from the trial court's denial of that motion; (3) "creat[ing] a conflict of interest" by bolstering the state's case during cross-examination of a witness; and (4) failing to object to the absence of instructions for lesser-included offenses of attempted first-degree murder.
>
> Sauceda further argued that appellate counsel had been ineffective by failing to: (1) "include all of the perjured testimony" in arguing the motion to dismiss should have been granted; (2) argue the trial court erred in rejecting his request for an intoxication instruction; (3) raise on appeal the court's denial of his motion for new trial; and (4) argue that his first-degree murder conviction could not be based on "transferred intent."

Id. The state trial court denied Rule 32 relief on May 29, 2013, addressing the merits of each of Sauceda's claims. (ECF No. 1-6 at 2-8).

Sauceda appealed the denial of Rule 32 relief, "repeat[ing] several of his claims of ineffective assistance of counsel." *Sauceda*, 2015 WL 3648019, at *1. The Arizona Court of Appeals granted review but denied relief in an order issued June 11, 2015. *Id.* at *1-3. Sauceda sought review in the Arizona Supreme Court, which denied review on April 11, 2016. (ECF No. 1-8 at 17).

Sauceda filed a second Rule 32 action on May 18, 2016. (ECF No. 1-8 at 69). In his second Rule 32 action he asserted

> . . . his Rule 32 counsel had been ineffective, there was newly discovered evidence (specifically, a doctor's report and exculpatory statements by Sauceda's then-girlfriend and a childhood friend), and he was actually innocent. The trial court summarily denied relief. It noted, first, that Sauceda or his counsel clearly had been aware of the purportedly new evidence or could have discovered it through the exercise of due diligence, given that the report was disclosed to trial counsel and Sauceda obviously knew the two potential witnesses and their potential testimony. It further observed that, whatever exculpatory value that evidence may have had, it did not establish his innocence in light of eyewitness testimony identifying him as the shooter. And, the court noted, Sauceda was not entitled to the effective assistance of Rule 32 counsel and his claims were not colorable in any event.

State v. Sauceda, 2018 WL 1467377, at *1 (Ariz. Ct. App. Mar. 26, 2018). The state trial court summarily denied relief on March 3, 2017. (ECF No. 1 at 5). The trial court concluded "the issues raised by Defendant in his Second PCR are not colorable." (ECF No. 1-8 at 69).

The court concluded Sauceda had not raised a colorable claim of newly discovered evidence pursuant to Rule 32.1(e), finding:

> the information in the medical record, the Declaration of Sherise Ulibarri, and the Affidavit of Steven Deleon is not newly discovered. Rather those documents merely confirm what Defendant knew either on the night in question or, with respect to the medical record, what his attorney knew several years before trial. Thus, Defendant has failed to establish a colorable claim for post-conviction relief based upon newly discovered material facts.

(ECF No. 1-8 at 70-71). The court further found Sauceda had not presented "newly discovered evidence" demonstrating his "actual innocence" of the crimes of conviction pursuant to Rule 32.1(h), concluding:

> Defendant's position seems to be that the sworn testimony of the mother of his daughter and his childhood friend conclusively establish that Defendant did not have a gun on him when he left for the evening or at the party, was not wearing red, was not the shooter, and was not in a gang. What Defendant overlooks, however, is that multiple witnesses at the trial who either came to the party with Defendant or saw him there, testified otherwise.

(ECF No. 1-8 at 72).[5]

The trial court also found Sauceda was not entitled to the effective assistance of counsel in his post-conviction action because he had been represented by appointed counsel in his appeal, and also found Sauceda had not specified any valid claim that post-conviction counsel failed to present, thus failing to establish prejudice. *Sauceda*, 2018 WL 1467377, at *1.

Sauceda sought review by the Arizona Court of Appeals, which granted review but denied relief in a decision issued March 26, 2018. *Sauceda*, 2018 WL 1467377, at *1. The appellate court concluded, *inter alia*:

> Sauceda repeats his claim of actual innocence in light of the witness statements and report. To prevail on a claim of actual innocence under Rule

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[5] The state habeas trial court, which was also the convicting court, further found:

> Based upon the evidence the State presented at the trial of this matter Defendant simply cannot establish by clear and convincing evidence that if the information contained in Exhibits "A", "B", and "C" to his Second PCR was presented at trial, no reasonable fact-finder could find defendant guilty of the underlying offenses beyond a reasonable doubt. Rule 32.1(h), Ariz. R. Crim. P.

(ECF No. 1-8 at 72).

> 32.1(h), Sauceda is required to show "by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt." As the trial court pointed out, Sauceda has ignored the evidence presented at trial identifying him as the shooter. In light of that evidence, we agree with the court that Sauceda has not shown that "no reasonable fact-finder" could have rejected the testimony of both his then-girlfriend and his childhood friend and found him guilty.

Id. at *2. Sauceda did not seek review of the denial of relief by the Arizona Supreme Court, and the Court of Appeals' mandate issued July 3, 2018. (ECF No. 10-1 at 112).

B. Federal Habeas Claims

Sauceda asserts: he was denied the effective assistance of counsel; there are "newly discovered facts" which would have changed the jury's verdict; and he is actually innocent of the crimes of conviction. (ECF No. 1 at 6-7). Respondents assert Sauceda's habeas petition is barred by the statute of limitations. (ECF No. 10).

II. Statute of limitations

Relief on the merits of Sauceda's petition for a writ of habeas corpus is not barred by the statute of limitations provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The AEDPA imposed a one-year statute of limitations on state prisoners seeking federal habeas relief from their state convictions. 28 U.S.C. § 2244(d)(1). The one-year statute of limitations on habeas petitions generally begins to run on "the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." *Id.* at § 2244(d)(1)(A). The limitations period is tolled during the time a "properly filed" state action for post-conviction relief is pending in the state courts. *Id.* at § 2244(d)(2).

Sauceda's conviction became final on April 9, 2012, when the time for seeking a writ of certiorari in his direct appeal expired. *See Lambrix v. Singletary*, 520 U.S. 518, 527 (1997); *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Prior to that date Sauceda had initiated an action for state post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, which tolled the statute of limitations until April 11, 2016,

when the Arizona Supreme Court denied review in that matter. The statute of limitations then ran for 105 days until Sauceda filed a second Rule 32 action on July 25, 2016, which the state courts did not find successive or untimely, and therefore the statute of limitations was again tolled. The state appellate court denied review in Sauceda's second Rule 32 action on March 26, 2018. He did not seek review by the Arizona Supreme Court, and the mandate issued July 3, 2018. At that time Sauceda had 260 days to file his federal habeas petition, i.e., the petition was due March 20, 2019. Therefore, the petition, filed February 19, 2019, is timely.[6]

III. Analysis

A. Standard of Review

Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Court may not grant a writ of habeas corpus to a prisoner on a claim adjudicated on the merits in a state court unless the state court's decision denying the claim was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Harrington v. Richter*, 562 U.S. 86, 98 (2011), *quoting* 28 U.S.C. § 2254(d). *See also Lafler v. Cooper*, 566 U.S. 166, 172-73 (2012). A state court decision is contrary to federal law if it contradicts the governing law established by United States Supreme Court, or if it reached a different result from that of the Supreme Court on a set of materially indistinguishable facts. *See, e.g.*, *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). Furthermore, the state court's decision constitutes an unreasonable application of clearly established federal law only if it is objectively unreasonable. *See, e.g.*, *Renico v.*

[6] For purposes of the timeliness of a § 2254 petition, in cases wherein the Arizona Court of Appeals' decision is not appealed to the Arizona Supreme Court, the date the mandate issues is the date the statute of limitations begins to run on the federal habeas action. However, if the intermediate appellate court's decision denying Rule 32 relief is appealed to the Arizona Supreme Court, it is the date of the Arizona Supreme Court's decision, not the issuance of the Court of Appeals' mandate, that concludes the post-conviction process and determines when the tolling period has terminated. *See Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th Cir. 2007). *See also Martinez v. Ryan*, 2018 WL 3110045, at *3 & n.3 (D. Ariz. 2018), *distinguishing Celaya v. Stewart*, 691 F. Supp. 2d 1046, 1053 (D. Ariz. 2010).

Lett, 559 U.S. 766, 773 (2010); *Runningeagle v. Ryan*, 686 F.3d 758, 785 (9th Cir. 2012). An unreasonable application of federal law is different from an incorrect one. *See Harrington*, 562 U.S. at 101. "'A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.'" *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016), *quoting Harrington*, 562 U.S. at 101. *See also Dixon v. Ryan*, 932 F.3d 789, 801 (9th Cir. 2019).

Additionally, on federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C.A. § 2254(e)(1). *See also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Furthermore, "[u]nlike § 2254(d), § 2254(e)(1)'s application is not limited to claims adjudicated on the merits. Rather, it appears to apply to all factual determinations made by state courts." *Kirkpatrick v. Chappell*, 926 F.3d 1157, 1170 (9th Cir. 2019).

B. Merits

1. Ineffective assistance of counsel

Sauceda asserts his trial, appellate, and post-conviction counsel's performance was unconstitutionally ineffective:

> Mr. Sauceda was appointed Rule 32 counsel which was ineffective, and so Mr. Sauceda filed a Rule 32 Petition pro per. Mr. Sauceda provided an affidavit from trial counsel that swore that his performance fell below the reasonableness standards. Trial counsel failed to timely file a special action to challenge dismissal of a Rule 12.9 challenge of the grand jury proceedings. Trial counsel failed to object to no lesser-included offense instructions. Mr. Sauceda's trial counsel already has stated that his assistance fell below the objectively reasonable standard. Appellant counsel failed to include an issue of denied jury instruction on "intoxication" and "premeditation." Appellant counsel was ineffective when it failed to argue reversible error when it denied a request for new trial.
>
> . . . Defense counsel failed to introduce the medical records of Carlos Sanchez and bring Dr. Zacher's report to the attention of the jury. Defense counsel failed to object to a lack of a *Willits* instruction to the jury, which would have allowed the jury to take a negative prejudicial inference and

> limited Mr. Sauceda's challenge to fundamental error rather than abuse of discretion. Then, post-conviction counsel filed a no-issue claim despite all of this. Mr. Sauceda was appointed counsel by statute and no has no remedy to challenge counsel's effectiveness.

(ECF No. 1 at 6).[7]

To prevail on an ineffective assistance of counsel claim a habeas petitioner must demonstrate his attorney's performance was deficient and he was prejudiced by the alleged deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance will be found deficient only if counsel's actions "fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Id.* at 688. *See also Cheney v. Washington*, 614 F.3d 987, 994 (9th Cir. 2010). When evaluating defense counsel's performance, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . ." *Strickland* 466 U.S. at 689 (internal quotations omitted). To establish prejudice the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

It is the petitioner's burden to satisfy both prongs of the *Strickland* test. *See Wong v. Belmontes*, 558 U.S. 15, 16-17 (2009); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Vega v. Ryan*, 757 F.3d 960, 969 (9th Cir. 2014). However, if a habeas petitioner cannot meet "the highly demanding and heavy burden of establishing actual prejudice," it is unnecessary to determine whether his counsel's performance was deficient. *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005). *See also Strickland*, 466 U.S. at 697; *Rhoades v. Henry*, 611 F.3d 1133, 1141 (9th Cir. 2010); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other.").

[7] To be entitled to a jury instruction pursuant to the holding in *State v. Willits*, 96 Ariz. 184 (1964), a defendant must prove both that the state failed to preserve exculpatory, material, accessible evidence, and resulting prejudice. *See Arizona v. Fulminante*, 193 Ariz. 485, 503 (1999). If the defendant makes this showing, they are entitled to an instruction informing the jury it may draw an adverse inference from the state's action.

Additionally, on federal habeas review a *Strickland* claim adjudicated on the merits by a state court is reviewed under a "highly deferential" or "doubly deferential" standard. *Atwood v. Ryan*, 870 F.3d 1033, 1057 (9th Cir. 2017); *Visciotti v. Martel*, 862 F.3d 749, 770 (9th Cir. 2016). The "highly deferential" standard of review "'requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Visciotti*, 862 F.3d at 770, *quoting Strickland*, 466 U.S. at 689. The "doubly deferential" standard of review requires the habeas court applying *Strickland* to determine whether there is a "*reasonable argument* that counsel satisfied *Strickland*'s deferential standard . . ." *Harrington*, 562 U.S. at 788 (emphasis added). Even if the Court could conclude on de novo review that the petitioner might satisfy both prongs of the *Strickland* test, the "AEDPA requires that a federal court find the state court's contrary conclusion" "*objectively unreasonable* before granting habeas relief." *Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014) (emphasis added).

Sauceda contends his trial counsel's performance was deficient because he failed to timely file a special action to appeal the trial court's dismissal of Sauceda's challenge to the grand jury proceedings. Sauceda challenged the denial of the motion to dismiss the indictment in his direct appeal; his appellate counsel thoroughly and persuasively briefed the issue to the state appellate court. Appellant's Opening Brief, *Sauceda*, 2010 WL 3391172 at *12-26. The Arizona Court of Appeals noted: "Prior to trial, Defendant moved to dismiss the indictment, claiming it was obtained with false testimony from the investigating officer at the grand jury proceedings. The trial court summarily denied the motion." *Sauceda*, 2011 WL 2517250, at *1. In denying relief on this substantive claim the state appellate court then extensively reviewed the record and the applicable law and concluded: "There was no abuse of discretion by the trial court in denying the motion to dismiss." *Id.* at *3.

In his first Rule 32 petition Sauceda asserted the claim raised herein, i.e., trial counsel's performance was deficient because he failed to timely file a special action to

appeal the trial court's dismissal of Sauceda's challenge to the grand jury proceedings. The Arizona Court of Appeals affirmed the habeas trial court's denial of relief on this claim, concluding:

> [A]lthough he claims the trial court denied his motion solely on the basis of timeliness, the record does not support that claim. Instead, the court stated it had "reviewed" the motion before denying it and did not state it was denying it as untimely. And, although Sauceda additionally argues the motion should have been granted on its merits, we rejected that argument on appeal. It therefore cannot be raised in a Rule 32 proceeding, nor can counsel's performance in regard to the motion be said to be deficient. Ariz. R.Crim. P. 32.2(a)(2). For the same reason, we reject Sauceda's claim that counsel should have challenged the court's ruling by special action. Sauceda has not explained how raising the issue in a special action instead of on appeal could have changed the result.

Sauceda, 2015 WL 3648019, at *2.

The denial of relief, because Sauceda was not prejudiced by his counsel's performance, was not an unreasonable application of *Strickland* because the appellate court's finding that it would not have granted relief on the special action, a matter of state law, is entitled to deference by this Court. *See Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005); *Hartman v. Summers*, 120 F.3d 157, 161 (9th Cir. 1997). Because the state appellate court determined a special action challenging the grand jury proceedings was not likely to succeed, Sauceda is unable to establish any prejudice arising from counsel's performance in failing to file a special action.

Sauceda also argues his trial counsel was ineffective for failing to object to the jury instructions because they did not include a lesser-included offense instruction. In his direct appeal the state appellate court concluded:

> Prior to settlement of jury instructions, Defendant submitted a memorandum requesting that the jury be instructed on the lesser-included offenses of second degree murder and manslaughter in regard to the charge of first degree murder (Count One) and to attempted second degree murder with respect to the two charges of attempted first degree murder (Counts Two and Three). The trial court granted the request for the lesser-included offense instructions in regard to Count One. There was, however, no discussion by the trial court and counsel as to lesser-included offense instructions in regard

> to Counts Two and Three, and no objection by Defendant to the absence of such instructions in the final instructions to the jury. Because Defendant did not object to the trial court's failure to instruct on attempted second degree murder as a lesser-included offense on the two counts of attempted first degree murder, our review of this claim of error is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3.c []; *State v. Rivera*, 152 Ariz. 507, 516 [] (1987) [].
>
> The lack of the lesser-included offense instruction in regard to the two counts of attempted first degree murder does not rise to the level of fundamental error because it did not interfere with defendant's ability to conduct his defense. *The defense at trial was that Defendant was not the shooter, not that he acted with a lesser culpable mental state*. Defendant was fully able to present this defense even in the absence of an instruction on the lesser-included offense of attempted second degree murder.
>
> Moreover, to obtain relief under fundamental error review, the defendant bears the burden of establishing not only the existence of fundamental error, but also that the error in his case caused him actual prejudice. *State v. Henderson*, 210 Ariz. 561, 567 [] (2005). The showing of prejudice that must be made depends on the type of error that occurred and the facts of the particular case. *Id.* at 568 [].
>
> In the present case, the trial court instructed on two lesser-included offenses in regard to the charge of first degree murder, but the jury nevertheless found Defendant guilty on the greater offense as charged. The victim, with respect to the first degree murder charge, was Defendant's best friend. The State's theory on this charge was that Defendant accidently killed his friend while attempting to deliberately kill the other victims and was therefore guilty of first degree murder based on "transferred intent." Under the doctrine of transferred intent, when an assailant aims at one person and hits another, the felonious intent toward the intended victim is transferred to the actual victim. *State v. Johnson*, 205 Ariz. 413, 419 [] (App. 2003). Consequently, to find Defendant guilty of premeditated first degree murder of his friend, the jury had to necessarily conclude that Defendant deliberately and with premeditation attempted to kill the other victims. Under these circumstances, Defendant cannot meet his burden of showing any likelihood that the jury would have found him guilty of a lesser offense on the two counts of attempted first degree murder if a lesser-included offense instruction had been given.

Sauceda, 2011 WL 2517250, at *5-6 (emphasis added and parentheticals omitted).

In his first Rule 32 action Sauceda asserted counsel's failure to seek a lesser-included offense instruction constituted ineffective assistance of counsel. The state

appellate court denied relief on this claim, determining: "We agree with the [state habeas trial] court that Sauceda cannot show prejudice. We determined on appeal that Sauceda was not prejudiced by the absence of those instructions. Thus, he cannot demonstrate prejudice based on counsel's failure to object." *Sauceda*, 2015 WL 3648019, at *2. This conclusion was not an unreasonable application of *Strickland*, because counsel's choice of a sound defense strategy, and any decisions made regarding the implementation of that strategy, are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. *See also Ayala v. Chappell*, 829 F.3d 1081, 1103 (9th Cir. 2016). It is well settled that "counsel's tactical decisions at trial . . . are given great deference and must similarly meet only objectively reasonable standards." *Elmore v. Sinclair*, 799 F.3d 1238, 1250 (9th Cir. 2015). *See also Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) ("trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy"). A defense attorney may make a "strategic decision" not to request a lesser-included offense instruction. *See Matylinsky v. Budge*, 577 F.3d 1083, 1092 (9th Cir. 2009); *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985) ("Under the *Strickland* test, counsel's strategic choice to forgo [a lesser-included] instruction for voluntary manslaughter was reasonable because counsel had good cause to believe that further efforts to obtain such an instruction would harm [the defendant's] case."). The Ninth Circuit Court of Appeals has recognized that it can "be reasonable for a defense attorney to opt for an 'all-or-nothing' strategy, forcing the jury to choose between convicting on a severe offense and acquitting the defendant altogether." *Crace v. Herzog*, 798 F.3d 840, 852 (9th Cir. 2015).

The petitioner bears the burden of demonstrating that his attorney's decision to not request a lesser-included offense instruction was other than a "reasonable strategic decision." *Matylinksy*, 577 F.3d at 1092. Sauceda makes no such showing. Furthermore, when considering whether a habeas petitioner was prejudiced by his counsel's alleged errors, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. When answering this question the federal habeas court must necessarily consider the

strength of the state's case against the petitioner. *Djerf v. Ryan*, 931 F.3d 870, 883 (9th Cir. 2019); *Allen v. Woodford*, 395 F.3d 979, 999 (9th Cir. 2005) ("even if counsel's conduct was arguably deficient, in light of the overwhelming evidence of guilt, [the petitioner] cannot establish prejudice"); *Johnson v. Baldwin*, 114 F.3d 835, 839-40 (9th Cir. 1997). In this matter, the evidence against Sauceda was extensive. Sauceda has not met his burden of demonstrating his attorney's decision to not request the lesser-included instruction was other than a strategic choice, and he fails to establish the requisite prejudice.

Sauceda also alleges his appellate counsel failed to include an issue of jury instructions on "intoxication" and "premeditation." In his first Rule 32 action the appellate court determined this claim was procedurally defaulted:

> Sauceda briefly discusses his claims that appellate counsel was ineffective in failing to raise on appeal the denial of his new trial motion and his request for an intoxication instruction. However, he does not argue the trial court erred in rejecting those claims, instead stating he wishes to preserve them for future proceedings. The failure to argue a claim on review constitutes waiver of that claim, and we therefore do not address these issues further. *Cf. Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Sauceda, 2015 WL 3648019, at *3. The state appellate court found these claims waived by an adequate and independent state procedural rule and, therefore, these claims are procedurally barred. *See*, *e.g.*, *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991); *Coleman v. Thompson*, 501 U.S. 722, 727-28 (1991); *Szabo v. Walls*, 313 F.3d 392, 395 (7th Cir. 2002). "If a prisoner has defaulted a state claim by 'violating a state procedural rule which would constitute adequate and independent grounds to bar direct review . . . he may not raise the claim in federal habeas, absent a showing of cause and prejudice or actual innocence.'" *Ellis v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000), *quoting Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994). However, notwithstanding the procedural default, Sauceda's claim asserting ineffective assistance of appellate counsel may be denied on the merits. *See Ayala v. Chappell*, 829 F.3d 1081, 1096 (9th Cir. 2016); *Wafer v. Hedgpeth*, 627 F. App'x 586, 587 (9th Cir. 2015), *citing Runningeagle*, 686 F.3d at 777 n.10; *Salvador Montes v. Ryan*, 2019 WL 2011065, at *6 (D. Ariz. Apr. 3, 2019.

To succeed on a claim of ineffective assistance of appellate counsel,

> . . . the petitioner [must] demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue. *Smith*, 528 U.S. at 285; *Wildman v. Johnson*, 261 F.3d 832, 841-42 (9th Cir. 2001). Second, the petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal.

Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010).

Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal," and to establish prejudice the habeas petitioner must demonstrate the issue counsel failed to raise was "stronger" than the issues counsel did raise. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

> In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason—because she declined to raise a weak issue.

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (citations and footnotes omitted), *quoted in Hurles v. Ryan*, 188 F. Supp. 3d 907, 922 (D. Ariz. 2016).

A thorough review of the entire record in this matter, including the appellate briefs filed by counsel on Sauceda's behalf, reveal that appellate counsel was thoroughly familiar with the entire record in this matter, raised all plausible claims on Sauceda's behalf, and thoroughly and persuasively argued and briefed each plausible claim to the Arizona Court of Appeals. *See* Appellant's Opening Brief, *Sauceda*, 2010 WL 3391172; Appellant's Supplemental Brief, *State v. Sauceda*, 2010 WL 5484521 *and* 2010 WL 5484521 (Ariz. Ct. App. Nov. 12, 2010); Appellant's Reply Brief, *State v. Sauceda*, 2011 WL 10549412 (Ariz. Ct. App. June 3, 2011). Sauceda makes only a conclusory, unsupported allegation that appellate counsel's performance was deficient because counsel failed to assert he

should have been given a jury instruction on intoxication and premeditation, and he makes no showing that these claims "merit-worthy."[8]

Sauceda maintains his trial counsel was ineffective for failing to introduce the medical records of Carlos Sanchez and to bring the report of Dr. Zacher, who treated Mr. Sanchez, to the attention of the jury. Sauceda did not exhaust this claim in the state courts and the claim is procedurally defaulted. However, the claim may be denied on the merits because Sauceda is unable to establish any prejudice, i.e., that had counsel presented this specific evidence to the jury the verdict would have been different. The state habeas trial court concluded, in considering this evidence in a different context, that "whatever exculpatory value that evidence may have had, it did not establish [Sauceda's] innocence in light of eyewitness testimony identifying him as the shooter." *Sauceda*, 2018 WL 1467377, at *1.

Sauceda's trial counsel explored the relevant issue with regard to Dr. Zacher's report in his examination of Dr. Zacher. On appeal, with regard to Sauceda's *Willits* claim, the State cited the trial transcript:

> [DEFENSE COUNSEL]: All right then. Going to [Carlos], you testified that he had a gunshot wound to the head?
>
> [Dr. Zacher]. Yeah, that's correct.
>
> First one.
>
> Q. I believe he had two entry wounds and one on the left front parietal and the other on the left frontal and the other was right parietal, does that sound right?
>
> A. Uh-hum.
>
> Q. Now, there were no exit wounds, correct?
>
> A. Correct.
>
> Q. And, in fact, he underwent surgery where later some of the bullet fragments were removed?
>
> A. They were.

---

[8] And, as found by the trial court:

> As Defendant was not entitled to an intoxication instruction under Arizona law, appellate counsel's failure to challenge the trial court's denial of such an instruction does not constitute deficient performance under prevailing professional norms. Nor can Defendant show he was prejudiced by the trial court's failure to give an instruction that is contrary to existing law and to which Defendant was not entitled.

(ECF No. 1-6 at 6).

Q. And those fragments would have been provided to the police, correct?

A. Yes.

Q. Protocol for that?

A. I don't know about protocol. We handed those directly off to the police officers usually waiting right outside the operating room.

Q. If they're not there, there is a procedure that you utilize?

A. I believe there is.

Q. Are you personally aware of the procedure?

A. No.

(R.T. 8/12/08 [p.m.], at 42-43.) After this testimony, neither the prosecutor nor the jurors had any questions of Dr. Zacher, and he was excused as a witness.

Detective Lowe also testified that, throughout the investigation, detectives spoke to Ivan, Marcus, Jose Peter and German, and they "all identified [Appellant] as the person who shot the gun and the person firing it," and that "there was no evidence of any other type of weapon [that] was used inside the house." (R.T. 8/05/08, at 123.)

Jurors asked Detective Lowe "[h]ow many nine millimeter casings were recovered," and he responded, "Seven." (R.T. 8/05/08, at 124.) Jurors asked Lowe "[h]ow many nine millimeter projectiles were recovered," and he responded, "Well, we recovered five projectiles at the scene itself. They were all consistent with a nine millimeter .38 caliber which is almost exactly the same and then there were two that were in [Jose]." (Id. at 124-25.) Detective Lowe testified that "all of the casings were fired by the same weapon." (Id. at 136.)

On August 14, 2008, defense counsel filed a memorandum in support of the defenses request for a *Willits* instruction, asserting that the police, "by failing to preserve the bullets and or bullet fragments that entered Carlos['] [] head, Sauceda was deprived of a meaningful opportunity to contest the conclusions of the state's witnesses regarding the state's theory behind how the shooting was committed. . ." (R.O.A., Item 363, at 2.) The defense asserted that there were at least two projectiles "that [were not accounted for because they never exited Carlos['] head," arguing that "while the state did not literally rely on the unpreserved projectiles, it did rely on their absence to support its case." (R.O.A., Item 363, at 3-4.) Defense counsel contended that failure "to recover or preserve the projectiles in Carlos has eliminated any opportunity to examine the projectiles to determine if they are of a different caliber or different type of projectile and/or if they contain markings similar to the projectiles recovered at the scene." (R.O.A., Item 363, at 5.) The State did not file a written response to Appellant's *Willits* request.

The court and the parties discussed jury instructions prior to submitting the matter to the jury. The court stated it "found no basis in the

> evidence for the Court to give a *Willits* instruction, meaning that somehow the State mishandled or destroyed or otherwise did something improper regarding the handling of the casings or the bullets or any other evidence in which were - which were found at the scene." (R.T. 8/15/09, at 3.)

Appellee's Answering Brief, *Sauceda*, 2010 WL 9446084, at *34-37.

Counsel's choice to explore the information available from Dr. Zacher through examination of this witness, rather than through introducing his report as evidence, was presumably a strategic decision and Sauceda has not established he was prejudiced by counsel's failure to introduce the report in addition to Dr. Zacher's testimony. Furthermore, given the weight of the evidence against Sauceda, there was no reasonable probability that presenting the additional evidence would have resulted in a different verdict. *See Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) ("A petitioner suffers no actual prejudice when '[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate' the alleged prejudice caused by the allegedly unconstitutional action.").

Sauceda contends trial counsel was ineffective because counsel failed to object to the lack of a *Willits* instruction, which limited the appellate court to reviewing Sauceda's *Willits* claim under the fundamental error standard rather than the more lenient abuse of discretion standard. In denying Sauceda's *Willits* claim the appellate court found and concluded:

> Defendant next argues that the trial court erred by refusing his request for a *Willits* instruction based on the absence at trial of bullet fragments removed from the head of one of the wounded victims. *See generally State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). A *Willits* instruction permits the jury to draw an inference from the State's failure to preserve material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503 [] (1999). Defendant maintains that the absence of the bullet fragments deprived him of the ability to test the fragments and prove another gunman may have been responsible for the murder and attempted murder charges. In denying Defendant's request, the trial court ruled that the evidence was insufficient to show "that the police had and discarded or destroyed, lost, or otherwise mishandled any of those fragments."
>
> To be entitled to a *Willits* instruction, Defendant must show: (1) the State failed to preserve accessible, material evidence that "might tend to

> exonerate him;" and (2) prejudice resulted. *Id.* A defendant, however, is not entitled to a Willits instruction "merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33 [] (1995). "Whether either showing has been made . . . is a question for the trial court," and the refusal to give a *Willits* instruction "will not be reversed absent a clear abuse of discretion." *State v. Perez*, 141 Ariz. 459, 464 [] (1984).
>
> We agree with the trial court that the evidence at trial does not show that the State lost, destroyed, or failed to preserve the bullet fragments. A surgeon [Dr. Zacher] testified that bullet fragments were removed from the victim who had been shot twice in the head. When asked what happened to the fragments, the surgeon indicated such items are "usually" given to an officer waiting outside the operating room. The surgeon further testified that when an officer is not present, there is some other procedure followed by the hospital but that he had no knowledge of that procedure. This evidence does not establish that the fragments were lost or destroyed by the police. There was no evidence the fragments were actually given to the police. Nor was there any evidence the fragments are not still in the possession of the hospital. Absent evidence that the hospital does not have the fragments in its possession (and, therefore, available for testing by Defendant), there was no abuse of discretion by the trial court in refusing to give a Willits instruction.
>
> Further, Defendant fails to show that the bullet fragments have exculpatory value. The police recovered seven nine-millimeter casings and five nine-millimeter projectiles at the scene. A criminalist testified all seven casings were fired from the same weapon. Defendant does not offer any specifics regarding the nature or size of the fragments of the other two projectiles removed from the victim's head at the hospital or make any showing that testing of the fragments would tend to exculpate him or otherwise support his theory of more than one shooter. On this record, we cannot conclude that Defendant was prejudiced by any unavailability of the bullet fragments. *See State v. Dunlap*, 187 Ariz. 441, 464 [] (App. 1996) (holding defendant not entitled to Willits instruction when claim that lost or destroyed evidence is exculpatory is "entirely speculative").

Sauceda, 2011 WL 2517250, at *4.

This ineffective assistance of counsel claim fails because Sauceda is unable to establish that, but for his counsel's alleged error, the result of his criminal proceeding, i.e., his appeal, would have been different. As evidenced by the appellate court's consideration and rejection of the substantive *Willits* claim as recited *supra*, under either standard of review Sauceda's *Willits* claim was without merit. Counsel "is not necessarily ineffective

for failing to raise even a non-frivolous claim," much less a frivolous claim. *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012). *See also Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (holding counsel's failure to take a futile action can never be deficient performance). *Cf. Moormann*, 628 F.3d at 1107) (holding that, if there is no underlying error, "appellate counsel did not act unreasonably in failing to raise a meritless claim" and petitioner "was not prejudiced by appellate counsel's omission").

Sauceda contends his post-conviction counsel's performance was unconstitutionally deficient. He raised this claim in his second Rule 32 action and the state appellate court concluded:

> Sauceda next asserts, citing *Martinez v. Ryan*, 566 U.S. 1 (2012), that he is entitled to raise a claim of ineffective assistance of Rule 32 counsel as an "equitable remedy" because he was appointed counsel. In *Martinez*, the United States Supreme Court concluded that defendants have an "equitable" but not constitutional, "right to the effective assistance of initial post-conviction counsel," but "it limited its decision to the application of procedural default in federal habeas review." *State v. Escareno–Meraz*, 232 Ariz. 586, ¶ 5 (App. 2013). As this court has explained, "*Martinez* does not alter established Arizona law," id. ¶ 6, that a non-pleading defendant cannot raise a claim of ineffective post-conviction counsel, *id.* ¶ 4. Further, in *Escareno–Meraz*, we concluded we lacked the authority to disregard our supreme court and "create a right for non-pleading defendants to effective representation in Rule 32 proceedings" and, in any event, found "no basis to do so." *Id.* ¶ 6. Sauceda has offered nothing to suggest we can or should chart a different course here.

Sauceda, 2018 WL 1467377, at *2.

The state court's denial of relief on this claim was not contrary to clearly established federal law because the United States Supreme Court has never held that a state defendant has a Sixth Amendment right to the effective assistance of counsel beyond his first appeal "as of right." *Martinez* did not establish a federal constitutional right to the effective assistance of post-conviction counsel; instead, in *Martinez* the Supreme Court held that a *pleading* defendant can assert his post-conviction counsel was ineffective as cause for their failure to properly exhaust an ineffective assistance of trial counsel claim in the state courts.

2. Newly discovered "facts"

Sauceda asserts he is entitled to federal habeas relief because he has presented newly discovered "facts" which, if presented to the jury, would probably have changed the verdict. The allegedly newly discovered evidence is:

> (i) Dr. Zacher's Medical Report. Mr. Sauceda was unaware during the trial that in the medical records of Carlos Sanchez was the report of Dr. Zacher, which stated the bullet fragments were turned over to the authorities. Mr. Sauceda's defense counsel never attempted to have the medical records admitted to evidence. The court and jury were never made aware of definitive proof that Dr. Zacher had turned the bullet fragments over to the police. . . . The jury did not have before it the fact that bullet fragments were recovered from the head of one of the victims. The State's ballistics expert testified that certain shell casings had marks that he would never expect to see from a Glock. There are bullets that were never tested and shell casings that were not accounted for.
>
> (ii) The Declaration of Sherise Ulibarri. Neither defense counsel nor the State called this witness at trial. While she was with Mr. Sauceda on the night of the incident, defense counsel did not subpoena her or call her as witness in the trial. The jury never heard any testimony she would give.
>
> (iii) The Declaration of Steven Deleon. Neither defense counsel nor the State called this witness at trial. While he was with Mr. Sauceda on the night of the incident, defense counsel did not subpoena him or call him as witness in the trial. The jury never heard any testimony he would give.

(ECF No. 1 at 6-7).

Sauceda presented a claim of newly discovered evidence in his second Rule 32 action. The state court analyzed Sauceda's claim that newly discovered evidence entitled him to relief under the standard for review set out in Rule 32, and affirmed the state habeas trial court's conclusion that the evidence was not newly discovered. *Sauceda*, 2018 WL 1467377, at *2.

Even if the evidence was "newly discovered," the Court can grant habeas relief "only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief. *E.g.*, *Gordon v. Duran*, 895 F.2d 610, 614 (9th Cir. 1990). The Supreme Court has never recognized

factual innocence as a free-standing constitutional claim, but rather has specifically held it is *not* a free-standing constitutional claim. *Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). Post-conviction evidence serving only to "undercut the evidence presented at trial" does not warrant federal habeas relief. *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997). Furthermore, "[n]ewly discovered evidence is a ground for habeas relief only when it bears on the constitutionality" of the petitioner's conviction and "would probably produce an acquittal." *Spivey v. Rocha*, 194 F.3d 971, 979 (9th Cir. 1999), *citing Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993). *See also Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (rejecting habeas claim based upon newly discovered evidence because the petitioner "neither allege[d] an independent constitutional violation nor present[ed] affirmative proof of his innocence"). "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution— not to correct errors of fact." *Herrera*, 506 U.S. at 400, *citing Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved").

"New" evidence does not meet the requisite standard if the evidence does not undermine the structure of prosecution's case. *Spivey*, 194 F.3d at 979. "Evidence which suggests only that some other individual might have committed the crime rather than showing that the defendant did not commit the crime is insufficient to meet the 'probability of acquittal' standard." *Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir. 1993). Evidence that merely casts doubt on the petitioner's guilt, but does not affirmatively prove innocence, is insufficient to merit relief on a claim of actual innocence. *See House v. Bell*, 547 U.S. 518, 555 (2006) (rejecting freestanding actual innocence claim even though the petitioner had "cast considerable doubt on his guilt"); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th

Cir. 2000) (rejecting a freestanding actual innocence claim even though the petitioner's new evidence "certainly cast doubt on his conviction").

Sauceda is unable to establish that the "newly discovered" evidence is either newly discovered or that it would probably produce an acquittal, and he has not established the violation of a constitutional right in his state criminal proceedings. To the extent Sauceda's claim can be understood as a freestanding claim that the newly discovered evidence shows that he is actually innocent, as explained more fully *infra*, his claim is also not cognizable on habeas review.

3. Actual innocence

Sauceda argues:

> Mr. Sauceda demonstrated through the medical report of Dr. Zacher and the declarations of Mr. Deleon and Ms. Ulibarri his actual innocence. Had this evidence been presented no reasonable jury would have convicted Mr. Sauceda. Contrary to the Court's statements, the testimony of Mr. Dominguez, Mr. Villagrana, and Mr. Borja were inconsistent with prior statements. The only testimony that could have been presented without impeachment is the testimony by Mr. Deleon and Ms. Ulibarri. Both of their declarations corroborate each other.

(ECF No. 1 at 7).

Sauceda raised this claim in his second Rule 32 action. The state trial court denied relief, and the state appellate court affirmed the denial of relief:

> To prevail on a claim of actual innocence under Rule 32.1(h), Sauceda is required to show "by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt." As the trial court pointed out, Sauceda has ignored the evidence presented at trial identifying him as the shooter. In light of that evidence, we agree with the court that Sauceda has not shown that "no reasonable fact-finder" could have rejected the testimony of both his then-girlfriend and his childhood friend and found him guilty.

Sauceda, 2018 WL 1467377, at *2.

Sauceda is not entitled to federal habeas relief on his claim of actual innocence of the criminal acts underlying his conviction. *See Coley v. Gonzalez*, 55 F.3d 1385, 1387 (9th

Cir. 1995). Even if his claim of innocence was a cognizable claim in this habeas proceeding, Sauceda has not offered any evidence that affirmatively proves his innocence. *See Jones v. Taylor*, 763 F.3d 1242, 1251 (9th Cir. 2014) ("The most that can be said of the new testimony is that it undercuts the evidence presented at trial. Evidence that merely undercuts trial testimony or casts doubt on the petitioner's guilt, but does not affirmatively prove innocence, is insufficient to merit relief on a freestanding claim of actual innocence."). In *Carriger* the Ninth Circuit Court of Appeals noted that, to be entitled to habeas relief based on a claim of actual innocence, the evidence presented by the petitioner to the habeas court would have to be "truly persuasive." 132 F.3d at 476-77 (holding the petitioner would have to go beyond establishing doubt about his guilt and affirmatively establish his innocence, noting the petitioner had "presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor [was] there any new and reliable physical evidence, such as DNA, that would preclude the possibility of guilt."). Thus, to the extent that Sauceda asserts a free-standing claim of actual innocence based on newly discovered evidence, the claim must be denied.

IV. Conclusion

Sauceda's federal habeas petition was filed within the one-year statute of limitations specified by the AEDPA. The state court's denial of relief on his ineffective assistance of counsel claims was not an unreasonable application of *Strickland* and the claims that were procedurally defaulted in the state courts may be denied on the merits. Sauceda's claim that he has newly discovered evidence warranting habeas relief is both not cognizable and without merit and his claim of actual innocence is not cognizable.

IT IS THEREFORE RECOMMENDED that Sauceda's petition seeking a federal writ of habeas corpus (ECF No. 1) be **DENIED.**

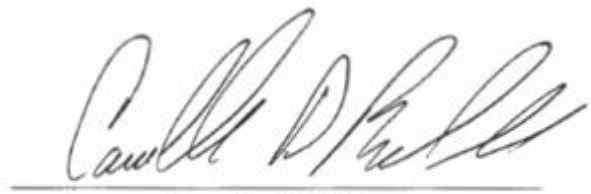
This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment.

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length.

Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo appellate consideration of the issues. *See United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will constitute a waiver of a party's right to appellate review of the findings of fact and conclusions of law in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The undersigned recommends that, should the Report and Recommendation be adopted and, should Sauceda seek a certificate of appealability, a certificate of appealability should be denied because he has not made a substantial showing of the denial of a constitutional right.

Dated this 13th day of April, 2020.



Camille D. Bibles
United States Magistrate Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Isidro Sauceda, Petitioner/Appellant, V. Charles L. Ryan, Director of the Arizona Department of Corrections, Respondent/Appellee, And The Attorney General of the State of Arizona, Additional Respondent.	Case No.: 20-16038 D.C. No. 2:19-cv-01132-NVW District of Arizona Petition for Rehearing En Banc

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TABLE OF AUTHORITIES

I. INTRODUCTION

Appellant, at the age of 29 years-old, was convicted of charges of first-degree murder, two counts of attempted first-degree murder, one count of aggravated assault, and one count of assisting a criminal street gang (which are alleged to have occurred when he was just 24 years old) without any direct evidence. This is one of the rare cases when Appellant's assertion of innocence is consistent with the undisputed facts. He was charged with being responsible for the shooting spree that killed one person and injured three others. However, there was no weapon presented at trial. Two of the bullets from the spree of shots fired on the night in question were never made available to the defense for testing. Although Appellant had never been part of a gang in his life, on the inconsistent and contradictory testimony of prosecution witnesses, the State argued that Appellant was the shooter because of gang affiliations based upon clothing color. He was accused by the State of wearing "red" on the night in question.

During and after the trial, Appellant suffered from ineffective assistance of counsel: Trial counsel admitted in an affidavit that he was ineffective in not preserving the record on a lesser-included instruction to the jury. Further, Appellant's counsel failed to request a *Willits* instruction even though the medical witness established that bullets taken from the head of Carlos Sanchez had been given to the police after they were removed in surgery.

Years after the trial, counsel undersigned obtained affidavits from two witnesses, never called at the jury trial, who testified that on the night in question Appellant was not wearing the color red, did not possess a gun, and had never been in a gang. These key witnesses would have been integral in exonerating Appellant in his jury trial. Unfortunately, his defense counsel never bothered to call them. This is a travesty.

Without this Court's intervention, Appellant, an innocent man, will most probably never receive the fair trial that he deserves. As discussed below, the issues presented easily rise to the level of being "debatable among jurists," thereby justifying a certificate of appealability to issue. Otherwise, Appellant will remain in prison for the rest of his life because the prosecution convinced the jury that he was wearing red, which meant he was in a gang, and, therefore, was guilty of the shooting death of the victim.

Appellant urges this Court to hear the certificate of appealability matter *en banc*, reopen the case, and reverse the district court's order denying Appellant the certificate of appealability that he deserves.

II. REASON WHY COURT SHOULD GRANT *EN BANC* REVIEW

Appellant was denied a Certificate of Appealability ("COA") by the district court. He moved for a COA in this Court which was denied on November 4, 2020. (Docket Entry ("Docket") 2, 3). Appellant timely moved for reconsideration,

which was denied by a two-judge panel on November 23, 2020. (Docket 4, 5). In denying the motion, the Motion Panel closed the case. (Docket 5).

Pursuant to Rule 35, FRAP, and Ninth Circuit Rule 27-10, Appellant requests that this Court reopen the case and grant a rehearing *en banc*. Rule 27-10 reads in pertinent part: "A party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings in this Court must comply with the time limits of FRAP 40(a)(1)." As stated by Judge Fletcher, in his concurrence in *Henry v. Ryan*, 766 F.3d 1059, 1061 (9th Cir. 2014):

> Ninth Circuit Rule 27–10(b) specifically contemplates that orders issued in response to motions may be reheard en banc, as does our General Order 6.11. Our long-standing and consistent practice has been to allow en banc calls of orders, [citation] even when those orders have been entered after the panel's decision on the merits of a case. *See, e.g., Garcia v. Google, Inc.*, No. 12–57302, Docket Entry No. 46 (9th Cir. Mar. 6, 2014) (order issued by our en banc coordinator notifying the parties that an order of the three judge panel "denying a stay of the panel's prior orders" had been called en banc, and noting that "[t]he *en banc* call is confined to the stay order only, and the parties should address only the order in the briefing").

Id. at 1060. Similarly, here, Appellant timely and properly requests that this Court consider his case *en banc*, only for the purpose of whether a Certificate of Appealability should be issued.

En banc rehearing is permitted under Rule 35, FRAP. As stated in *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987): "We now

hold that the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision." It is submitted that there is an internal conflict among the decisions regarding the issuance of COAs. As discussed below, the Ninth Circuit has granted COAs in cases similar to Appellant's case, including in cases regarding ineffective assistance of counsel for: (1) failing to make a record regarding a lesser-included offense instruction (*Lambright v. Stewart*, 220 F.3d 1022, 1028 (9th Cir. 2000); (2) procedurally defaulted claims (*Turner v. Calderon*, 281 F.3d 851, 874 (9th Cir. 2002); and (3) failure to duly investigate exculpatory evidence (*Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006).

Furthermore, rehearing *en banc* is warranted regarding questions of exceptional importance. *Carriger v. Stewart*, 132 F.3d 463, 466 (9th Cir. 1997) (granting en banc review because of the exceptional importance of issues regarding whether a state may execute an individual whose guilt is shrouded in doubt and who has raised serious claims of constitutional error). Similarly, in the present case, (although not a death penalty one) Appellant has presented a question of exceptional importance regarding factual innocence coupled with his claims of ineffective assistance of counsel causing Appellant to be greatly prejudiced. Absent a rehearing *en banc* by this Court, Appellant, an innocent man, will be forced to spend the rest of his life behind bars.

III. STANDARD OF REVIEW

In *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), Justice Kennedy stated: "We do not require petitioner to prove, before the issuance of the certificate of appealability, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." *Id.* at 338.

In so reasoning, the Court concluded *inter alia*: "[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination ***to a threshold inquiry into the underlying merit of his claims***." *Id.* at 327 (emphasis added) (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)). The "debatable amongst jurists of reason" inquiry has been interpreted as a very low barrier to the issuance of a COA. *Id.* at 338.

The Ninth Circuit has held "we resolve any doubt regarding whether to issue a COA in favor of [the petitioner].". *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

IV. ARGUMENT

A. Appellant Has Made A Substantial Showing Of The Denial Of His Sixth Amendment Constitutional Right To Effective Assistance Of Counsel Regarding Trial Counsel's Admitted

Failure To Ensure That There Was A Lesser-Included Instruction Or To Even Create A Record On Such Issue:

At trial, not only did Appellant's counsel fail to ensure that there was a lesser-included offense instruction, but he also failed to create any record regarding this issue. The affidavit of trial counsel specifically admitted that: "It was my responsibility as counsel to object and make the necessary record so that the denial of these lesser-included instructions would be preserved for appeal." (Docket 2, 6:15-23).

The affidavit by Appellant's trial counsel establishes that his performance was deficient. Where counsel admits their own error, the effective assistance of counsel claim is ripe for consideration. *See* *United States v. Vargas-Lopez*, 243 F.3d 552 (9th Cir. 2000) (vacating conviction and sentence when counsel admitted that his inadvertent failure to execute plea agreement was ineffective assistance of counsel).

As explained by Justice O'Connor in *Strickland v. Washington*, 466 U.S. 668, 683 (1984), the test to determine whether a person's right to effective assistance of counsel was violated is: "First, the defendant must show that counsel's performance was deficient. […] Second, the defendant must show that deficient performance prejudiced the defense." *Id.* at 687.

Here, Appellant established his trial counsel's admitted deficient performance. (Docket 2, 6:13-24). The admitted deficient performance of

Appellant's trial counsel also prejudiced Appellant. In *Lambright*, this Court determined a petitioner was entitled to a COA on the issue that the petitioner was entitled to a lesser-included offense instruction. 220 F.3d at 1028. There, based upon the holding in *Beck v. Alabama*, 447 U.S. 625 (1980), that the Due Process Clause requires a lesser-included offense instruction, the *Lambright* court granted a COA. In the present case, trial counsel's ineffectiveness prejudiced Appellant because his counsel failed to make a record, thereby denying him a direct appeal on that issue.

As Justice Stevens opined in *Beck*, "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[.]" *Beck*, 447 U.S. at 634–35. Here, the evidence established that a lesser-included offense instruction should have been given, and, thus, as in *Lambright*, Appellant was entitled to a COA.

The district court improperly ruled that there was no prejudice from the lack of lesser-included offense instructions. Directly contrary to the district court's determination is *Crace v. Herzog*, 798 F.3d 840, 847 (9th Cir. 2015). There, this Court held that *Strickland* did not require the court to presume that because a jury convicted the defendant of a particular offense, that the jury would not convict of a lesser-included offense if presented with that option. *Id.* at 847: "The

Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury ***necessarily would have reached the same verdict even if instructed on an additional lesser included offense***." *Id.* at 847 (emphasis added). Similarly, Appellant was denied the lesser-included offense instruction, but the district court presumed that because Appellant was convicted of the offense without the option of a lesser-included offense instruction that Appellant was not prejudiced.

Appellant has presented an issue on which reasoned jurists could disagree, or an issue adequate to deserve encouragement to proceed further. *Jones v. Ryan*, 691 F.3d 1093, 1100 (9th Cir. 2012) (granted expanded COA "ineffective assistance of trial counsel related to trial counsel's failure to discover and use the inconsistencies in the testimony regarding the kicked-in door in Jones's trial, the testimony at Scott Nordstrom's trial, and several police reports"). Therefore, this Court should grant Appellant a COA so that he can present this substantial showing of the denial of his Sixth Amendment right on the merits.

B. Appellant Made A Substantial Showing Of The Denial Of His Sixth Amendment Constitutional Right To Effective Assistance Of Counsel Regarding His Trial Counsel's Failure To Object To The Lack Of A *Willits* Instruction When He Had No Counsel During His State Court PCR Proceeding Which Was The First Time Appellant Could Have Brought Ineffective Assistance Of Counsel Claims:

The district court erred when it determined that Appellant was procedurally defaulted from making his ineffective assistance of counsel claim regarding the lack of a *Willits*[1] instruction. In fact, Appellant presented this issue to the state court in his timely filed second post-conviction petition. (Docket 2, 9:22-10:4).

Even assuming *arguendo* that Appellant was procedurally defaulted, that is overcome by his substantial claim of ineffective assistance of counsel pursuant to *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). The *Martinez* court determined that where, as here, ineffective assistance of counsel must be raised in a collateral post-conviction proceeding, procedural default does not bar the federal court from hearing 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." *Martinez*, 566 U.S. at 17. Here, Appellant's appointed PCR counsel stated there was "no claim"; therefore, Appellant effectively had no counsel during his state court PCR proceedings, which was the first available opportunity for him to be able to bring his ineffective assistance of counsel claims.

In *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013), regarding the definition of an "insubstantial" claim, this Court explained: "Stated otherwise, a

[1] *State v. Willits*, 96 Ariz. 184, 185 (1964), which allows a jury instruction permitting the jury to make a negative inference against the state when there is loss or destruction of evidence.

claim is 'insubstantial' if 'it does not have any merit or … is wholly without factual support.'" *Id.* at 1245 (quoting *Martinez*, 566 U.S. at 16). Here, Appellant has presented a meritorious claim with specific factual support that his trial counsel's performance was ineffective.

Appellant's trial counsel failed to object when no *Willits* instruction was given to the jury. The *Willits* instruction, given when the state has lost or destroyed evidence, would have allowed the jury to form a negative inference against the State. The police did not have the bullets recovered from the skull of Sanchez. Therefore, Appellant's defense could not test those bullets, let alone determine the caliber of them.

Dr. Zacher, the surgeon that removed the bullets, testified that the procedure was for the hospital to turn over those bullets to the authorities. At trial, Detective Lowe was asked if the Police had the bullets from Sanchez's head, Detective Lowe, specifically responded: "Not that I'm aware of." (Docket 2, p. 12:14-16). Appellant's trial attorney knew that Sanchez had been shot in the head and those bullets were still in his skull when he went to the hospital. Trial counsel knew that those bullets were removed at the hospital, but never made any record on the lack of the State's production of this evidence and inability of the defense to test them, let alone attempting to introduce Dr. Zacher's report into evidence. Appellant's trial counsel never attempted to introduce into evidence Dr. Zacher's

medical report done at the time of the surgery on Sanchez. That medical report, created on the day of the surgery, stated: "These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments." (District Court Docket, 1, Exhibit A).

In *Turner*, 281 F.3d at 874, although denying relief on the merits, a COA was granted on defendant's claim of ineffective assistance of counsel when trial counsel failed to test blood evidence. There, the trial counsel failed to arrange for the comparison of the blood samples drawn from the defendant six days after the homicide and those from the samples taken from the buck knife. *Id.* at 874. Those tests would have revealed the defendant's excessive drug use as a mitigating fact. Here, trial counsel failed to object to the lack of a *Willits* instruction after the State failed to produce the bullets recovered from Sanchez's head. That lack of production prevented Appellant's trial counsel from testing those bullets or even determining their caliber.

Appellant argued, contrary to the State's argument, that there may have been more than one gun. Indeed, seven bullets were fired inside the house, five bullets were recovered together with the two remaining in Sanchez's head. However, only five casings were recovered from inside of the house. By definition, the lack of that jury instruction prejudiced Appellant and a COA should issue.

Appellant submits that reasoned jurists could disagree as to whether Appellant's right to effective assistance of counsel was violated, or that he has presented an issue adequate to deserve encouragement to proceed further. *Canales v. Davis*, 740 F. App'x 432 (5th Cir. 2018) (determining a COA was warranted for ineffective assistance of counsel claim that was otherwise procedurally defaulted). On this basis, a COA should issue on the Appellant's constitutional claim regarding the lack of a *Willits* instruction.

C. Appellant Made A Substantial Showing Of The Denial Of His Constitutional Right Of Effective Assistance of Counsel When His Trial Attorney Did Not Duly Investigate Exculpatory Witness Testimony Establishing That Appellant Was Factually Innocent And Not The Shooter:

Appellant has presented substantial evidence regarding the denial of his Sixth Amendment right to effective assistance of counsel, where his trial counsel failed to investigate. The failure to investigate is a substantial claim for ineffective assistance of counsel. *See* *Reynoso*, 462 F.3d at 1112; *see also* *Rios v. Rocha*, 299 F.3d 796, 799 (9th Cir. 2002).

The *Reynoso* Court stated: "The duty to investigate is especially pressing where, as here, the witnesses and their credibility are crucial to the State's case." *Reynoso*, 462 F.3d at 1113. There, had defense counsel investigated and questioned the witnesses about their expectation of reward money in return for their testimony inculpating Reynoso, she would have been able to provide the jury

an explanation of the incentive to identify, regardless of their lack of knowledge. *Id.* at 1118. Here, had Appellant's trial counsel investigated and called Ulibarri and DeLeon to testify during the guilt phase, it would have provided the jury with specific exculpatory evidence contradicting the State's weak argument regarding gang affiliation and color of clothing.

In *Rios*, this Court reversed the denial of a habeas petition because of counsel's failure to adequately investigate witnesses who would have testified that the defendant was not the shooter. 299 F.3d at 800. The *Rios* court, quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) opined: "the failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Id.* at 805. Here, Appellant's trial counsel also failed to investigate actual exculpatory testimony provided by Ulibarri and DeLeon.

Here, the State's circumstantial case hinged on the theory that Appellant was wearing red, and therefore, was a rival gang member. The State argued this in their opening statement, during trial, and in their closing argument. By example only, the State argued in closing: "We already heard from more than one person he was wearing ***red*** clothing. He had some kind of ***red shoelaces, red bandana***. […] The ***red color*** associated is associated with the Phoeniqueras gang, all right." (Docket 2, 14:11-14 (quoting RT, 8/13/2008, p. 25:15-21)).

Dominguez also testified ***inconsistently*** at trial about the identity and location of shooter. On direct examination, Dominguez testified: "They [the shots] were coming from Isidro up there, from on top." (Docket 2, 15:7-8, (quoting RT, 7/9/2008, 81:11-12)). On cross-examination, Dominguez's testimony flip-flopped, answering "Yes" to the question: "You told them you didn't know if he was the shooter or was simply running from the shooting; correct?" (*Id.*, 15:8 (quoting RT, 8/7/2008, 113:16-18)). On redirect, Dominguez ***again*** flip-flopped his testimony. (*Id.*, 15:9-10 (quoting RT, 8/7/2008, 125:14-22)).

The other "eyewitnesses", Villagrana, Razo, and Borja, failed to even identify Appellant as the shooter during their testimony. Villagrana was asked: "You don't know who the shooter was, correct", to which he responded "Correct." (*Id.*, 16:1-3 (quoting RT, 7/14/2008, 85:13-14). Razo, did not make any in-court identification at all, and only testified that the shooter was wearing what "looked like a lot of red." (*Id.*, 16:4-7 (quoting RT, 7/14/2008, 136:16)). Borja testified that he did not even know who the shooter was, or that Appellant was even at the party. (*Id.*, 16:8-12 (quoting RT, 7/16/2008, 80:3-8)).

Appellant's trial counsel failed to investigate how Ulibarri[2] or DeLeon would have testified during the guilt phase of the trial nor were these key defense

[2] Ulibarri testified during the penalty phase of the trial but was never called to testify during jury trial. She was never asked any questions about the issues presented in her subsequent affidavit.

witnesses even subpoenaed to testify during trial. Counsel undersigned investigated these two witnesses which resulted in sworn affidavits. (Docket 2, 17).

Ulibarri's affidavit reads in pertinent part:

> 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.
> […]
> 12. 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.
> 13. 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 or [sic] any type.

(*Id.*, 17:3-12).

Deleon's sworn affidavit reads in pertinent part:

> 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.
> […]
> 9. I remember that Isidro was not wearing any garment that night which was red in color.
> […]

> 12. [sic] 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.
> […]
> 14.[sic] To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

(*Id.*, 17:15-18:9). These affidavits establish Appellant's factual innocence and specifically contradict the State's flimsy theory together with the inconsistent testimony of the State's witnesses.

Just as in *Reynoso* and *Rios*, prejudice is shown here. A COA should have issued because, at the very least, jurists of reason would disagree with the district court's conclusion that Appellant failed to present a constitutional violation or has presented an issue adequate to deserve encouragement to proceed further. *Roybal v. Davis*, 148 F. Supp. 3d 958, 1125 (S.D. Cal. 2015) (granting COA regarding claim of ineffective assistance of counsel for failure to investigate). Appellant was denied his constitutional right to effective assistance of counsel when defense counsel failed to duly investigate defense exculpatory witnesses.

D. Appellant Has Presented A Convincing Claim Of Actual Innocence When Exculpatory Evidence Would Have Shown: (1) He Was Not Wearing "Red" Clothing, As The State Argued Throughout Its Case; (2) Was Not In A Gang; and (3) Did Not Have A Gun On The Night In Question, Establishing By Definition That He Was Not The Shooter:

Since the moment Appellant was charged with the crimes on which he was convicted (on flimsy circumstantial evidence) he has always asserted his actual

innocence. *McQuiggin v. Perkins*, 569 U.S. 383 (2013) (actual innocence defeated a claim that habeas issues were procedurally defaulted). Appellant presented an actual innocence defense during trial and maintains his actual innocence as he currently sits in prison for crimes he did not commit.

As stated above, the State's entire case was based upon the weak argument that Appellant was a gang member, which they attempted to establish through the color of his clothing as *red*. The State also failed to produce any gun. Moreover, the State's case was built upon the weak theory that Appellant was shooting at rival gang members as the motive and intent for the crimes, supported by Appellant's purported *red* clothing on the night in question. The affidavits presented by Ulibarri and DeLeon confirmed that Appellant was not wearing any red, but rather dark colored clothing.

The State's theory was that all of the bullets matched the casings found. There were seven bullets fired inside the house, but only five casings were recovered from the inside of the house. The State recovered two additional casings outside of the house. Two of the bullets remained in Sanchez's head, and those bullets were removed in surgery. Dr. Zacher's medical report established that those bullets were turned over to the authorities. The police did not have the bullets. Appellant was prevented from any testing on the type or caliber of bullets that were in Sanchez's skull.

The testimony of DeLeon and Ulibarri establishes Appellant was not in a gang. Both would have been able to testify that Appellant did not own a gun, and DeLeon would have confirmed that Appellant was searched at the door of the party before entering and no gun was ever discovered on Appellant's person.

Appellant has demonstrated his actual innocence, has illustrated that he received ineffective assistance of counsel at his trial, and has shown he was prejudiced by such ineffectiveness.

V. CONCLUSION

Therefore, based upon the foregoing, Appellant requests that this Court grant a rehearing *en banc,* reopen the case, and issue a Certificate of Appealability.

Respectfully submitted this 7th day of December, 2020.

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton, Esq.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I electronically transmitted the above document, Petition For Rehearing En Banc, to the Clerk's office using the CM/ECF system for filing and sent a Notice of Electronic Filing to the following ECF registrant:

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By: /s/ Sandra Slaton

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 20-16038

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,118.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ Sandra Slaton **Date** 12/07/2020

(use "s/[typed name]" to sign electronically-filed documents)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Isidro Sauceda,
Petitioner/Appellant,

V.

Charles L. Ryan, Director of the Arizona Department of Corrections,
Respondent/Appellee,
And

The Attorney General of the State of Arizona,

Additional Respondent.

Case No.: 20-16038

D.C. No. 2:19-cv-01132-NVW
District of Arizona

Motion For Reconsideration On Denial Of Certificate Of Appealability

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TABLE OF AUTHORITIES

I. INTRODUCTION

Isidro Sauceda ("Appellant"), now 41 years old, is serving a life sentence on a first-degree murder conviction for which he is innocent. As discussed below, Appellant made a substantial showing of a denial of his Sixth Amendment constitutional right to effective assistance of Counsel throughout his case, and even in the post-conviction relief phase of the state proceedings. His trial attorney filed an affidavit admitting that he committed ineffective assistance of counsel during trial. The State's case was entirely based on circumstantial evidence. No gun was ever produced. Three of the four State's witnesses were unable to identify Appellant as the shooter. The one witness who did identify him, was impeached on cross-examination, and flip-flopped on the identification. The State's case hinged mainly on the flimsy theory that Appellant was a gang member (he was not) and to prove this theory the State relied heavily on the fact that Appellant was wearing the color "red" on the night in question. On top of this "color" theme, the State's mission was to convince the jury that the Appellant's supposed gang affiliation served as the motive for the shooting.

On the most crucial evidence in the trial—the color of clothing Appellant was wearing and the ballistics/gun evidence—trial counsel ***failed*** to investigate. If trial counsel had done his investigation he would have known that: Two witnesses would have testified Appellant did not wear "red" clothing the night of

the shooting, was not a member of a gang, and did not possess a gun. The jury did not receive a *Willits* instruction on the ballistics evidence, even though two of the bullets were unavailable to be tested by the defense. Self-admitted ineffective trial counsel never made a record by failing to object to the trial court's refusal to instruct the jury on a lesser-included offense.

Other than Supreme Court review, this Court will be Appellant's last avenue to seek relief on a circumstantial case for which he maintains his innocence. Appellant urges this Court to grant him a Certificate of Appealability so that he may brief and argue his case here.

II. STANDARD OF REVIEW

In *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), Justice Kennedy stated: "We do not require petitioner to prove, before the issuance of the certificate of appealability, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." *Id.* at 338.

In so reasoning, the Court concluded *inter alia*: "[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination ***to a threshold inquiry into the***

underlying merit of his claims." *Id.* at 327 (emphasis added) (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)). Former Justice Kennedy further held:

> Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating ***that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.***

Id. at 327 (emphasis added). The "debatable amongst jurists of reason" inquiry has been interpreted as a very low barrier to the issuance of a COA. *Id.* at 338.

The Ninth Circuit has held that any doubt about whether to issue a COA is resolved in favor of petitioner whose habeas petition has been denied on the merits. *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

III. ARGUMENT

A. Appellant Made A Substantial Showing Of The Denial Of His Sixth Amendment Constitutional Right To Effective Assistance Of Counsel Regarding Trial Counsel's Admitted Failure To Object Or Create A Record On The Lack Of Lesser-included Offense Instruction:

At trial, not only did Appellant's counsel fail to ensure that there was a lesser-included offense instruction, but counsel also failed to create any record regarding a lesser-included offense instruction. The affidavit of trial counsel reads in pertinent part:

> 4. As the Count 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 attempted second degree murder instructions. Further, 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 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.

(Motion, 6:15-23).

The sworn affidavit by Appellant's trial counsel establishes that his performance was deficient. Where a counsel admits their own error, the effective assistance of counsel claim is ripe for consideration. *See United States v. Vargas-Lopez*, 243 F.3d 552 (9th Cir. 2000) (counsel admitted that his inadvertent failure to execute plea agreement was ineffective assistance of counsel); *see also Hoffman v. Arave*, 236 F.3d 523, 535 (9th Cir. 2001) (counsels' admission that their advice to client to reject plea offer on their misinterpretation of death penalty statute would be held unconstitutional ineffective assistance).

As explained by Justice O'Connor in *Strickland v. Washington*, 466 U.S. 668, 683 (1984), the test to determine whether a person's right to effective assistance of counsel was violated is: "First, the defendant must show that counsel's performance was deficient. […] Second, the defendant must show that

deficient performance prejudiced the defense." *Id.* at 687. In the present case, Appellant established deficient performance by his trial counsel's admitted deficient performance. (Docket Entry ("DE") 2, 6:13-24).

Here, the Magistrate's Report, adopted by the District Court, changed the standard of *Strickland* to require Appellant to establish that the outcome "***would***" have been different. Instead of requiring that there be a ***reasonable probability*** that the outcome would have been different, the District Court placed the burden on Appellant to prove a much stricter requirement than was required.

The admitted deficient performance of Appellant's trial counsel prejudiced his defense by failing to object, or create a record, on the lack of lesser-included offense instructions. In *Lambright v. Stewart*, 220 F.3d 1022, 1028 (9th Cir. 2000), this Court determined a petitioner was entitled to a COA on the issue that the petitioner was entitled to a lesser-included offense instruction. There, based upon the holding in *Beck v. Alabama*, 447 U.S. 625 (1980), that the Due Process Clause requires a lesser-included offense instruction, the *Lambright* court granted a COA. In the present case, the evidence at trial establishes that a lesser-included offense instruction should have been given, and therefore, a COA should issue.

As Justice Stevens opined in *Beck*, "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[.]" *Beck*, 447 U.S. at

634–35. Appellant was not presented with that option because his trial counsel failed to object, or even make a record, regarding the lack of lesser-included offense instructions.

The District Court improperly accepted the Magistrate's Report, which determined that because Appellant was convicted of first-degree murder, there was no prejudice from the lack of lesser-included offense instructions. This is the very situation with which the *Beck* court was presented, and rejected: "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 Magistrate's determination, adopted by the District Court, defeats the holdings in *Beck* and *Strickland*:

Furthermore, as stated by this Court in *Crace v. Herzog*, 798 F.3d 840, 847 (9th Cir. 2015), *Strickland*:

> [D]oes not require a court to presume … 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. […] The Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury ***necessarily would have reached the same verdict even if instructed on an additional lesser included offense***.

(Emphasis added). Similarly, Appellant, here, was denied the lesser-included offense instruction, when his trial counsel failed to object, or even create a record, resulting in a constitutional violation.

Appellant has presented an issue on which reasoned jurists could disagree and should be permitted to bring his appeal on the District Court's denial of his Petition for Habeas Corpus. Alternatively, the issue presented regarding trial counsel's admitted failure to object, or even create a record, on the lack of lesser-included offense instructions was adequate to deserve encouragement to proceed further. *See Jones v. Ryan*, 691 F.3d 1093, 1100 (9th Cir. 2012) (granted expanded COA regarding ineffective assistance of counsel claim for failing to discover and utilize inconsistencies in the testimony); *Roybal v. Davis*, 148 F. Supp. 3d 958, 1125 (S.D. Cal. 2015) (COA granted for ineffective assistance of counsel claim); *Lopez v. Pollard*, No. 05-C-0999, 2008 WL 11485628, at *2 (E.D. Wis. May 2, 2008) (granted COA regarding ineffective assistance of counsel for failure to request lesser-included offense instruction).

B. Appellant Made A Substantial Showing Of The Denial Of His Sixth Amendment Constitutional Right To Effective Assistance Of Counsel When His Trial Counsel Failed To Object To The Lack Of A Willits Instruction And His Post-Conviction Counsel Filed A "No Claim" Statement, Leaving Him To Proceed *Pro Se* In Those Proceedings:

The District Court incorrectly adopted the Magistrate's Report which determined that Appellant was procedurally defaulted from making his ineffective

assistance of counsel claim regarding the lack of a *Willits*[1] instruction. However, Appellant presented this issue to the state court in his timely filed second post-conviction petition. (Motion, 9:22-10:4).

Even assuming *arguendo* that Appellant was procedurally defaulted, that is overcome by the substantial claim of ineffective assistance of counsel pursuant to *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), or Appellant's actual innocence claim pursuant to *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

The *Martinez* court determined that where, as here, ineffective assistance of counsel must be raised in a collateral post-conviction proceeding, procedural default does not bar the federal court from hearing a "substantial claim of ineffective assistance of counsel when there was no counsel or counsel was ineffective." *Martinez*, 566 U.S. at 17. Appellant's appointed PCR counsel stated there was "no claim" forcing Appellant to proceed in his post-conviction proceedings *pro se*.

In *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013), the test for overcoming procedural default would require the petitioner to show "a substantial claim for ineffective assistance of counsel" and:

> We conclude, for the narrow purpose of satisfying the second *Martinez* requirement to establish "cause," that a prisoner need show

[1] *State v. Willits*, 96 Ariz. 184, 185 (1964), which allows a jury instruction permitting the jury to make a negative inference against the state when there is loss or destruction of evidence.

> only that his PCR counsel performed in a deficient manner. A prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his required showing that the trial-counsel IAC claim be "substantial" under the first *Martinez* requirement.

Id. at 1245–46. As the *Detrich* court reasoned: "Stated otherwise, a claim is 'insubstantial' if 'it does not have any merit or … is wholly without factual support.'" *Id.* at 1245 (quoting *Martinez*, 566 U.S. at 16). In the present case, Appellant has presented a meritorious claim with specific factual support that his trial counsel's performance was ineffective.

Appellant's trial counsel failed to object when no *Willits* instruction was given to the jury. The *Willits* instruction, given when the state has lost or destroyed evidence, would have allowed the jury to form a negative inference against the State. The police did not have the bullets recovered from the skull of Sanchez. Therefore, Appellant's defense team could not inspect, review, or test those bullets, let alone determine the caliber of them. No *Willits* instruction was provided to the jury, and Appellant's trial counsel failed to object.

Dr. Zacher, the surgeon that removed the bullets, testified that the procedure was for the hospital to turn over those bullets to the authorities. At trial, Detective Lowe was asked if the Police had the bullets from Sanchez's head, Detective Lowe, specifically responded: "Not that I'm aware of." (Motion, p. 12:14-16).

In *Turner v. Calderon*, 281 F.3d 851, 874 (9th Cir. 2002), although denying relief on the merits, a COA was granted on defendant's claim of ineffective assistance of counsel when trial counsel failed to test blood evidence. Similarly, a COA should issue in the present case.

Appellant's trial attorney knew that Sanchez had been shot in the head and those bullets were still in his skull when he went to the hospital. Trial counsel knew that those bullets were removed at the hospital, but never made any record on the lack of evidence or his inability to test the evidence.

Appellant's trial counsel never even attempted to introduce into evidence Dr. Zacher's medical report done at the time of the surgery on Sanchez. That medical report stated: "These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments." (Motion, Exhibit A, 1).

PCR counsel filed a "no issue" statement on post-trial remedies. Pursuant to *Martinez*, as clarified by *Detrich*, Appellant was forced to present a claim of ineffective assistance of counsel without an attorney. Appellant has presented a meritorious claim that has significant factual support.

It has been held that "manifest injustice" or "actual innocence" is a remedy to procedural default and statute of limitations claims regarding federal habeas petitions. *McQuiggin*, 569 U.S. at 394. There, a convincing claim of actual

innocence resulted in the issuance of a COA. *Id.* at 401. Here, Appellant's actual innocence claim provides an exception to the determination by the District Court that Appellant's claim for ineffective assistance of counsel was procedurally barred.

Since the moment he was originally charged Appellant has maintained his innocence. Two witnesses (who never testified during the guilt phase) were discovered after and gave sworn affidavits regarding how they would have testified. (Motion, p. 13-14). Ulibarri confirmed that Appellant:

- Was not wearing red, but rather dark clothing and black shoes with black shoelaces.
- Was not a member of a gang.
- Never had a gun on the night in question, and to her knowledge did not own a weapon of any type.

DeLeon, corroborated Ulibarri's testimony, and also stated:

- He was with Appellant during the entire time in question, including the day prior.
- Appellant was wearing dark clothing with black shoes. Appellant was not wearing any red clothing on the night in question.
- He and Appellant were searched at the front door of the party and no weapon was found.

- He never saw Appellant with a gun.
- Appellant was not a member of a gang.

(Motion, 17:3-18:19).

Reasoned jurists could disagree as to whether Appellant's right to effective assistance of counsel was violated. At the very least, Appellant has presented an issue adequate enough to deserve encouragement to proceed further. *McQuiggin*, 569 U.S. at 387 (COA was granted in underlying appeal by Sixth Circuit regarding procedural default and statute of limitations issue); *Canales v. Davis*, 740 F. App'x 432 (5th Cir. 2018) (determining a COA was warranted for ineffective assistance of counsel claim that was otherwise procedurally defaulted). On this basis, a COA should issue on the Appellant's constitutional claim regarding the lack of a *Willits* instruction.

C. Appellant Made A Substantial Showing Of The Denial Of His Constitutional Right Of Effective Assistance of Counsel When His Trial Attorney Did Not Duly Investigate Exculpatory Witness Testimony Establishing That Appellant Was Factually Innocent And Not The Shooter:

Appellant is entitled to COA: He has presented substantial evidence regarding the denial of his constitutional right to effective assistance of counsel, where his trial counsel failed to investigate. The failure to investigate is a substantial claim for ineffective assistance of counsel. *See Reynoso v. Giurbino*,

462 F.3d 1099, 1112 (9th Cir. 2006); *see also Rios v. Rocha*, 299 F.3d 796, 799 (9th Cir. 2002).

In *Reynoso*, this Court determined that trial counsel was ineffective for failing to investigate. 462 F.3d at 1120. The *Reynoso* Court stated: "The duty to investigate is especially pressing where, as here, the witnesses and their credibility are crucial to the State's case." *Id.* at 1113. Had defense counsel investigated and questioned the witnesses about their expectation of reward money in return for their testimony inculpating Reynoso, she would have been able to provide the jury an explanation of the incentive to identify, regardless of their lack of knowledge. *Id.* at 1118.

In *Rios*, this Court reversed the denial of a habeas petition because of counsel's failure to adequately investigate witnesses who would have testified that the defendant was not the shooter. *Rios*, 299 F.3d at 800. This Court, quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) opined: "the failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Id.* at 805. Appellant's trial counsel also failed to investigate actual exculpatory testimony.

Here, the State's circumstantial case hinged on the theory that Appellant was wearing red, and therefore, was a rival gang member. The State peppered this theory throughout its opening and closing arguments together with the

testimony of law enforcement officers. By example only, the State 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 Phoeniqueras gang, all right." (Motion, p. 14:11-14).

Marcus Dominguez testified ***inconsistently*** at trial. On direct examination, Dominguez testified: "They [the shots] were coming from Isidro up there, from on top." (Motion, 15:7-8, (quoting RT, 7/9/2008, 81:11-12)). On cross-examination, Dominguez's testimony flip-flopped, answering "Yes" to the question: "You told them you didn't if he was the shooter or was simply running from the shooting; correct?" (*Id.*, 15:8 (quoting RT, 8/7/2008, 113:16-18)). On redirect, Dominguez ***again*** flip-flopped his testimony. (*Id.*, 15:9-10 (quoting RT, 8/7/2008, 125:14-22)).

The other "eyewitnesses," Villagrana, Razo, and Borja, failed to even identify Appellant as the shooter. Villagrana was asked: "You don't know who the shooter was, correct", to which he responded "Correct." (Motion, 16:1-3 (quoting RT, 7/14/2008, 85:13-14). Razo, did not make any in-court identification at all, and only testified that the shooter was wearing what "looked like a lot of

red." (Motion, 16:4-7 (quoting RT, 7/14/2008, 136:16)). Borja testified that he did not even know who the shooter was, or that Appellant was even at the party. (Motion, 16:8-12 (quoting RT, 7/16/2008, 80:3-8)).

Appellant's trial counsel did not investigate how Sherise Ulibarri[2] or Steven DeLeon would have testified during the guilt phase of the trial. These key defenses witnesses were not called to testify. Counsel undersigned investigated these two witnesses which resulted in sworn affidavits. (Motion, 16). Ulibarri was Appellant's girlfriend at the time, and DeLeon actually went to the party with Appellant on the night in question.

Ulibarri's affidavit reads in pertinent part:

> 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.
> 8. I personally tied Isidro's new shows [sic] right before Isidro left for the party on December 13, 2003.
> 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.
> […]
> 12. 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.
> 13. 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 or [sic] any type.

[2] Ulibarri testified during the penalty phase of the trial but was never called to testify during the guilt phase of the trial.

(Motion, 17:3-12).

Deleon's sworn affidavit corroborates Ulibarri's affidavit as well as providing additional information:

> 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.
> […]
> 9. I remember that Isidro was not wearing any garment that night which was red in color.
> 10. [sic] On December 13, 2003 I was with Isidro and other friends when we were all searched at the front door of the party for weapons.
> 12. [sic] 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.
> 13. [sic] Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my best personal knowledge he did not own a weapon of any type.
> 14.[sic] To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

(Motion, 17:15-18:9). These affidavits establish Appellant's factual innocence and specifically contradict the State's flimsy theory together with the inconsistent testimony of the State's witnesses.

Just as in *Reynoso* and *Rios*, defense counsel failed to investigate witnesses which exculpated Appellant. By definition, prejudice is shown here. A COA should have issued because jurists of reason would disagree with the District

Court's conclusion that Appellant failed to present a constitutional violation. At the very least, Appellant has presented an issue adequate enough to deserve encouragement to proceed further. *Roybal*, 148 F. Supp. 3d at 1125 (granting COA regarding claim of ineffective assistance of counsel for failure to investigate); *Lee v. Ryan*, No. CV-01-2178-PHX-GMS, 2019 WL 2617052, at *14 (D. Ariz. June 26, 2019) (same). Appellant was denied his constitutional right to effective assistance of counsel when defense counsel failed to duly investigate exculpatory witness testimony.

D. Appellant Has Presented A Convincing Claim Of Actual Innocence When Exculpatory Evidence Would Have Shown: (1) He Was Not Wearing "Red" Clothing, As The State Argued Throughout Its Case; (2) Was Not In A Gang; and (3) Did Not Have A Gun On The Night In Question, Establishing By Definition That He Was Not The Shooter:

Since the moment Appellant was charged with the crimes on which he was convicted (on 100% circumstantial evidence) he has always asserted his actual innocence. Appellant presented an actual innocence defense.

The State's entire case was based upon nothing more than circumstantial evidence. The State failed to produce any gun. Moreover, the State's case was premised on the fact the Appellant was a member of a gang who shot other competing gang members. The State based this entire theory on the fact that they claimed Appellant was wearing a lot of ***red*** clothing on the night in question. The

affidavits presented by Ulibarri and DeLeon confirmed that Appellant was not wearing any red, but rather dark colored clothing.

Without any gun, the State's theory was that all of the bullets matched the casings found. There were seven bullets fired inside the house, but only five casings were recovered. The State recovered two additional casings outside of the house. However, the State argued that all of the bullets and all of the casings were recovered.

Two of the bullets remained in Sanchez's head, and those bullets were removed in surgery. Dr. Zacher's medical report established that those bullets were turned over to the authorities. The police did not have the bullets. Appellant was prevented from any testing on the type or caliber of bullets that were in Sanchez's skull.

The testimony of DeLeon and Ulibarri establishes Appellant was not in a gang. Both would have been able to testify that Appellant did not own a gun, and DeLeon would have confirmed that Appellant was searched at the door where no gun was ever discovered on Appellant's person.

Appellant has not only established that reasonable doubt existed to prevent his conviction, but also that Appellant is actually innocent. Therefore, this Court should issue a COA to allow him to present his issues to this Court.

IV. CONCLUSION

Therefore, based upon the foregoing, Appellant requests that this Court grant his Motion For Reconsideration and issue a Certificate of Appealability.

Respectfully submitted this 16th day of November, 2020.

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton, Esq.
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I, Sandra Slaton, attorney for Appellant Isidro Sauceda, hereby certify:

1. This Motion for Reconsideration is presented pursuant to Ninth Circuit Rule 26-10.

2. Pursuant to Ninth Circuit Rule 40-1, this Motion contains less than 4,200 words.

3. The word count in this Motion is 4,189 words as determined by Microsoft Word 365.

Respectfully submitted this 16th day of November, 2020.

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton, Esq.
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I electronically transmitted the above document, Motion For Reconsideration On Denial Of Certificate Of Appealability, to the Clerk's office using the CM/ECF system for filing and sent a Notice of Electronic Filing to the following ECF registrant:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Isidro Sauceda, Petitioner/Appellant, V. Charles L. Ryan, Director of the Arizona Department of Corrections, Respondent/Appellee, And The Attorney General of the State of Arizona, Additional Respondent.	Case No.: 20-16038 D.C. No. 2:19-cv-01132-NVW District of Arizona Motion For Certificate Of Appealability

Petitioner/Appellant, Isidro Sauceda ("Mr. Sauced"), by and through counsel undersigned, hereby submits his Motion for Certificate of Appealability. On April 13, 2020, the Magistrate filed the Report and Recommendation and *sua sponte* stated that a certificate of appealability should not issue. On April 27, 2020, Mr. Sauceda, through counsel undersigned, timely filed objections to the Magistrate's Report and Recommendation. On April 29, 2020, the District Court adopted the Magistrate's Report and Recommendation, dismissed Mr. Sauceda's petition for a writ of habeas

corpus and also denied a certificate of appealability to appeal from such order to the United States Court of Appeals for the Ninth Circuit.

Mr. Sauceda respectfully requests that this Court issue a certificate of appealability, pursuant to provisions of 28 U.S.C. § 2253, and Rule 22(b) of the Federal Rules of Appellate Procedure and also submits that he is entitled to redress on appeal.

I. Introduction

Mr. Sauceda, an innocent man, still sits in prison for a crime he did not commit. The State of Arizona used a case built on circumstantial evidence and conjecture to convict Mr. Sauceda of first-degree murder, attempted first-degree murder, aggravated assault, and assisting a criminal street gang. At no point, was any gun, the weapon used in the crimes charged, ever located, or presented to the jury. Mr. Sauceda was convicted on the State's theory that he was the member of a rival gang which provided him with the motive to kill.

The State's theory was built on inconsistent testimony and purported circumstantial symbols of gang affiliation. For example, the State's evidence centered around Mr. Sauceda wearing red colored clothing. None the witnesses who testified at trial, as fully discussed below, were able to unequivocally identify Mr. Sauceda as the shooter, nor did they testify that Mr. Sauceda was the one wearing the red clothing. Indeed, three out of four witnesses were completely unable to identify Mr. Saucedo as the shooter. The one witness who arguably could identify him, gave inconsistent and contradictory testimony as to his identification.

Mr. Sauceda's trial attorney failed to provide effective assistance of counsel. Indeed, Mr. Sauceda's trial counsel submitted a sworn affidavit that his failure to object to the lack of a lesser included offense instruction was ineffective assistance of counsel. His defense counsel also failed to secure a jury instruction allowing the jury to make a

negative inference against the state regarding the bullets recovered from Carlos Sanchez's skull when Dr. Zacher's Report specifically illustrated that such bullets were provided to the police department. Additionally, Mr. Sauceda asserts that his post-conviction counsel failed to provide effective assistance of counsel when she submitted a no-colorable claims notice.

Mr. Sauceda also asserts that trial counsel was ineffective for failure to investigate. Trial counsel failed to include the medical report of Dr. Zacher in evidence. As discussed below, the medical report, provides proof that the bullets recovered from Mr. Sanchez's head were provided to the police. Dr. Zacher's Report provided specific evidence that after the bullets were recovered from Carlos Sanchez's skull, they were provided to the police department. Such evidence, written at the time of the surgery, establishes that the police department was provided the bullets, but at some point lost or misplaced them, making them unavailable for production to Mr. Sauceda. Mr. Sauceda's defense counsel also failed to investigate the testimony of Sherise Ulibarri and Steven DeLeon who would have provided contradictory testimony to the State's witness.

In adopting the Report and Recommendation, the District Court wrongly failed to consider established federal law. The dismissal of Mr. Sauceda's Petition for Habeas Corpus was, at the very least, debatable and this Court should issue a certificate of appealability. Mr. Sauceda has demonstrated a substantial constitutional violation.

II. A Certificate of Appealability Is Warranted Because Mr. Sauceda Has Made A Substantial Showing Of A Constitutional Violation:

Pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure, Mr. Sauceda seeks a Certificate of Appealability with respect to all issues raised in his Petition for Writ of Habeas Corpus. It is respectfully submitted that Mr. Sauceda has demonstrated a substantial showing of a constitutional violation in arguing that he was denied his Sixth Amendment right to effective assistance of counsel, was

denied his Fifth Amendment right to a new trial on the basis of newly discovered evidence, and was denied his Fifth Amendment right to a new trial and to have his conviction reversed based upon actual innocence, as more fully set forth below.

The standard for determining when a Certificate of Appealability is warranted was explained by the Supreme Court in *Miller-El v. Cockrell*, 537 U.S. 332 (2003). As former Justice Kennedy opined:

> [O]ur opinion in *Slack* held that a C[ertificate] O[f] A[ppealability] does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" (internal citations omitted).

Id. at 337 (citing *Slack v. McDaniel*, 529 U.S. 473, 489 (2000). As the Supreme Court went on to explain: "We do not require petitioner to prove, before the issuance of the COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that petitioner will not prevail." *Id.* at 338.

Mr. Sauceda asserts that he has raised at a minimum, and much more, factual and legal claims of a constitutional magnitude that he has "demonstrate[d] that his petition involves issues which are debatable among jurists of reason, that another court could

resolve the issue differently, or that the issues are adequate to deserve encouragement to proceed further." *Id.* at 327.

III. Mr. Sauceda Has Presented Constitutional Claims That His Sixth Amendment Right To Effective Assistance Of Counsel Was Violated:

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court has stated: "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Specifically, former Justice O'Connor opined in *Strickland*: "The defendant must show that there is a ***reasonable probability*** that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a ***probability sufficient to undermine confidence in the outcome***." *Id.* at 694 (1984) (emphasis added).

In the present case, the District Court wrongly adopted the Magistrate's Report and Recommendation which repeatedly equivocated the standard set forth in *Strickland* with a requirement that Mr. Sauceda illustrate that the outcome "***would***" have been different. (Report and Recommendation ("R&R"), p. 17:7-8; 20:24-26). The District Court essentially "converted *Strickland's* prejudice inquiry into a sufficiency-of-the-evidence question." *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015). Mr. Sauceda was not required to show that the verdict ***would*** have been different. Instead, pursuant

to *Strickland* and its progeny, Mr. Sauceda was merely required to demonstrate a "reasonable probability" that undermined the confidence in the outcome.

A. Ineffective Assistance Of Counsel For Failure To Object To Lack of Lesser Included Offense Instruction:

The Magistrate determined, and the District Court wrongly adopted such determination, that the state court's finding that Sauceda could not show prejudice through the absence of lesser-included offense instructions "was not an unreasonable application of *Strickland*, because counsel's choice of a sound defense strategy, and any decisions made regarding the implementation of that strategy, are "virtually unchallengeable." R&R at 14:1-8. The failure to request a lesser-included offense instruction was not a reasonable strategic decision. Mr. Sauceda's trial counsel ***himself*** admitted that his representation was unreasonable on this basis:

> 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 Count 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 attempted second degree murder instructions. Further, 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 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.

(Objections to Report and Recommendation ("Objections"), 4/27/2020, p. 2-3 (citing, Petition for Writ of Habeas Corpus, Appendix Tab A).

The District Court also wrongly adopted the Magistrate's Report and Recommendation that it cannot presume that trial counsel's performance was ineffective. Mr. Sauceda was not requesting that the District Court presume that his defense counsel was ineffective. Instead, through defense counsel's sworn affidavit, Mr. Sauceda established that his defense counsel was ineffective in failing to object to a lesser included offense instruction. Under *Strickland*, trial counsel's affidavit ***by itself*** established that the prong of ineffectiveness was met. Where counsel admits their own inadvertence in failing to timely execute a plea agreement, the record is sufficiently developed for examination of an ineffective assistance of counsel claim. *United States v. Vargas-Lopez*, 243 F.3d 552 (9th Cir. 2000); *See also Hoffman v. Arave*, 236 F.3d 523, 535 (9th Cir. 2001).

The failure of counsel to request a lesser included offense instruction unequivocally interfered with Mr. Sauceda's defense. "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 v. Alabama*, 447 U.S. 625, 634 (1980). Defense counsel must seek a lesser-included offense instruction to avoid the risk of "unwarranted conviction." *Id*. at 638. A defendant is not precluded from receiving a lesser-included offense instruction even where he asserts an all-or-nothing defense. *United State v. Crutchfield*, 547 F.2d 496, 501 n. 4 (9th Cir. 1977). 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. This procedural safeguard is especially important in cases such as this one. The State's entire

case was built on circumstantial evidence. However, because Mr. Sauceda's counsel failed to object to the trial court's own failure to provide a lesser included offense jury instruction, the jury was only presented with two options: convict of first-degree murder or acquit.

The District Court wrongly adopted the Magistrate's Report and Recommendation which determined that there was "not an unreasonable application of *Strickland*" and accepted the Arizona appellate court's conclusions on the issue finding that as a consequence of transferred intent:

> [T]o find Defendant guilty of premeditated first degree murder of his friend, the jury had to necessarily conclude that Defendant deliberately and with premeditation attempted to kill the other victims. Under these circumstances, Defendant cannot meet his burden of showing any likelihood that the jury would have found him guilty of a lesser offense on the two counts of attempted first degree murder if a lesser-included offense instruction had been given.

R&R at13:14-25. Such an analysis, however, presumes that the jury would have found premeditation for *any/all* of the victims, even if it were provided a lesser-included offense instruction. Pursuant to *Beck,* which concluded that if given a lesser-included offense instruction, a jury would not have resolved its doubts toward conviction, here too it is reasonably probable that the jury would not have found premeditation. Further, the *Strickland* standard

> [D]oes not require a court to presume … 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. The Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury ***necessarily would have reached the same verdict even if instructed on an additional lesser included offense***.

(Emphasis added*)*. *Crace* 798 F.3d at 847 (reaffirming *Strickland's* "reasonable probability standard," citing *Strickland*, 466 U.S. at 694).

In *Crace v. Herzog*, the Ninth Circuit observed that *Beck* created a "due process" rule, *Crace*, 798 F.3d at 851, n.8, and found that the lack of a lesser included offense instruction was a "constitutional violation" which warranted habeas corpus relief. *Id*. at 846. The failure of trial counsel to request a lesser-included offense instruction violated Mr. Sauceda's right to due process. Mr. Sauceda could have been convicted of lesser offenses—or it is reasonably probable that he may not have been unanimously convicted at all.

At the very least, Mr. Sauceda has presented a claim which is debatable among jurists. Therefore, this Court should issue a certificate of appealability and allow Mr. Sauceda to appeal the District Court's dismissal of his Petition for Habeas Corpus on this basis.

B. Ineffective Assistance Of Counsel Claim Regarding Failure To Request A *Willits* Instruction Was Not Procedurally Defaulted:

The District Court wrongly adopted the Magistrate's finding that Mr. Sauceda claim of ineffective assistance of counsel regarding failure to request a *Willits* instruction was procedurally defaulted. Indeed, it cannot be disputed that Mr. Sauceda raised this issue in the State court starting with his timely filed Second post-conviction petition. On

the denial of that petition, Mr. Sauceda appealed that ruling including the appeal of the failure to include the jury instruction which was decided on the merits by the Arizona state courts. (Objections, p. 5 (citing Second Rule 32 Petition, p. 4-6; Petition for Review, p. 4-5).

Even assuming the claim was procedurally defaulted, Mr. Sauceda has established, pursuant to *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), that procedural default would not bar his claim:

> [W]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17.

The District Court improperly adopted the Magistrate's Report and Recommendation regarding the failure to secure a jury instruction on the State being unable to produce the bullets recovered from Carlos Sanchez's head. Indeed, a *Willits* instruction, from the case of *State v. Willits*, 96 Ariz. 185 (1964). In *Willits*, Arizona supreme court determined that a jury instruction would permit the jury to find that loss, or destruction, of evidence by the State would allow the jury to form an inference against the State's interest. *Id.* at 187. Furthermore, "a finding of 'bad faith' is not a prerequisite to this corrective procedure." *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *see also Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (quoting *Vodusek v. Bayiner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Where lost or destroyed evidence is relevant to the defense, and the deprivation of evidence to support

defendant's theories proves to be prejudicial, the imposition of an adverse inference instruction is warranted. *See Cyntegra, Inc. v. IDEXX Labs., Inc.*, 322 Fed. Appx. 569, 572 (9th Cir. 2009). Mr. Sauceda was never even able to present the issue of the *Willits* instruction completely because of the absence of a crucial material record, Dr. Zacher's report. Had Mr. Sauceda received the *Willits* instruction, it would have allowed the jury to form a negative inference against the state.

Mr. Sauceda claimed that his trial counsel's failure to introduce the medical records of Carlos Sanchez was prejudicial. There was a ***reasonable probability*** that presenting the additional evidence from Dr. Zacher's report, could have resulted in a different outcome. The State's case against Mr. Sauceda relied entirely on a theory that there was only one (1) gun present, a gun that was never even produced for the jury. Dr. Zacher's report was evidence that contradicted the State's theory that there was only one (1) gun present at the party on the night of the shooting. Three bullets were found to have gone through the walls of the den, one bullet was found under Kristopher Dominguez's pant leg, and two bullets were still inside Carlos Sanchez's skull as there were no exit wounds. (*Id.*, p. 6:17-18). There were seven bullets fired inside of the house. Only five bullet casings were found inside the small den. (Trial Exhibits 9, 10, 12, 13, 14). Another two bullet casings were discovered outside of the house. (Trial Exhibit 15 and 16). Three bullets were fired outside of the house, two remained in Razo's body, and another was embedded in an exterior wall of the house. The State's theory at trial was predicated on the theory that there were five casings and five bullets found inside of the den, and two casings and two bullets found outside, and all were fired from

the same gun. Dr. Zacher's report strongly undermines the State's one (1) gun theory and establishes a debate regarding the appealability in this case.

The District Court improperly adopted the Magistrate's Report and Recommendation rejecting Mr. Sauceda's ineffective assistance of counsel claim regarding Mr. Sauceda's trial counsel failing to object to the trial court's denial of a *Willits* instruction. Mr. Sauceda has established that a *Willits* instruction was supported. Dr. Zacher's report, which was written in real time in relation to the incident in question, corroborates the fact that these bullets were given to the police and yet the police did not have this evidence to produce to the defendant. Dr. Zacher testified at trial, but the report was never admitted into evidence by counsel. (*Id.* at p. 7). While Dr. Zacher testified that the procedure was that the specimens were to be handed over to the police, he could not confirm whether the procedure was followed. At trial, Detective Bruce Lowe testified that bullets had been removed from the head of Carlos Sanchez. When asked if the fragments were in the custody of the Glendale Police Department, he stated "Not that I'm aware of." (ROA 563 at p. 8:4-7). However, Dr. Zacher's report clearly stated: "These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments." (Dr. Zacher's Report, attached as **Exhibit A**). Therefore, *res ipsa loquitur*, the only inference is that the evidence was lost or destroyed while in police custody.

Mr. Sauceda has established that a certificate of appealability should issue because it is, at the very least, debatable that his trial counsel was ineffective for failing to argue that a *Willits* instruction was warranted. There is a reasonable probability, at a

minimum, that a *Willits* instruction could have resulted in a completely different outcome because the jury would have been able to make an inference against the State.

C. Mr. Sauceda's Trial Counsel Was Ineffective For Failure To Investigate:

Mr. Sauceda's claims of newly discovered evidence were *not* freestanding, as they also support Mr. Sauceda's claim of ineffective assistance of counsel. In *Rios v. Rocha*, 299 F.3d 796, 799 (9th Cir. 2002), the Ninth Circuit overturned a denial of *habeas* relief on the grounds that deficiency of counsel was prejudicial. In *Rios*, the Ninth Circuit determined, where five undiscovered witnesses later testified that defendant was not the shooter there was a reasonable probability the outcome would have been different, and defendant was unfairly prejudiced. *Id.* at 800. Counsel was found to be ineffective to defendant's prejudice in *Rios* because the newly discovered witness testimony that counsel did not duly investigate would probably have changed the outcome As stated by the *Rios* court quoting *Lord v. Wood,* "the failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence. *See Lord v. Wood,* 184 F.3d 1083, 1093 (9th Cir.1999) ("A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance."). Similarly, in the present case, Mr. Sauceda put forth newly discovered evidence, the crucial testimony of Sherise Ulibarri and Steven DeLeon that his trial counsel did not duly investigate. Neither Ms. Ullibari nor Mr. DeLeon testified during the guilt phase of trial. While Ms.

Ulibarri testified during the penalty phase, the prejudice to Mr. Sauceda had already occurred. Both witnesses provided testimony that contradicted the State's overriding theory that Mr. Sauceda was wearing red and a was member of a rival gang. Such evidence, had it been presented to the jury, at the very least, could probably have resulted in a different outcome.

The State hinged its theory on the color of the clothing Mr. Sauceda was wearing as establishing gang affiliation and motive to attack the victims, who were rival gang members. The State referenced the color "red" and "red rag" throughout the trial, including in its opening statement and closing argument:

- "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." *See* RT 08/13/08, ROA 573, p. 25:15-21 (emphasis added);
- "Even people who did not point him out they described the person who was doing the apologizing with the gun and the ***red bandanas***, okay." *Id*. at 53:4-7 (emphasis added);
- "There was one person wearing ***red bandana*** okay." *Id*. at 56:9 (emphasis added);
- "He said he was, the defendant, was wearing gray shoes with ***red stripes*** or laces … And then Marcus said he was wearing a gray cap with ***red trim*** and a ***red bandana*** underneath that cap." *Id*. at 62:6-7, 17-18 (referencing description given by Marcus Dominguez) (emphasis added);
- "It was ***the red***." *Id*. at 76:16 (emphasis added).

(Objections, p. 11-12) (*see also* Affidavits of Sherise Ulibarri and Steven DeLeon, attached hereto as Exhibits B and C).

Most of the victims were members of the Califas gang. The State being able to establish that Mr. Sauceda was a member of the rival gang, the Phoeniqueras, was crucial to the State's case. The State relied on witnesses who had given multiple inconsistent statements regarding the identification of Mr. Sauceda and what he was wearing.

Mr. Dominguez's testimony was not consistent at all during examination and cross-examination. He first testified: "They [the shots] were coming from Isidro up there, from on top." (Objections, p. 12 ¶ 14 (citing RT 7/9/08, ROA 584, p. 81)). Mr. Dominguez later testified on cross-examination that he never saw Mr. Sauceda shoot. Yet again, Mr. Dominguez switched his testimony back to stating that Mr. Sauceda was the shooter. (Objections, p. 12:11-17). Mr. Dominguez further testified that Mr. Sauceda was wearing a lot of ***grey*** that night, which did not support the State's theory that Mr. Sauceda was wearing red. (*Id.*, p. 12:15-17). Indeed, Mr. Dominguez's testimony reads in pertinent part:

> And then you say: Oh, yeah gray Dickies and gray muscle shirt, a gray sweater, a gray cap with red trimmings on the cap and he had a red rag I think under that.
>
> Then you said: And he has a white shirt under the sweater. He was kind of skinny, little bit skinnier than me. He's 24. He had a mustache, a beard. He has tattoos of spiders on his arms or something.
>
> Is that -- does that sound about right to you?
>
> A. Yes.
>
> Q. As far as what he [Mr. Sauceda] was wearing that night?
>
> A. Yes.

(*See* Reporter's Transcript, 7/9/2008, p. 62:11-23).

Mr. Villagrana admitted on cross-examination that he could not identify the shooter. (*Id.* at p. 12:17-18 (citing RT 07/14/2008, p. 85. ("You don't know who the shooter was, correct?" "Correct." *Id*. at 88)).

Mr. Razo did not make an in-court identification, and only said that the shooter was wearing what "looked like a lot of red." (Objections, p. 12 (citing RT 07/14/2008, p. 136). When asked if the person who shot him was in the courtroom, Mr. Razo answered "No." (Objections, p. 12 (citing RT 07/14/2008, p. 147)). Mr. Borja told police officers that he did not even know Mr. Sauceda was at the party, (Objections, p. 12 (citing RT 07/16/08, p. 77)), and confirmed this in a police interview, *Id*. at p. 80. When asked at trial "Now isn't it true you didn't know it was Cheeto [Mr. Sauceda] at the time?", Mr. Borja responded "I still don't know." (*Id*.).

Mr. Dominguez was the only witness who even arguably could be said to have identified Mr. Sauceda as the shooter. However, as detailed above, Mr. Dominguez's testimony was inconsistent, and he was specifically impeached on his testimony that Mr. Sauceda was the shooter. Furthermore, Mr. Dominguez testified that Mr. Sauceda was wearing ***grey*** clothing ***not*** red.

The sworn affidavits from Ms. Ulibarri and Mr. Deleon, directly contradicted the inconsistent witness testimony from trial as detailed above. Ms. Ulibarri, Mr. Sauceda's girlfriend at the time, provided a sworn affidavit ***after*** the trial court had dismissed Mr. Sauceda's first Rule 32 Petition. *See* Second PCR at 6:12-13. Indeed, it was Mr. Sauceda, and counsel undersigned, who discovered this new evidence during the time the petition for review was pending on the denial of his first post-conviction petition. Ms. Ulibarri

swore under penalty of perjury the following facts about December 13, 2003, the night of the shooting:

> 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.
> 8. I personally tied Isidro's new shows [sic] right before Isidro left for the party on December 13, 2003.
> 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.
> […]
> 12. 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.
> 13. 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 or [sic] any type.

(Objections, p. 13:14-22; *see also* Exhibit B).

Steven Deleon, a lifelong friend of Mr. Sauceda, also provided an affidavit. Mr. Deleon stated under penalty of perjury:

> 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.
> 7. I happen to remember this fact about the tennis shoes because I liked them so much I tried them on, and Isidro had to tell me to take those shoes off.
> 8. I remember that Isidro had the shoes on when we left for the party.
> 8. [sic] I remember arguing with Isidro on who would wear the new Jordan shoes on the night of December 13, 2003. Since they were Isidro's new shoes he wore them to the party.
> 9. I remember that Isidro was not wearing any garment that night which was red in color.
> 10. Having known Isidro since we were children together, I had an opportunity to regularly observe what Isidro would wear in clothing type and

> color. I never remember observing Isidro wearing a red bandana or handkerchief around his head or anywhere on his body, including December 13, 2003.
> 10. [sic] On December 13, 2003 I was with Isidro and other friends when we were all searched at the front door of the party for weapons.
> 12. [sic] 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.
> 13. [sic] Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my best personal knowledge he did not own a weapon of any type.
> 14.[sic] To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

(Objections, p. 14:4-20; *see also* Exhibit C).

Ms. Ulibarri was only briefly contacted by Mr. Sauceda's trial counsel once and was only called as a witness during the ***penalty*** phase of trial. Ms. Ulibarri was never asked to testify during the guilt phase.

Mr. Deleon was only briefly contacted by an investigator in 2006 long before trial, but was never contacted by the police, and was never called as a witness at trial.

Similar to the "constitutionally deficient performance" of trial counsel in *Rios*, here too, Mr. Sauceda's trial counsel was ineffective for failure to investigate. The absence of the testimony of Ms. Ulibarri and Mr. DeLeon at trial severely prejudiced Mr. Sauceda, as they would have substantially undermined the State's core theory that Mr. Sauceda was wearing red and was the shooter. Central to the State's theory was an inference that Mr. Sauceda was associated with a gang, the Phoeniqueras, the rival gang to which the victims belonged.

Again, Mr. Sauceda has presented, at the very least, a debatable position establishing that a certificate of appealability should issue on this basis.

D. Findings On Ineffective Assistance Of Post-Conviction Counsel As Contrary To Established Federal Law:

The Magistrate found, and the District Court wrongly adopted those findings, that Mr. Sauceda could not bring an ineffective assistance of counsel claim regarding his appointed post-conviction counsel. However, *Martinez*, *supra*, clearly established a federal *equitable* right to plead ineffective assistance of post-conviction counsel in a federal habeas petition. *Martinez*, 566 U.S. at 6. "These rules reflect an equitable judgment that only where a prisoner is ***impeded*** or ***obstructed*** in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Id*. at 13 (emphasis added). Although not a constitutional remedy, it is well-establish Supreme Court *precedent* that a habeas petitioner may raise an ineffective assistance of counsel regarding their post-conviction counsel. Such a rule is designed to permit Mr. Sauceda to claim in a habeas context that his constitutional right to due process and effective representation were violated. That is exactly what Mr. Sauceda did in the present case.

Mr. Sauceda was appointed post-conviction counsel pursuant to Arizona statutes, A.R.S. § 13-4301. Post-conviction counsel filed a "no issue" claim. However, following that "no issue" claim Mr. Sauceda filed a post-conviction claim that at the bare minimum established a claim to ineffective assistance of counsel based upon Mr. Sauceda's defense counsel's sworn affidavit.

As former Justice Kennedy opined in *Martinez*, when post-conviction proceedings are the first chance of a defendant to challenge the effective assistance of counsel, the defendant needs competent counsel do so or fair process has not been provided. *Martinez*, 566 U.S. at 10-11. It is axiomatic that there is no right without a remedy: *ubi jus ibi remedium* – no right without a remedy. As the Supreme Court stated in *Martinez*:

> To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.
>
> The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or ***may misapprehend the substantive details of federal constitutional law***. [citation omitted] While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

Martinez, 566 U.S. at 12 (emphasis added). In the present case, while Mr. Sauceda was appointed counsel, his appointed counsel failed to effectively assist him in the presentation of his post-conviction claims.

As required, Mr. Sauceda has established that it is debatable that he can bring a claim that post-conviction counsel was ineffective. Therefore, a certificate of appealability should be granted on this basis as well.

IV. Mr. Sauceda Has Presented Constitutional Claims Regarding Newly Discovered Evidence:

The District Court wrongly adopted the Magistrate's Report and Recommendation finding that Mr. Sauceda was unable to establish newly discovered evidence existed. Pursuant to Arizona Rules of Criminal Procedure Rule 32.1, Mr. Lund

established that the evidence discovered after trial was discovered with due diligence. Pursuant to *State v. Bilke*, 162 Ariz. 51, 53 (2016), due diligence is established when the defendant is actively seeking a remedy pursuant to Arizona Rules of Criminal Procedure, Rule 32.

Indeed, Mr. Sauceda himself discovered Dr. Zacher's Report, as fully discussed above, and the testimony of Ms. Ulibarri and Mr. DeLeon, as fully discussed above, while the appeal of his first post-conviction was pending.

Mr. Sauceda established that the evidence was discovered after trial, where the jury in its capacity could not fully weigh the credibility of the eyewitness testimony. *See Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (reversing denial of *habeas* in part for trial counsel's failure to acquire a statement from a witness who admitted to committing the charged crime); *Riley v. Payne*, 352 F.3d 1313, 1318-25 (9th Cir. 2003) (reversing denial of *habeas* in part for trial counsel's objectively unreasonable performance in failing to interview or call defendant's associate and eyewitness to the incident).

Mr. Sauceda has presented a debatable claim on which not all jurists would agree regarding the evidence discovered after trial and presented in his second post-conviction relief petition. Therefore, Mr. Sauceda requests that this Court issue a certificate of appealability.

V. Mr. Sauceda Has Presented Claims Of Actual Innocence:

The District Court wrongly adopted the Magistrate's Report and Recommendation that Mr. Sauceda has not offered any evidence that affirmatively

proves his innocence. R&R at 25:2. 1251. However, as established above, the evidence affirmatively demonstrates that Mr. Sauceda was innocent. Where the State's theories were very narrow and relied on sparse, inconsistent, and inferential evidence that was purely circumstantial in nature, Mr. Sauceda's newly discovered evidence establishes actual innocence.

The evidence in Dr. Zacher's report, together with the affidavits of Ms. Ulibarri and Mr. DeLeon, demonstrate Mr. Sauceda's innocence. Dr. Zacher's report establishes that there were *two* bullets which were not accounted for in the State's theory. This also established that there were seven bullets fired within the house but only five casings were recovered by the police. In fact, the report of Dr. Zacher establishes that the two unaccounted for bullets could have been fired by a second gun. Furthermore, the disappearance of the bullets would have created an inference against the State with a proper *Willits* instruction. The discovery of unaccounted for and now missing bullets heavily undermines the State's one-gun theory. The evidence of Dr. Zacher *does* affirmatively prove innocence.

The evidence of Ms. Ulibarri and Mr. Deleon also, as explained above, contradicts the State's identification of Mr. Sauceda as the shooter. The State's reliance on inconsistent witness testimony that Mr. Sauceda was wearing "red clothes" and a member of a rival gang, the Phoeniqueras, is completely undermined and contradicted by the testimony sworn statements of Ms. Ulibarri and Mr. DeLeon.

Ms. Ulibarri stated in her sworn affidavit that Mr. Sauceda was not wearing red that night and had never previously worn red to her knowledge. In fact, Ms. Ulibarri

stated Mr. Sauceda was dressed in all-black or dark colored clothing. Such testimony would have contradicted inconsistent testimony of purported "eyewitness" claims that Mr. Sauceda had been wearing red shoelaces or a red bandana.

Mr. Deleon's testimony corroborated Ms. Ulibarri's account exactly. Their sworn statements undercut the inconsistent testimony at trial by witnesses that the State made regarding Mr. Sauceda wearing red clothing on the night of the shooting. Three of the State's eyewitnesses could not identify the shooter; the one who even arguably identified Mr. Sauceda gave inconsistent testimony, was impeached on cross-examination, and described Mr. Sauceda as was wearing ***grey*** clothing, not red. Had the State presented a stronger theory of guilt, witness accounts of clothing might not rise to the level of affirming innocence, but *when the State's entire means of identification relied on clothing color*, these affidavits—perfectly consistent with each other—do *affirmatively* prove innocence.

Mr. Sauceda has, at a minimum, presented a debatable issue among jurists. Therefore, Mr. Sauceda asserts that this Court should issue a certificate of appealability on this basis.

VI. Mr. Sauceda Presented Integrated Issues Which Establish Constitutional Violations:

Mr. Sauceda was not merely attempting to establish a claim that newly discovered evidence exists or that he has a free-standing claim of factual innocence. Indeed, Mr. Sauceda's claim of factual innocence is *based* on evidence discovered after trial that his trial counsel failed to investigate. "A lawyer who fails adequately to investigate, and to

introduce into evidence records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). Mr. Sauceda has presented a debatable issue which establishes that he should be granted a certificate of appealability on this issue.

VII. Conclusion

Based upon the foregoing, Petitioner, Isidro Sauceda, requests that this Court issue a Certificate of Appealability in this matter as set forth above. Mr. Sauceda has raised debatable issues regarding the constitutional violation of his Sixth Amendment right to effective assistance of counsel and to have his conviction reversed based upon actual innocence. Therefore, Mr. Sauceda requests that this Court issue a certificate of appealability on all of Mr. Sauceda's claims.

Respectfully submitted this 29th day of June, 2020.

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton, Esq.
Attorney for Petitioner

I electronically transmitted the above document, Motion for Certificate of Appealability, to the Clerk's office using the CM/ECF system for filing and sent a Notice of Electronic Filing to the following ECF registrant:

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By: /s/ Sandra Slaton

EXHIBIT A

St. Joseph's Hospital and Medical Center
CHW
350 W. Thomas Rd. Phoenix, AZ 85013

The incision was opened using a #10 blade scalpel extending in a curvilinear fashion from just anterior to the right ear to the midline in the right frontal region. Bovie electrocautery was then used to further elevate the soft tissues and reflect them anteriorly. At this point, the defect in the bone was readily notable and, in fact, as the restriction from the soft tissues was released, the bone fragment actually popped away from the patient's head resulting in oozing of hemorrhagic brain and hematoma from around the bone fragment. After the entire craniotomy flap had been elevated anteriorly and retracted with fishhooks and a Leyla bar, the temporalis muscle was also incised using Bovie electrocautery and was also reflected anteriorly with fishhooks. The bone fragment was then disconnected from the remaining periosteum and this was removed. This revealed hemorrhagic brain and hematoma in the right frontal region, along with shredded dura. There was a small amount of acute arterial bleeding from several small arteries around the perimeter of the incision. These were all cauterized using Bovie electrocautery.

Once gross hemostasis on the surface had been obtained, the dura that was remaining intact was opened in the center of the defect and reflected laterally, and then gentle suction and irrigation were used to evacuate the hematoma and macerated brain from the central portion of the right frontal lobe. Only tissue which already appeared to be disconnected was evacuated at this time. Multiple rounds of irrigation were carried out. Bipolar electrocautery was used to obtain hemostasis throughout the resection bed. Once this had been achieved, it was felt that the desired decompression had been achieved and, therefore, the dura was reapproximated. Duragen was then placed over the exposed areas of brain. Hemostasis was excellent at the time of closure.

The bone fragment that had been removed which measured approximately 5 x 6 cm was then carefully sculpted to close the cranial defect, and multiple small plates and screws were used to hold this bone fragment in place to effectively close the craniotomy site.

The temporalis muscle was then reapproximated using interrupted 2-0 Vicryl suture. The skin flap was reapproximated, and the galeal layer was reapproximated using interrupted 2-0 Vicryl suture, and then staples were placed in the skin.

It was at this time that the oozing from the left frontal region appeared to have slowed and was now primarily just bleeding. This incision was closed using staples.

It should be noted that during the initial dissection of the soft tissues, two bullet fragments were identified, one of them was just under the galeal layer between the skin and the bone and this was removed, and then during removal of the large bone fragment overlying the brain at the inferior aspect of this bone fragment, another piece of bullet was also identified and this was also removed. These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments.

EXHIBIT B

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UNITED STATES COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, **Plaintiff,** **v.** **ISIDRO SAUCEDA,** **Defendant.**	**No. 1 CA-CR 14-0027 PRPC** District of Arizona, Phoenix **DECLARATION OF CHERISE ULIBARRI**

I, CHERISE ULIBARRI, do hereby declare under penalty of perjury the following:

1. That I am the Mother of a common daughter with Isidro Sauceda, Azeriah Sauceda, who is 9 years old.

2. That I was the girlfriend of Isidro Sauceda on or about December 13, 2003, the night he went to a party.

3. I learned later that Isidro was later convicted of murder and other related crimes from what happened at that party.

4. I learned later that Isidro was accused of being in a gang.

5. I also learned that Isidro was accused of wearing red garments and red shoe laces to that party.

6. During that time Isidro and I were living together.

7. On that particular day, December 13, 2003, I personally bought Isidro a pair of Jordon tennis shoes as a Christmas present. The shoes were all black with black shoe laces.

8. I personally tied Isidro's new shows right before Isidro left for the party on December 13, 2003.

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.

11. On December 13, 2003 I was 18 years old and had known Isidro for approximately a year.

12. 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.

13. 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 or any type.

14. I was only called to testify during the aggravation phase in Isidro Sauceda's trial. If I had been subpoenaed to testify during the guilt phase by either side, including Isidro Sauceda's lawyers, I would have testified to these facts.

5·28·15
Date

Sherise Ulibarri
Sherise Ulibarri

STATE OF New Mexico)
) ss:
County of Bernalillo)

Personally came before me, the undersigned, on May 28, 2015, the above-named Sherise N. Ulibarri, who appeared before me with evidence of his/her identification.

Jazmin Marquez
Notary Public

My Commission Expires:

02/26/2019

OFFICIAL SEAL
JAZMIN MARQUEZ
NOTARY PUBLIC - State of New Mexico
My commission expires: 02/26/2019

EXHIBIT C

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MARICOPA COUNTY SUPERIOR COURT

FOR THE STATE OF ARIZONA

STATE OF ARIZONA, **Plaintiff,** **v.** **ISIDRO SAUCEDA,** **Defendant.**	**No. CR2005-112128-001-DT** **AFFIDAVIT OF STEVEN DELEON**

I, STEVEN DELEON, do hereby declare upon my duly sworn oath the following:

1. That I have known Isidro Saucedo ("Isidro") for approximately 24 years as a friend.

2. That I accompanied Isidro, with other individuals, on December 13, 2003, to a party which took place in the area of 90th Avenue in Glendale, Arizona.

3. I learned subsequently from other third parties that Isidro was convicted of murder and other related crimes from what happened at that party.

4. In approximately early 2006 I was contacted by a defense investigator who I believed was working on behalf of Isidro in this case.

5. I remember telling the investigator that Isidro did not commit any crime. I do not

remember being asked at that time anything about what Isidro was wearing in terms of color, type of clothing, or shoes.

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 Ulibarri.

7. I happen to remember this fact about the tennis shoes because I liked them so much that I tried them on, and Isidro had to tell me to take those shoes off.

8. I remember that Isidro had the shoes on when we left for the party.

8. I remember arguing with Isidro on who would wear the new Jordan shoes on the night of December 13, 2003. Since they were Isidro's new shoes he wore them to the party.

9. I remember that Isidro was not wearing any garment that night which was red in color.

10. Having known Isidro since we were children together, I had an opportunity to regularly observe what Isidro would wear in clothing type and color. I never remember observing Isidro wearing a red bandana or handkerchief around his head or anywhere on his body, including December 13, 2003.

10. On December 13, 2003 I was with Isidro and other friends when we were all searched at the front door of the party for weapons.

12. 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 to the party search Isidro, myself and others. I did not see any gun emerge from the person of Isidro at that time.

13. Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my best personal knowledge he did not own a weapon of any type.

14. To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

15. To my personal knowledge I never heard Isidro utter any apology whatsoever to Marcus Dominguez or any other person at the party on the night in question.

14. I was not asked by either the Defense or the State to be a witness in this matter.

15. The police did not interview me.

16. On the night in question and early morning hours of the next day, December 13 and 14, 2003, I was present at the party while police were there and no police officer, or anyone else for that matter, asked for my statement .

17. Had I been subpoenaed by any party I would have testified to these facts.

18. Other than the brief interview that the defense investigator had with me in 2006, as mentioned above, I was never contacted again by any representative for either the defense or the State until approximately early October, 2015, when I was contacted by the defense on behalf of Isidro.

19. This Affidavit follows.

20. I make this Affidavit based upon own personal knowledge except as to those facts based upon my information and belief, and as to such facts, I believe them to be true.

21. I make this Affidavit voluntarily and of my own free will.

10-6-2015
Date

Steven Deleon

STATE OF ARIZONA)
) ss:
County of MARICOPA)

Personally came before me, the undersigned, on October 6, 2015, the above-named Steven Deleon, who appeared before me with evidence of his/her identification.

Notary Public

My Commission Expires:
July 28, 2019

Notary Public State of Arizona
Maricopa County
Dale Ann Andrade
My Commission Expires 07/28/2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isidro Sauceda, Petitioner, V. Charles L. Ryan, Director of the Arizona Department of Corrections, Respondent, And The Attorney General of the State of Arizona, Additional Respondent.	No. CV 19-01132 PHX NVW (CDB) The Hon. Neil V. Wake NOTICE OF APPEAL

Notice is hereby given that Petitioner, Isidro Sauceda, in the above named case, through counsel undersigned, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the entire order and final judgment of the United States District Court denying petitioner's application for writ of habeas corpus, accepting the report and recommendation of the Magistrate, and denying the certificate of appealability in this proceeding on April 29, 2020.

Respectfully submitted this 28th day of May, 2020.

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton, Esq.
Attorney for Petitioner

I electronically transmitted the above document, Notice of Appeal, to the Clerk's office using the CM/ECF system for filing and sent a Notice of Electronic Filing to the following ECF registrant:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isidro Sauceda, Petitioner, V. Charles L. Ryan, Director of the Arizona Department of Corrections, Respondent, And The Attorney General of the State of Arizona, Additional Respondent.	No. CV 19-01132 PHX NVW (CDB) The Hon. Neil V. Wake OBJECTION TO REPORT AND RECOMMENDATIONS

Petitioner, ISIDRO SAUCEDA ("Mr. Sauceda"), through counsel undersigned, hereby files his Objection to Report and Recommendations of the Honorable Camille D. Bibles as follows:

RESPECTFULLY SUBMITTED this 27th day of April, 2020

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton
Attorney for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner has been in prison since approximately 2008 for convictions of which he is innocent. The entire case against Petitioner is built on prejudicial innuendo and circumstantial evidence: 1) The gun, which is the weapon which Petitioner purportedly used in the shootings was never found; 2) There was only conflicting testimony as to Petitioner's identity as the shooter; and, 3) Virtually the entire case was built on the color "red" for the clothing that Petitioner allegedly wore on the night in question, associated with a gang membership. Petitioner's counsel was prejudicially ineffective during trial and post-conviction phases of the case. Petitioner asks for relief in his habeas and objects to the Magistrate's report and recommendation as follows:

I. Objections On Magistrate's Report Re: Ineffective Assistance of Counsel:

Under *Strickland v. Washington*, "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Specifically: "The defendant must show that there is a **reasonable probability** that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a **probability sufficient to undermine confidence in the outcome**." *Id.* at 694 (1984) (emphasis added). Petitioner first objects to the Magistrate's repeated equivocation of the standard as requiring a showing that the

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outcome would have been different. Report and Recommendation, ("R&R") at p. 17:7-8. R&R at 20:24-26). The Magistrate, "in essence converted *Strickland's* prejudice inquiry into a sufficiency-of-the-evidence question." *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015). Petitioner is not required to show that the verdict would have been different, merely a reasonable probability that undermines confidence in the outcome.

A. Objection to Lesser-Included Offense Instruction:

1. The Magistrate determined that the state court's finding that Sauceda could not show prejudice by the absence of lesser-included offense instructions "was not an unreasonable application of *Strickland*, because counsel's choice of a sound defense strategy, and any decisions made regarding the implementation of that strategy, are "virtually unchallengeable." R&R at 14:1-8. According to the Magistrate, "[t]he petitioner bears the burden of demonstrating that his attorney's decision to not request a lesser-included offense instruction was other than a "reasonable strategic decision," which it found Petitioner "makes no such showing." R&R at 14:22-24. Petitioner objects to the Magistrate's findings, on the basis that Petitioner did show that the failure to request a lesser-included offense instruction was not a reasonable strategic decision. Petition for Review, p. 18. Trial counsel *himself* admitted in a filed Affidavit that his representation was unreasonable on this basis:

> 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 Count 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 attempted second degree murder instructions. Further, 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 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.

See Appx. Tab A; ROA, item 613, Appendix B and C.

2. The Magistrate cannot presume that trial counsel's performance was effective, R&R at 14:4-11, when this contradicts trial counsels' own affidavit sworn to under oath. Under *Strickland*, trial counsel's affidavit *alone* undermines confidence in the outcome, and by itself should be enough to establish the ineffectiveness prong of *Strickland*. Where counsel admits their own inadvertence in failing to timely execute a plea agreement, the record is sufficiently developed for examination of an ineffective assistance of counsel claim. *United States v. Vargas-Lopez*, 243 F.3d 552 (9th Cir. 2000); *See also Hoffman v. Arave*, 236 F.3d 523, 535 (9th Cir. 2001). The failure of counsel to request a lesser included offense instruction *did* interfere with Petitioner's defense. "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 v. Alabama*, 447 U.S. 625, 634 (1980). Defense counsel must seek a lesser-included offense instruction to avoid the risk of "unwarranted conviction." *Id.* at 638. A defendant is not precluded from receiving a lesser-included offense instruction even where he asserts an all-or-nothing defense. *United State v. Crutchfield*,

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547 F.2d 496, 501 n. 4 (9th Cir. 1977). "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. This procedural safeguard is especially important in cases such as this one, built on virtually all circumstantial evidence. The jury was only presented with two options: convict of first degree murder, or acquit.

3. To emphasize, the Magistrate puts forth as "not an unreasonable application of *Strickland*" (R&R at 12:14) the state appellate court's conclusions on the issue, finding that, as a consequence of transferred intent:

> to find Defendant guilty of premeditated first degree murder of his friend, the jury had to necessarily conclude that Defendant deliberately and with premeditation attempted to kill the other victims. Under these circumstances, Defendant cannot meet his burden of showing any likelihood that the jury would have found him guilty of a lesser offense on the two counts of attempted first degree murder if a lesser-included offense instruction had been given.

R&R at13:14-25. This analysis, however, presumes that the jury would have found premeditation for *any* of the victims, even if it had been given a lesser-included offense instruction. It is indeed probable, per *Alabama v. Beck*, that if given a lesser-included offense instruction, the jury would not have resolved its doubts toward finding premeditation for the other victims as well. Further, the *Strickland* standard

> does not require a court to presume … 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. The

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> Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury *necessarily* would have reached the same verdict even if instructed on an additional lesser included offense.

(Emphasis added). *Crace* 798 F.3d at 847 (reaffirming *Strickland's* "reasonable probability standard," citing *Strickland*, 466 U.S. at 694). In *Crace v. Herzog*, the Ninth Circuit observed that *Beck v. Alabama* created a "due process" rule, *Crace*, 798 F.3d at 851, n.8, and found that the lack of a lesser included offense instruction was a "constitutional violation" which warranted habeas corpus relief. *Id*. at 846. The failure of trial counsel to request a lesser-included offense instruction violated Petitioner's right to due process to his extreme prejudice, in that he could have been convicted of lesser offenses—or may not have unanimously convicted at all—and be walking free now.

B. Objection To Ineffective Assistance of Counsel Findings Pertaining to *Willits* Instructions:

4. The Magistrate found that Petitioner did not exhaust his claim of ineffective assistance of counsel based on his failure to introduce the medical records of Carlos Sanchez at trial. R&R at 17:3-5. On this basis, the Magistrate concluded that the claim is procedurally defaulted. *Id*. at 17:5-6. Petitioner raised this issue from the filing of his Second Rule 32 PCR Petition ("Second PCR"), and onward. p. 4:19 – 6:9; Petition for Review, p. 4-5. This issue was decided on the merits by the state courts as well. Even if the failure to properly investigate the medical records of Carlos Sanchez and the report of Dr. Zacher had been procedurally defaulted, such a bar is overcome by claims of ineffective counsel under *Martinez*.

> [w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez v. Ryan, 566 U.S.1, 17 (2012). As Petitioner alleges, his Rule 32 Counsel was tantamount to no counsel at all, thereby making *Martinez* applicable.

5. The Magistrate found that Petitioner's claim of counsel's failure to introduce the medical records of Carlos Sanchez nor bring attention to the report of Dr. Zacher could also be denied on the merits because it alleges Petitioner is unable to establish any prejudice. R&R at 17:6-8. Petitioner objects on the grounds that there was reasonable probability that presenting the additional evidence from Dr. Zacher's report, would have resulted in a different verdict. The State's case against Petitioner relied on a theory that there was only one gun present, a gun that was never even produced for the jury. Petition for Review at 14. However, Dr. Zacher's report brings to light that the evidence strongly points toward multiple guns being present the night of the shooting. Three bullets were found to have gone through the walls (ROA, item 563, p. 11), one was found under the pant leg of Kristopher Dominguez, and two bullets were found inside the skull of Sanchez with no exit wounds (ROA, item 592, p. 42). Yet only five shell casings were found inside the small den (Trial Exhibits 9, 10, 12, 13, 14), and another two were found outside of the house (Trial Exhibit 15 and 16). Moreover, three more bullets were fired outside, two remaining in Razo's body, and another embedded in an exterior wall. The State's theory at trial was predicated on an understanding that

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there were five casings and five bullets found inside, and two casings and two bullets found outside, and all were fired from the same Glock semi-automatic pistol. However, this theory is contradicted by the fact that *two more* bullets were found to have been fired inside, without casings present. Dr. Zacher's report strongly undermines the State's one Glock theory, where a second shooter with a gun *that doesn't eject casings* was likely present.

6. The Magistrate finds that Petitioner's ineffective assistance of counsel claim with respect to the lack of an objection to the trial court's denial of a *Willits* instruction "fails because Sauceda is unable to establish that, but for his counsel's alleged error, the result of his criminal proceeding, i.e., his appeal, would have been different." R&R at 20:24-26. Petitioner objects to this finding on the basis that he has established that a *Willits* instruction was supported by the evidence, and would have created a negative inference, in this circumstantial evidence case, against the State which, in turn, would have had a probable likelihood of changing the jury verdict.

7. Petitioner brought up this issue in his second Rule 32 PCR Petition: "[Dr. Zacher's] report, which was written in real time to the incident in question, corroborates the fact that these bullets were given to the police and yet the police no longer had this evidence at trial." Second PCR at p. 6:7-9. Second PCR, Ex. A; Appx. Tab B. Dr. Zacher testified at trial, but the report was never admitted into evidence by counsel. ROA, item 424, p. 15. Dr. Zacher testified that the procedure was that the specimens be handed over to the police. ROA, item 592, p. 43:8-11 ("I don't know about protocol. We handed

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those directly off to the police officers usually waiting right outside the operating room."). At trial, Detective Bruce Lowe testified that bullets had been removed from the head of Carlos Sanchez. ROA, item 563, p. 78. When asked if the fragments were in the custody of the Glendale Police Department, he stated "Not that I'm aware of." *Id*. at 78:17. Therefore, *res ipsa loquitur*, the only inference is that the evidence was lost or destroyed while in police custody.

8. A *Willits* instruction permits the jury to find that destruction of evidence committed or enabled by the State creates an inference that the destroyed evidence was against the State's interest. *State v. Willits*, 96 Ariz. 184, 187 (1964). "[A] finding of 'bad faith' is not a prerequisite to this corrective procedure." *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *see also Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (quoting *Vodusek v. Bayiner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Where lost or destroyed evidence is relevant to the defense, and the deprivation of evidence to support defendant's theories proves to be prejudicial, the imposition of an adverse inference instruction is warranted. *See Cyntegra, Inc. v. IDEXX Labs., Inc.*, 322 Fed. Appx. 569, 572 (9th Cir. 2009). As Petitioner alleged in his second Rule 32 PCR Petition, he "was never even able to present the issue of the Willits instruction completely because of the absence of a crucial material record." Second PCR at p. 11:16-17. Had Petitioner received the *Willits* instruction, it would have allowed the jury to form a negative inference against the state. Second PCR at p. 16:7-9.

C. Objection To Findings On Ineffective Assistance of Counsel As Contrary to Established Federal Law:

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9. The Magistrate found that the state court's denial of relief on Petitioner's claim of ineffective assistance of counsel "was not contrary to clearly established federal law because the United States Supreme Court has never held that a state defendant has a Sixth Amendment right to the effective assistance of counsel beyond his first appeal "as of right." R&R at 21:22-25. Petitioner objects on the basis that *Martinez* clearly establishes a federal *equitable* right to plead effective assistance of post-conviction counsel in a habeas petition. *Martinez v. Ryan*, 566 U.S. 1, 6 (2012). "These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Id*. at 13 (emphasis added). Although not a constitutional remedy, it is a Supreme Court *precedent* designed to permit Petitioner to plead in a habeas context that his constitutional right to due process and effective representation were violated by ineffective assistance of counsel. That is what Petitioner has done in the present case.

II. Objection To Findings On Newly Discovered Evidence:

10. The Magistrate found that Petitioner is unable to establish that the "newly discovered" evidence is either newly discovered or that it would probably produce an acquittal and has not established a violation of a constitutional right in his state criminal proceedings. R&R at 24:3-5. Petitioner argued that the evidence was newly discovered in his second Rule 32 Petition. Second PCR at 11:22 – 12:22. Relief from a Judgment or Order may be granted on the basis of "newly discovered evidence, that, with

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reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b). F.R.C.P., Rule 60(b)(2). Petitioner showed that the evidence was discovered after trial, where the jury in its capacity could not weigh the credibility of the eyewitness testimony fully. *See also Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (reversing denial of *habeas* in part for trial counsel's failure to acquire a statement from a witness who admitted to committing the charged crime); *Riley v. Payne*, 352 F.3d 1313, 1318-25 (9th Cir. 2003) (reversing denial of *habeas* in part for trial counsel's objectively unreasonable performance in failing to interview or call defendant's associate and eyewitness to the incident).

11. As stated in the Report, the Supreme Court has never recognized factual innocence as a free-standing constitutional claim, but rather has specifically held it is *not* a free-standing constitutional claim, citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993). R&R at 22:28 – 23:2. However, Petitioner's claims of factual innocence are *not* freestanding, as they also support Petitioner's claim of ineffective assistance of counsel. In *Rios v. Rocha*, the Ninth Circuit overturned a denial of *habeas* relief on the grounds that deficiency of counsel was not prejudicial. *Rios v. Rocha*, 299 F.3d 796, 799 (9th Cir. 2002). Where five undiscovered witnesses later testified that defendant was not the shooter, the Ninth Circuit found that there was a reasonable probability the outcome would have been different, and defendant was unfairly prejudiced. *Id.* at 800. Counsel was found to be ineffective to defendant's prejudice in *Rios v. Rocha* because the newly discovered witness testimony that counsel did not duly investigate would probably have

changed the outcome. Here, Petitioner put forth the newly discovered, unimpeached testimony of two witnesses and demonstrated that they undermined the State's theory such that the outcome would probably have been different. As in *Rios* where the newly discovered testimony showed that *habeas* relief was warranted, *habeas* relief should be granted for Petitioner.

12. The Magistrate cites as a basis for its findings that new evidence fails to meet the requisite standard if it does not undermine the structure of the prosecution's case, citing *Spivy v. Rocha*, 194 F.3d 971, 979 (9th Cir. 1999). However, Petitioner has shown that the newly discovered evidence would have undermined the structure of the prosecution's case. The State hinged its theory on the color of clothing Mr. Sauceda was wearing as establishing gang affiliation and motive to attack the victims, who were also gang members. Second PCR at p. 8. The State referenced the color "red" and "red rag" throughout the trial, including in its opening statement and closing argument:

- "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 bandanna***. 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." *See* RT 08/13/08, ROA 573, p. 25:15-21 (emphasis added);
- "Even people who did not point him out they described the person who was doing the apologizing with the gun and the ***red bandanas***, okay." *Id*. at 53:4-7 (emphasis added);
- "There was one person wearing ***red bandana*** okay." *Id*. at 56:9 (emphasis added);
- "He said he was, the defendant, was wearing gray shoes with ***red stripes*** or laces … And then marcus said he was wearing a gray cap with ***red trim*** and a ***red bandana*** underneath that cap." *Id*. at 62:6-7,

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17-18 (referencing description given by Marcus Dominguez) (emphasis added);

- "It was ***the red***." *Id*. at 76:16 (emphasis added).

13. Because most of the victims of the shooting were members of the Califas gang, establishing gang affiliation with the rival gang, the Phoeniqueras, was crucial to the prosecution's case and highly prejudicial to Petitioner. The State relied purely on inconsistent testimonies of red clothing to create an inference that Petitioner was associated with the Phoeniqueras. The State relied on witnesses who had given multiple inconsistent statements prior to trial. Marcus Dominguez, Ivan Villagrana, Jose Peter Razo, and German Borja all had inconsistent testimony and prior statements.

14. Mr. Dominguez's testimony was not consistent during examination and cross-examination. He first testified: "They [the shots] were coming from Isidro up there, from on top." RT 7/9/08, ROA 584, p. 81. He later testified he never saw Mr. Sauceda shoot, *Id*. at 114, yet again switched testimony back to Petitioner being the shooter, *Id*. at 125. Petition for Review, p. 15. Mr. Dominguez further testified that Petitioner was wearing a lot of grey that night, which did not support the State's theory that Petitioner was wearing red. *Id*. at 62. Mr. Villagrana admitted on cross-examination that he could not identify the shooter. RT 07/14/208, ROA 588, p. 85. ("You don't know who the shooter was, correct?" "Correct." *Id*. at 88). Petitioner for Review, p. 15. Mr. Razo did not make an in-court identification, and only said that the shooter was wearing what "looked like a lot of red." *Id*., p. 136. When asked if the person who shot him was in the courtroom, he said "No." (*Id*. at 147). Petition for Review, p. 15. Mr. Borja told police

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officers that he did not even know Petitioner was at the party, RT 07/16/08, ROA item 583, p. 77, and confirmed this in a later police interview, *Id*. at p. 80. When asked at trial "Now isn't it true you didn't know it was Cheeto at the time?", Mr. Borja responded "I still don't know." *Id*. Mr. Dominguez was the only witness to assert any inference that Petitioner was the shooter. None of the other witnesses were able to affirmatively identify the shooter.

15. The newly discovered testimony from Ms. Ulibarri and Mr. Deleon directly contradicted these inconsistent witness testimonies. Sherise Ulibarri, Petitioner's girlfriend at the time, provided a sworn affidavit after the trial court had dismissed Petitioner's first Rule 32 Petition. *See* Second PCR at 6:12-13. Ms. Ulibarri swore under penalty of perjury the following facts about December 13, 2003, the night of the shooting:

> 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.
> 8. I personally tied Isidro's new shows [sic] right before Isidro left for the party on December 13, 2003.
> 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.
> …
> 12. 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.
> 13. 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 or [sic] any type.

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Second PCR at p. 6:5 – 7:3 and Ex. B; App. Tab D. Steven Deleon, a lifelong friend of Petitioner, also provided an affidavit. Second 32 at p. 7:6. Mr. Deleon stated under penalty of perjury:

> 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.
> 7. I happen to remember this fact about the tennis shoes because I liked them so much I tried them on, and Isidro had to tell me to take those shoes off.
> 8. I remember that Isidro had the shoes on when we left for the party.
> 8. [sic] I remember arguing with Isidro on who would wear the new Jordan shoes on the night of December 13, 2003. Since they were Isidro's new shoes he wore them to the party.
> 9. I remember that Isidro was not wearing any garment that night which was red in color.
> 10. Having known Isidro since we were children together, I had an opportunity to regularly observe what Isidro would wear in clothing type and color. I never remember observing Isidro wearing a red bandana or handkerchief around his head or anywhere on his body, including December 13, 2003.
> 10. [sic] On December 13, 2003 I was with Isidro and other friends when we were all searched at the front door of the party for weapons.
> 12. [sic] 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.
> 13. [sic] Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my best personal knowledge he did not own a weapon of any type.
> 14.[sic] To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

See Second PCR at p. 7:10-20 and Ex. C; Appx. Tab C. Ms. Ulibarri was only briefly contacted by counsel once and was only called as a witness during the penalty phase of the trial and was never asked to testify during the guilt phase. Second PCR at 7:3-4 and

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Ex. B; Appx. Tab D. Ex. . Mr. Deleon was only briefly contacted by an investigator in 2006, but was never called as a witness for trial, and was never contacted by police. Second PCR at p. 7:7-9 and Ex. C; Appx. Tab C. Like the "constitutionally deficient performance" of trial counsel in *Rios v. Rocha*, trial counsel here violated Petitioner's right to effective assistance of counsel in failing to investigate these two witnesses. The absence of their testimony at trial severely prejudiced Petitioner, as they would have substantially undermined the State's core theory that Petitioner must have been the shooter because the shooter was purportedly wearing red. Core to the theory was an inference that Petitioner was associated with a gang, which further prejudiced Petitioner.

III. Objections To Findings On Actual Innocence:

16. The Magistrate found that Petitioner has not offered any evidence that affirmatively proves his innocence. R&R at 25:2. 1251 Petitioner again objects to the Magistrate's findings on the grounds that the evidence affirmatively proves innocence where the State's theories were very narrow and relied on sparse, inconsistent, and inferential evidence. The evidence of Dr. Zacher's report shows that there were *two* bullets which were not accounted for in the State's theory, which showed that there were seven shots fired within the house but only five casings recovered. The report of Dr. Zacher strongly proposes an inference that there was a second shooter with a gun that did not eject casings, unlike the semi-automatic pistol Petitioner alleged used. Furthermore, the disappearance of the bullets after entering police custody would have generally create an inference against the State with a proper *Willits* instruction. The

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discovery of unaccounted for and now missing bullets heavily undermines the State's one-gun theory. The evidence of Dr. Zacher *does* affirmatively prove innocence.

The evidence of Sherise Ulibarri and Steven Deleon also, as explained above, heavily undermines the State's identification of Petitioner as the shooter on spurious witness testimony that he was wearing "red clothes." Ms. Ulibarri testified that Petitioner was not wearing red that night and had never worn red to her knowledge, particularly disproving eyewitness claims that Petitioner had been wearing red shoelaces. Mr. Deleon's testimony corroborated Ms. Ulibarri's account exactly. Their testimonies undercut what few eyewitness connections the State made to Petitioner wearing red clothing the night of the shooting. Three of the State's eyewitnesses could not identify the shooter; the one who did identify Petitioner did not describe red clothing. Had the State presented a stronger theory of guilt, witness accounts of clothing might not rise to the level of affirming innocence, but *when the State's entire means of identification relied on clothing color*, these affidavits—perfectly consistent with each other—do *affirmatively* prove innocence.

17. Furthermore, *Rios v. Rocha* supports failure to investigate and introduce into evidence information that demonstrates factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, rendering deficient performance on the part of defense counsel. *Rios v. Rocha*, 299 F.3d at 805 (citing *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999). *See also Sanders*, 21 F.3d at 1457; *Riley v. Payne*, 352 F.3d at 1318-25. Counsel's "constitutionally deficient performance"

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severely prejudiced Petitioner by failing to investigate and introduce evidence of actual innocence to the record.

IV. Objection To The Magistrate's Analysis Fails to Integrate the Issues:

18. Petitioner Objects to the Magistrate's findings that the mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief, and that factual innocence is not a free-standing constitutional claim. R&R at p. 26-27 (citing *Gordon v. Duran*, 895 F.2d 610, 614 (9th Cir. 1990; *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). However, Petitioner is not claiming *merely* that newly discovered evidence exists or a free-standing claim of factual innocence. Petitioner's claim of factual innocence is *based* on the newly discovered evidence. "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). As Petitioner has shown, the newly acquired evidence is newly acquired because of counsel's failure to adequately investigate the case.

RESPECTFULLY SUBMITTED this 27th day of April, 2020

HORNE SLATON PLLC

By: /s/ Sandra Slaton
Sandra Slaton
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM-ECF system per Federal Rule of Civil procedure 5(b)(2)(E). Any other counsel of record and parties will be served by email transmission and/or first class mail this 27th day of April, 2020.

/s/ Sandra Slaton

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isidro Sauceda,
Petitioner,

V.

Charles L. Ryan, et. al.,
Respondent,

Case No.: CV19-01132-PHX-NVW (CDB)

PETITIONER'S REPLY TO STATE'S LIMITED ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, ISIDRO SAUCEDA ("Mr. Sauceda"), through counsel undersigned, hereby submits his Reply To State's Limited Answer To Petition For Writ Of Habeas Corpus. The Reply is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Mr. Sauceda's Petition For Writ Habeas Corpus is not time barred. Pursuant to Arizona law, and precedent, the operative date (for when a PCR petition is no longer pending in Arizona) is the date the mandate issues in cases where the appellate court grants discretionary review. *See Celaya v. Stewart*, 691 F. Supp. 2d 1046 (D. Ariz. 2010), *aff'd* 497 Fed. Appx. 744, 2012 WL 5505736 (9th Cir. 2012) . As will be discussed below, Mr. Sauceda timely filed his Petition For Writ of Habeas Corpus with 49 days remaining in the applicable 365-day limitations period.

I. **PROCEDURAL BACKGROUND FACTS:**

It is undisputed that no time elapsed on Mr. Sauceda's one-year limitations period pursuant to 28 U.S.C. § 2244 from January 10, 2012 (the time the Arizona Supreme Court

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denied his Petition For Review on his direct appeal), to February 13, 2012 (the time he filed his first Rule 32 PCR petition).

The February 13, 2012 PCR petition was denied on June 3, 2013. Mr. Sauceda timely filed his Petition for Review in the Arizona appellate court on December 15, 2014.[1] On June 11, 2015, the Arizona appellate court ***accepted review*** of Mr. Sauceda's petition for review of the trial court's denial of his first PCR petition, but denied relief. *State v. Sauceda*, 2 CA-CR 2015-0174-PR, 2015 WL 3648019 (App. June 11, 2015). On August 13, 2015[2], Mr. Sauceda filed a Petition for Review of the Arizona appellate court's decision. On April 11, 2016 the Arizona Supreme Court denied review. On April 29, 2016, the mandate was issued on the first PCR petition filed by Mr. Sauceda. No time elapsed between February 13, 2012 and April 29, 2016 because the PCR petition was filed before the limitations period began.

It is undisputed that between the first and second petitions, the AEDPA's limitation period was running. During the time between April 30, 2016 (the day after the mandate issued) and July 25, 2016 (the day the second PCR petition was filed) 86 days of the 365-day limitation period lapsed. The limitations period was again tolled on July 25, 2016, when Mr. Sauceda filed his second PCR petition, which was denied on March 6, 2017. Mr. Sauceda filed a timely Motion for Rehearing on March 21, 2017, which was denied on April 7, 2017. On May 8, 2017 Mr. Sauceda timely filed a Petition For Review in the Arizona appellate court on the denial of his second PCR petition. On March 26, 2018, the Arizona appellate court ***accepted review***, but denied relief. *State v. Sauceda*, 2 CA-CR 2017-0375-PR, 2018 WL 1467377 (App. Mar. 26, 2018). Mr. Sauceda did not file a Petition for Review with the Arizona Supreme Court. On July 3, 2018, the mandate was issued on Mr. Sauceda's second PCR Petition. Again, the

[1] Mr. Sauceda was granted a number of extensions to file his Petition for Review.

[2] Mr. Sauceda was granted a 30-day extension to file his Petition For Review In Arizona Supreme Court on July 10, 2015. *See* **Exhibit B**. This order gave Mr. Suaceda until August 13, 2015 to timely file his Petition For Review.

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AEDPA's limitation period was tolled from July 25, 2016 until Mr. Sauceda's PCR petition was no longer pending on July 3, 2018.

The AEDPA's limitation period ran for 230 days from July 4, 2018 until Mr. Sauceda filed his Petition for Writ of Habeas Corpus, on February 19, 2019. As will be discussed below, Mr. Sauceda timely filed his Petition with 49 days (365-86-230 = 49) remaining in the 365-day limitations period. *See* **Exhibit A** attached hereto to demonstrate Mr. Sauceda's limitations period and elapsed time.

II. LEGAL ARGUMENT

A. Mr. Sauceda's Petition For Writ Of Habeas Corpus Was Timely Filed:

1. The AEDPA's limitations period did not begin to run until April 19, 2012:

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets the limitations period to file a petition for writ of habeas corpus at 365 days. *See* 28 U.S.C. § 2244(d)(1).[3] Section 2244(d) reads in pertinent part:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

See 28 U.S.C. § 2244(d) (emphasis added). In the present case only subsection (d)(1)(A) is applicable. Mr. Sauceda's direct review became final 90 days after the Arizona Supreme Court

[3] A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

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denied review of his direct appeal.[4] Therefore, it is undisputed that limitations period began running from April 19, 2012. (Answer at 8:12-14).

2. Mr. Sauceda's First PCR was no longer "pending" pursuant to 28 U.S.C. § 2244(d)(2) when the Arizona appellate court issued the mandate regarding his first PCR Petition on April 29, 2016:

28 U.S.C. § 2244(d)(2) reads: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim ***is pending shall not be counted toward any period of limitation under this subsection***." (Emphasis added).

It is undisputed that the meaning of the word "pending" in 28 U.S.C. § 2244(d)(2) means that: "The Court looks to the ***rules of the state court*** to determine when a state decision on post-conviction petition is ***final*** to determine whether the petition is still pending for purpose of tolling the statute of limitations under § 2244(d)." *Celaya*, 691 F. Supp. 2d at 1053 (emphasis added); *see also Carey v. Saffold*, 536 U.S. 214, 219–20 (2002).

Contrary to the State's argument that under Arizona state law the limitations period began running on April 11, 2016 (Answer at 8:24-10-9), Mr. Sauceda's first PCR petition was "pending" until the date that the mandate issued on April 29, 2016. The limitations period then began to run again on the next day, April 30, 2016.

In Arizona, a PCR appeal "pending" until the Arizona appellate court issues the mandate in cases where there is a written decision. *See Celaya*, 691 F. Supp. 2d at 1053. The State erroneously argues that the *Celaya* decision is incorrect and should be disregarded. (Answer at 9:24-10:6). Indeed, *Celaya* is the only decision in Arizona which providing this Court with the proper analysis in determining the timeliness of a Habeas Petition under Arizona law.

3. In Arizona a PCR appeal is pending until the mandate issues in cases where the appellate court accepts review.

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[4] *See* 28 U.S.C. § 2101(c): "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

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Mr. Sauceda's PCR petitions were pending until the date the Arizona appellate court issued the mandate because review was granted on his Petitions for Review. Pursuant to Ariz. R. Crim. P. 32.9, the review by the Arizona appellate court of a trial court denying a PCR petition is discretionary. Ariz. R. Crim. P. 32.9 specifically states: "**(f) Disposition.** The appellate court may grant review of the petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper." *See also*, *State v. Smith*, 184 Ariz. 456, 459 (1996) ("The court of appeals, however, retains discretion over whether to grant review. Rule 32.9(f)."). In the present case, the Arizona appellate court granted review of both of Mr. Sauceda's Petitions for Review.

The question of when a PCR petition is "pending" for purposes of the AEDAPA, as stated earlier, is a question of state law. *See Carey*, 536 U.S. at 219–20; *see also Celaya*, 691 F. Supp. At 1053. In Arizona, as stated, by the Honorable David C. Bury of the District Court of Arizona, in *Celaya*, an appeal is no longer pending and final when the mandate issues in PCR cases where the Arizona appellate court grants review. *See Celaya*, 691 F. Supp. 2d at 1054-55. As Judge Bury stated in *Celaya*: "Specifically, the court held the appellate process is completed ***when the court of appeals issues its mandate***." *Id.* (emphasis added) (citing *Thompson v. Holder*, 192 Ariz. 348 (Ariz. App. 1998) relying on *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155 (App. 1983)). The federal Arizona District Court in *Celaya* also confirmed that: "Under Arizona law, appellate review in a criminal case ***is not final until the mandate has issued***." *See Celaya*, 691 F. Supp. 2d at 1074 (emphasis added).[5] In the present

[5] The *Celaya* court relied on citations to seven (7) Arizona cases in making such decision. ((*citing State v. Ward*, 120 Ariz. 413, 415 (1978); *see also Borrow v. El Dorado Lodge, Inc.*, 75 Ariz. 218, 220 (1953) (stating appellate court's judgment becomes effective on "the date of the issuance of the mandate"); *State v. Sepulveda*, 201 Ariz. 158, 159 n. 2 (App. 2001) ("A conviction becomes final upon the issuance of the mandate affirming the conviction on direct appeal and the expiration of the time for seeking certiorari in the United States Supreme Court."); *State v. Dalglish*, 183 Ariz. 188, 190 (App. 1995) ("We conclude that Petitioner's case was final on ... the date the Arizona Supreme court issued its mandate."); *State v. Jones*, 182 Ariz. 432, 432–434 (App. 1995) ("It is true that, in cases where there is an appeal pending, the final deadline [to file for post-conviction relief] will be unknown until the appeal is resolved and the

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case, the Arizona appellate court ***accepted review*** on both the first and second petitions filed by Mr. Sauceda, but denied relief.

Contrary to the State's argument that the *Celaya* decision was "incorrect" and should be "disregarded" (Answer at 8:24-9:6), the facts and holdings of *Celaya* are directly on point to Mr. Sauceda's case. In *Celaya*, the prisoner filed a petition for review in the Arizona appellate court, which was ***granted***, but ultimately ***denied*** relief by the Arizona appellate court. Similarly, in the present case, the Arizona appellate court granted review, but relief was denied.

The State's argument should be rejected that the Ninth Circuit's decisions in other cases make this Habeas Petition untimely.[6] Specifically, the State's citation to *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007) is completely distinguishable under ***Arizona law***. There, the *Hemmerle* court affirmed the dismissal of the petition as untimely. *Id.* at 1078. However, in *Hemmerle*, the prisoner's first PCR request was summarily dismissed for failure to file a brief after numerous extensions. *Id.* at 1071. Furthermore, review of the prisoner's second PCR was ***denied*** by the Arizona appellate court and Arizona Supreme Court. *Id.* at 1072. The Arizona appellate court did not issue any written decision on the merits of the petition for review. Instead, the Arizona appellate court simply issued an order ***denying*** review. Unlike in *Hemmerle*, in Mr. Sauceda's case the Arizona appellate court ***granted review*** of both petitions for review filed on the Mr. Sauceda's PCR petitions and issued formal written decisions on the merits.

In *Celaya*, distinguishing *Hemmerle* the court opined :

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mandate has issued."); *Owen v. Shores*, 24 Ariz. App. 250 (1975) ("There was still the necessity for issuance of the Court's mandate, and for the trial court to take the necessary action to enforce the mandate...."); *State v. Febles*, 210 Ariz. 589, 592 (App. 2005) (Conviction became final on date the court issued the mandate after time for further review expired.)).

[6] The State's reliance on *Phonsavanh Phongmanivan v. Haynes*, 918 F.3d 1021 (9th Cir. 2019), *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002), and *Welch v. Carey*, 350 F.3d 1079 (9th Cir. 2003) are all distinguishable and inapposite as none of them involves Arizona law. In *Phonsavanh Phongmanivan*, the case involved a ***Washington*** PCR petition. In *White*, the case involved a PCR petition filed in ***Guam***. In *Welch*, the case involved a PCR petition filed in ***California***. None of these cases even discuss Arizona law.

> Here, the ***appellate court granted review and issued a decision***, ***which became final when it issued the mandate*** as required by Rule 31.23. Here, once the appellate court issued its decision, ***it still needed to issue the mandate***.

Id. at 1054 (emphasis added). Similarly, in the present case, the Arizona appellate court "granted review and issued a decision" on the merits of both the petitions for review filed by Mr. Sauceda, "which became final when it issued the mandate".

Also contrary to the State's argument that *Celaya* was incorrect based upon the citation to Ariz. R. Crim. P. 31 instead of Ariz. R. Crim. P. 32 (Answer at 9:26-10-5), in Arizona if a formal written opinion on the merits is made by the Arizona appellate courts the matter is still pending until the mandate issues. *See* A.R.S. § 12-120.24. Specifically, the statute reads in pertinent part:

> If no request for review by the supreme court has been filed, or upon the receipt from the clerk of the supreme court of notification that the request for review has been denied, the clerk of the division shall, ***if the matter has been decided by formal opinion***, ***issue the mandate of the court of appeals***, ***if no written formal opinion has been rendered then by certified copy of the order of the court***.

(Emphasis added). Both of Mr. Sauceda's PCR petitions for review are governed by this Rule because the Arizona appellate court granted review and issued a formal written decision on the merits of the case.

The Arizona federal district courts decision of *Menendez v. Ryan*, CV142436PHXDGCJFM, 2015 WL 8923410, at *9 (D. Ariz. Oct. 20, 2015), again re-affirmed the holding in *Celaya*, but based A.R.S. § 12-120.24 instead of Ariz. R. Crim. P. 31. Specifically, the *Menendez* court stated in pertinent part:

> That adherence to state law in resolving the "pending" question was the impetus of District Judge Bury's decision in *Celaya*, and Magistrate Judge Velasco's decision in *Washington*. Thus, even if the undersigned disagrees with how they got there, ***the undersigned agrees that an Arizona post-conviction relief proceeding remains pending until issuance of the mandate, at least in those PCR cases in which a mandate is called for under Ariz. Rev. Stat. § 12–120.24***.

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Menendez, 2015 WL 8923410, at *9 (emphasis added). So too, in the present case, A.R.S. § 12-120.24 requires a mandate for Mr. Sauceda's PCR petitions to no longer be pending after the Arizona appellate court granted review and issued its formal written decision.

Celaya was affirmed by the Ninth Circuit. *See Celaya v. Ryan*, 497 Fed. Appx. 744 (9th Cir. 2012). The Ninth Circuit stated in pertinent part:

> Under Arizona law, Celaya's post-conviction review ("PCR") petition ***was "pending" until the Arizona Court of Appeals issued the mandate concluding its review*** of that petition on November 30, 2000. [citations omitted] Accordingly, Celaya's habeas petition, filed on November 28, 2001, was timely.

Id. at 745 (emphasis added).

Most recently, on March 13, and March 15, 2019, the holding in *Celaya* has again been re-affirmed. *See Alfonso Ochoa v. Ryan*, CV-17-03340-PHX-JAT, 2019 WL 1149924 (D. Ariz. Mar. 13, 2019); *see also Hernandez v. Ryan*, CV180413PHXDLRJFM, 2019 WL 2125012 (D. Ariz. Mar. 15, 2019). While the *Alfonso Ochoa* and *Hernandez* courts determined that the limitations period had run on the specific facts of those cases, both of the Court's relied on the holding in *Celaya* in holding that when a written decision accepting review of a petition for review is issued the PCR petition remains pending until the date of the mandate, not the date on which relief is denied. *See Alfonso Ochoa*, 2019 WL 1149924, at *4; *see also Hernandez*, 2019 WL 2125012, at *8.

The limitations period in Mr. Sauceda's case ran from the dates when the Arizona appellate court issued its mandates, not the date of the orders denying relief.

4. 86 days lapsed between Mr. Sauceda's first and second PCR petitions:

Mr. Sauceda accepts the State's argument that there is no gap tolling for the time between his first and second PCR petitions.[7] The second PCR petition does not expand on the

[7] The State's citations to *Hernandez v. Spearman*, F.3d 1071, 1076 (9th Cir. 2014) and *Stancle v. Clay*, 692 F.3d 948 (9th Cir. 2012) are applicable and confirm there is no statutory tolling available between a first and second PCR petition, when the second petition is not limited to an elaboration of the facts relating to the claims in the first petition.

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facts in the first PCR petition, but makes new arguments all together. However, contrary to the State's argument that 105 days lapsed between the two PCR petitions (10:12-11:3), only 86 days lapsed (April 30, 2016 to July 25, 2016) between Mr. Sauceda's first and second PRC Petitions.

Mr. Sauceda's petition for review of the trial court's denial of his first PCR petition was accepted by the Arizona appellate court. *See Sauceda*, 2015 WL 3648019, at *3. Subsequently, Mr. Sauceda also filed a petition for review of the Arizona appellate court's decision in the Arizona Supreme Court which was denied on April 11, 2016. The Arizona appellate court issued the mandate on April 29, 2016. Pursuant to *Celaya*, A.R.S. § 12-120.24, and Arizona law, the limitations period then began on the day following the issuance of the mandate, April 30, 2016. The second PCR petition was filed on July 25, 2016. There are ***86 days*** between April 30, 2016 (the day following the issuance of the mandate) and July 25, 2016 (the day Mr. Sauceda filed the second PCR petition). Therefore, 86 days lapsed of the 365-day limitation period pursuant to the AEDPA and § 2244(d)(2) between Mr. Sauceda's first and second PCR petitions. Mr. Sauceda still had 279 days remaining in the AEDPA's limitation period.

5. Only 230 days lapsed between Mr. Sauceda's second PCR petition and the current Petition for Writ of Habeas Corpus

Contrary to the State's argument that 331 days lapsed (Answer at 11:6-9), only 230 days of the 28 U.S.C. § 2244(d) limitations period had lapsed between Mr. Sauceda's second PCR petition becoming final (July 3, 2018 the date of the mandate) and the filing of the present Petition For Writ Of Habeas Corpus with this Court. On March 26, 2018, the Arizona appellate court ***granted review*** but denied relief. *See Sauceda*, 2018 WL 1467377, at *2. Mr. Sauceda did not file a petition for review in the Arizona Supreme Court. Accordingly, July 3, 2018, the Arizona appellate court issued the mandate regarding Mr. Sauceda's second PCR Petition. The following day, July 4, 2018, the AEDPA's limitations period again began to run until Mr. Sauceda filed the Petition for Writ of Habeas Corpus in this Court on February 19, 2019. A

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total of 230 days (not the 331days as argued by the State) lapsed between July 4, 2018 (date of the mandate) and February 19, 2019 (date when Petition for Writ of Habeas Corpus was filed).

Contrary to the State's argument (Answer at 11:6-9), the operative date in the present case under Arizona law is the date of the mandate. While the Arizona appellate court's formal written decision was issued on March 26, 2018, it was a "formal opinion" pursuant to A.R.S. § 12-120.24, not a denial of review. Therefore, based upon *Celaya*, A.R.S. § 12-120.24, and Arizona law, Mr. Sauceda's second PCR petition was no longer pending when the mandate issued on July 3, 2018.

6. Mr. Sauceda's petition was filed with 49 still remaining on the AEDPA's 365-day limitations period.

Mr. Sauceda's Petition for Writ of Habeas Corpus was filed with 49 days still remaining in the limitations period. Adding the 86 days (time between April 30, 2016 and July 25, 2016) to the 230 days (July 4, 2018 and February 19, 219) demonstrates that only 316 of the AEDPA's 365-day limitation period had lapsed. Therefore, Mr. Sauceda's Petition For Writ of Habeas Corpus was timely filed with 49 days still remaining on the limitations period.

B. Mr. Sauceda Has Also Presented A Valid Claim For Actual Innocence:

Contrary to the State's argument (Answer at 13-15), Mr. Sauceda has presented a claim of actual innocence. Not only does Mr. Sauceda assert his actual innocence to the crimes for which he was convicted but he also presented to new declarations from witnesses corroborating and establishing the same. First, the two declarations provided by Ms. Ulibarri and Mr. DeLeon establish Mr. Sauceda's claim of actual innocence. Ms. Ulibarri's declaration reads in pertinent parts that Mr. Sauceda: (1) was not wearing any red clothing or garment on the night in question; (2) was never in a gang; and (3) was not seen with a gun at any time in the history of the relationship. Mr. DeLeon's declaration reads in pertinent part that Mr. Sauceda: (1) was wearing dark blue or black clothing and black "Jordan" tennis shoes; (2) was searched at the door and no gun was identified; (3) was never seen at any time with a gun; (4) was not in a gang; and (5) was never heard uttering an apology to Marcos Dominguez.

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The State argues that these declarations merely place the testimony of the other 4 witnesses that appeared at trial in conflict. However, there is no demonstration that Mr. DeLeon or Ms. Ulibarri are not being truthful or factual in their statements. Furthermore, as stated in *Schlup v. Delo*, 513 U.S. 298 (1995), the standard is less than clear and convincing evidence. The *Schulp* court opined in pertinent part:

> [T]he district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.

Id. at 327–28.

Here, the two declarations do demonstrate Mr. Sauceda's actual innocence these crimes. The two individuals, one of which was with Mr. Sauceda at the party (Mr. DeLeon), demonstrate Mr. Sauceda's actual innocence. In Mr. Sauceda's case, "it is more likely than not" that no reasonable juror would have found him guilty. *Id.* at 328.

Additionally, the evidence regarding the bullet fragments that was not offered or admitted into evidence during Mr. Sauceda's trial establishes that the police lost or destroyed the evidence. In such a situation in Arizona, the jury is permitted to assume that the lost or destroyed evidence was unfavorable to the State's case. *See State v. Willits*, 96 Ariz. 184, 191 (1964); *see also State v. Glissendorf*, 235 Ariz. 147, 149 (2014) ("Because the trial court erred in refusing to give a *Willits* instruction and the State has not established that the error was harmless, we reverse the convictions and sentences and remand for a new trial.")

This new evidence presented by Mr. Sauceda establishes a claim for actual innocence and should provide a gateway for this Court to consider the merits of such argument.

III. CONCLUSION

Therefore, based upon the foregoing, this Court must determine that Mr. Sauceda's Petition For Writ Of Habeas Corpus, filed February 19, 2019, was timely pursuant to 28 U.S.C. § 2244 and Arizona law. Mr. Sauceda also asserts his actual innocent to the convictions.

Respectfully submitted this 20th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electroning Filing to the following ECF registrant:

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Occurrence	Date Filed	Date of Decision	Mandate Date (no longer pending)	Days Elapsed	Limitations Period Remaining
Conviction on Counts 2-5	August 20, 2008				
Conviction on Count 1	September 15, 2008				
Sentencing on Counts 2-5	November 13, 2008				
Sentencing on Count 1	October 21, 2009				
Notice of Appeal on Direct appeal	November 25, 2008[1]	July 23, 2011			
Petition for Review to Arizona Supreme Court	August 22, 2011	January 10, 2012			
Direct appeal Mandate			February 6, 2012		
It is undisputed that the day the limitations period began to run was April 19, 2012					
First PCR Petition	February 13, 2012	June 3, 2013		0	365
First PCR Petition for Review	December 15, 2014[2]	June 11, 2015		0	365
First PCR Petition for Review to Arizona Supreme Court	August 13, 2016	April 11, 2106		0	365
First PCR Petition Mandate			April 11, 2016	0	365
Second PCR Petition	July 25, 3016	March 6, 2017		86	365-86= 279
Motion For Rehearing	March 21, 2017	April 7, 2017		0	279
Second PCR Petition for Review	May 8, 2017	March 26, 2018		0	279

[1] The opening brief was not filed until after the sentencing of Mr. Sauceda for all 5 counts occurred. Mr. Sauceda also filed a supplemental brief on November 12, 2012.
[2] Series of continuances granted by trial court pursuant to Rule 32.9.

Second PCR Petition Mandate			July 3, 2019	0	279
Petition For Writ of Habeas Corpus	February 19, 2019			230	279-230= 49

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ATTORNEYS FOR RESPONDENTS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Isidro Sauceda, Petitioner, -vs- Charles L. Ryan, et al., Respondents.	CV19–01132–PHX–NVW (CDB) **LIMITED ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**

A jury convicted Petitioner Isidro Sauceda of first degree murder, two counts of attempted first degree murder, aggravated assault, and assisting a criminal street gang, and the trial court sentenced him to an aggregate term exceeding life in prison. Following a direct appeal and two rounds of state post-conviction review, Sauceda raises in this habeas petition claims of ineffective assistance of counsel and actual innocence. But his petition is untimely by 71 days without excuse. Despite his actual innocence merits claim, Sauceda cannot make a "gateway" showing that he was probably innocent in order to excuse his untimeliness. Therefore, his habeas petition is time barred and this Court should deny it without reviewing the merits.

I. BACKGROUND.

A. *The shooting.*

On December 13, 2003, David and several friends held a party at his Glendale home while his parents were away. (Exh. D, at 108–11.) To ensure the party was "safe," partygoers were patted down and asked if they had weapons. (*Id.* at 49–50.) While this was not intended to be a gang party, many members of rival gangs attended. The first to arrive were three members of the Phoeniqueras, a local gang known for wearing red clothes. (Exh. F, at 138–39.) The three were Sauceda, Marcus, and Marcus' brother, Khris. (*Id.*) At trial, four witnesses identified Sauceda as a member of the Phoeniqueras and remembered him wearing dark clothes and a red bandana. (Exh. C, at 62 (Marcus); Exh. E, at 27, 44, 47 (Ivan), 125, 133, 136 (Jose); Exh. G, at 50, 72–73 (German).) As Marcus remembered, Sauceda brought a gun inside the house. (Exh. C, at 65–66.)

Later, members of the Califas, a local gang known for wearing blue clothes, also arrived at the party. (*Id.* at 143.) These included Carlos, Jose, German, and Ivan. (Exh. G, at 43.) One of David's cousins noticed the rival gang members wearing their colors and feared there might be trouble. (Exh. F, at 122, 123, 139, 141.) He warned Carlos it was a bad idea for the Califas to go inside because people were drunk and "everybody [didn't] know what they were doing." (*Id.* at 144.) But Carlos reassured him not to worry, that nothing bad was going to happen, and that they were there "to party, no big deal." (*Id.* at 144–45.)

Inside, Sauceda and members of both gangs formed a circle. (Exh. G, at 60.) German and Carlos refused to shake hands with the Phoeniqueras and made an insult about the color red. (Exh. E, at 52–53; Exh. G, at 60–62.) In response, Sauceda began firing his gun. (Exh. C, at 81, 119.) One person identified Sauceda as the shooter to police, and he and two other witness identified Sauceda at trial. (*Id.* at 89, 119 (Marcus); Exh. E, at 55–57, 68–69 (Ivan), 133, 136 (Jose).) Sauceda shot Khris, and "went down to his knees, starting telling Marcus sorry."

(Exh. E at 60.) Sauceda then exited the house and fired at least another five shots. (*Id.* at 63–64.) Ultimately, Sauceda shot Carlos in the forehead (Exh. H, at 25–26.); Jose in the chin, arm, and back (Exh. E, at 133–34, 137, 146–47.); German in the head and wrist (Exh. G, at 60–62.); and Khris in the forehead—killing him (Exh. J, at 5, 15, 23.). About a week after the shooting, Sauceda came to Marcus' house and apologized to him and his brothers, saying he was "sorry for what [he] did to [Marcus'] brother." (Exh. G, at 97, 131.)

B. *Trial and Conviction.*

The State charged Saceda, *via* indictment, on May 6, 2005 on one count of first-degree murder, two counts of attempted first-degree murder, one count of aggravated assault, and one count of assisting a criminal street gang. (Exh. A.) The State also filed a notice of intent to seek the death penalty. (Exh. B.) A jury found Sauceda guilty as charged. (Exh. K.) But the jurors were unable to reach a verdict on whether to impose the death penalty, and a second jury hung at a retrial of the penalty phase. (Exh. L.) Accordingly, the trial court sentenced Sauceda to life without the possibility of release after 25 years. (Exh. M, at 23.) The court further sentenced Sauceda to 13.5 years for each of the attempt counts, 10.5 years for aggravated assault, and 7.5 years for assisting a criminal street gang. (*Id.*) The gang charge ran concurrently with the other non-capital offenses, and the life sentence ran consecutively to those other offenses. (*Id.*)

C. *Direct Appeal.*

Sauceda filed a notice of appeal on November 25, 2008. (Exh. N.) His opening brief raised three claims: (1) the indictment was based on perjured testimony and the trial court erred by declining to dismiss it, (2) the trial court erred by denying a "*Willits*" instruction that would have allowed jurors to infer that missing bullet fragments would have been helpful to the defense, and (3) The instruction on reasonable doubt unconstitutionally relieved the State of its burden of proof. (Doc. # 1, Exh. A.) He also filed a supplemental brief raising a fourth

claim: the trial court erred by declining to give an instruction for the lesser-included-offense of attempted second degree murder. (Doc. # 1, Exh. B.) The court of appeals affirmed the convictions, rejecting each of Sauceda's claims. (Doc. # 1, Exh. C.) Sauceda then filed a petition for review to the Arizona Supreme Court, which it denied on January 10, 2012. (Doc. # 1, Exhs. D, E.) Sauceda acknowledges he did not file a writ of *certiorari* to the United States Supreme Court. (Doc. # 1, at 3.)

D. *Post-conviction Review: Round 1.*

Sauceda filed a notice of post-conviction relief ("PCR") under Arizona Rule of Criminal Procedure 32 on February 13, 2012. (Exh. O.) Appointed counsel filed a notice of completion of record finding no colorable claims, and the superior court allowed him to withdraw and Sauceda to file a *pro se* petition. (Exh. P.) The *pro se* petition asserted the following issues: (1) ineffective assistance of trial counsel for failing to move to suppress out of court identifications, (2) trial counsel was ineffective for failing to timely file a special action challenging the indictment, (3) trial counsel was ineffective when cross-examining state witnesses, (4) trial counsel was ineffective for failing to object to the absence of a second degree murder instruction, (5) appellate counsel was ineffective for failing to include all the testimony before the grand jury that Sauceda claims was perjured, (6) appellate counsel was ineffective for failing to challenge the trial court's refusal to give jury instructions on intoxication and premeditation, and (7) appellate counsel was ineffective for failing to appeal the trial court's denial of motions for new trial and for judgment of acquittal. (Doc. # 1, Exh. F.) In a minute entry, the superior court denied each of these claims on the merits. (Doc. # 1, Exh. H.) Sauceda filed a *pro se* petition for review to the Arizona Court of Appeals. (Doc. # 1, Exh. I.) That court granted review but denied relief as to each claim on the merits. (Doc. # 1, Exh. L.) Sauceda then filed a petition for review to the Arizona Supreme Court,

which denied review on April 11, 2016. (Doc. # 1, Exhs. M, O.) The mandate issued on April 29, 2016. (Exh. Q.)

E. *Post-conviction Review: Round 2.*

Sauceda filed a second petition for post-conviction relief on July 25, 2016. (Doc. # 1, Exh. P.) There, he raised the following issues: (1) his first PCR attorney was ineffective for filing a notice of no colorable claim instead of raising a newly-discovered evidence claim, (2) there was newly discovered material evidence that would have changed the outcome of trial, and (3) actual innocence. (*Id.* at 1.) Sauceda's "new" evidence came in the form of three exhibits:

The first was the report of the surgeon, Dr. Zacher, which was not admitted at trial. (*Id.*, Exhibit A.) The report stated that upon removing three bullet fragments from Carlos, Dr. Zacher sent them to the authorities "via the standard protocol." (*Id.*) The second was a declaration from Cherise Ulibarri, Sauceda's girlfriend at the time, who did not testify at trial. (*Id.*, Exh. B.) She declared that had she been called to testify, she would have said she purchased black tennis shoes for Sauceda that day, and when he left for the party, he was wearing the shoes, jeans, and a dark sweatshirt. (*Id.*) She further claimed that to her knowledge, he was not a member of a gang and did not own or possess a gun. (*Id.*) The third was an affidavit of Steven Deleon, a friend of Sauceda who did not testify at trial. (*Id.*, Exh. C.) The affidavit claims Deleon would have testified to accompanying Sauceda to the party. (*Id.*) Deleon claimed Sauceda was wearing dark clothing, including the shoes bought by Ulibarri. (*Id.*) He further claimed Sauceda did not have a gun that evening and did not own one. (*Id.*) He also claimed Sauceda was not affiliated with a gang. (*Id.*)

The superior court denied relief. (Doc. # 1, Exh. R.) The court noted that to prevail on a newly discovered evidence claim under Rule 32.1(e), a defendant must show "(1) [t]he newly discovered evidence must have existed at the time of trial but be discovered after trial" and "(2) [t]he defendant exercised due diligence in

discovering the evidence and in bringing it to the court's attention." (*Id.* at 3.) The court found the evidence contained in Sauceda's three exhibits was known to him or his attorneys: the state disclosed Zacher's report, Sauceda would have personally known everything contained in the declarations of Ulibarri, his girlfriend, and Deleon, his childhood friend. (*Id.* at 3–4.) As a result, "[t]he mere fact that Defendant chose not to use at trial evidence that he knew about at the time of trial does not mean that the evidence constitutes newly discovered material facts for purposes of post-conviction relief." (*Id.* at 3.) The court further rejected Sauceda's actual innocence claim, holding that the declarations of two interested witnesses, which was contradicted by the testimony of others at trial, would not amount to the clear and convincing evidence necessary to establish actual innocence under Arizona law. (*Id.* at 5.) The court finally rejected Sauceda's ineffectiveness claim because there is no substantive claim of ineffective assistance of PCR counsel where defendants lack a constitutional right to counsel at that stage of proceedings. (*Id.* at 5–6.)

Sauceda filed a petition for review to the Arizona Court of Appeals repeating his PCR claims. (Doc. # 1, Exh. S.) On March 26, 2018, the court granted review but denied relief. (Doc. # 1, Exh. V.) It held the superior court was correct to summarily reject Sauceda's newly discovered evidence claim because he knew the substance of his additional evidence before trial. (*Id.* at 3.) The court further agreed that Sauceda's additional evidence would not establish his actual innocence by clear and convincing evidence in light of the contrary evidence presented at trial. (*Id.*) Finally, the court agreed there was no substantive claim of ineffective assistance of PCR counsel under Arizona law. (*Id.*) Sauceda did not file a petition for review to the Arizona Supreme Court, and the mandate issued on July 3, 2018. (Exh. R.)

II. SAUCEDA'S HABEAS CLAIMS.

Sauceda filed a petition for writ of habeas corpus on February 19, 2019. (Doc. # 1.) The petition states the following grounds for relief:

Ground 1: Ineffective assistance of counsel:

a. Trial counsel failed to timely file a state petition for special action challenging the grand jury indictment.

b. Trial counsel failed to object to the lack of lesser-included-offense instructions.

c. Trial counsel failed to contest the denial of his request for a *Willits* instruction.

d. Appellate counsel failed to challenge the trial court's denial of intoxication and premeditation instructions.

e. Trial counsel failed to present Zacher's report at trial.

f. PCR counsel filed a notice of no claim instead of raising substantive issues.

Ground 2: There were "newly discovered facts" that if presented at trial would have changed the verdict.

Ground 3: Actual innocence.

(Doc. # 1.)

III. RULE 5 STATEMENT.

Consistent with Rule 5 of the Rules Governing § 2254 Cases in the United States District Courts, the State attaches only the exhibits that are relevant to this limited answer. Those include excerpts from the trial transcripts. The State does have full transcripts of the trial and pre- and post-trial hearings. Finally, to aid in this Court's review, the State has attached the docket for proceedings in the trial and appellate courts. (Exhs. S & T.)

IV. SAUCEDA'S CLAIMS ARE INEXCUSABLY TIME-BARRED.

A. *The petition is untimely.*

1. AEDPA's limitations period began to run on April 19, 2012.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2244(d)(1). Of the four ways to determine the start of this one-year period, only the first is relevant here: "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). Because Sauceda did not file a petition for writ of *certiorari* to the United States Supreme Court, his convictions became final 90 days after the Arizona Supreme Court denied review of his direct appeal: on April 19, 2012. 28 U.S.C. § 2101(c); U.S. Supr. Ct. R. 13(1). The limitations period ran from that date forward.

2. No time accrued until the conclusion of Sauceda's round of PCR review on February 13, 2012.

AEDPA's limitations period is statutorily tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Sauceda filed his first notice of PCR on February 13, 2012, before his convictions became final. As a result, no time lapsed by July 25, 2016: the date the Arizona Court of Appeals denied relief on Sauceda's first PCR and collateral review ceased to be pending.

3. Sauceda's first round of PCR review ceased to be pending on April 11, 2016.

Collateral review proceedings are "pending" for purposes of 28 U.S.C. § 2244(d)(2) until the state's post-conviction proceeding "has achieved final resolution through the State's post-conviction procedures…." *Carey v. Saffold*,

536 U.S. 214, 220 (2002). When collateral proceedings are pending is a question of state law. *Phonsavanh Phongmanivan v. Haynes*, 918 F.3d 1021, 1022 (9th Cir. 2019). Courts take a functional approach: looking "to how a state procedure functions, rather than the particular name that it bears." *Carey*, 536 U.S. at 223. For instance, "it is the decision of the state appellate court, rather than the ministerial act of entry of the mandate, that signals the conclusion of review." *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002).

In Arizona, a PCR appeal ceases to be pending when the court of appeals renders its decision, not when the mandate issues. Rule 32.9(h) determines that a petition for review ceases to be "pending" upon the court of appeals's decision when stating: "*After a petition for review is resolved*, the appellate clerk must return the record to the trial court clerk for retention." (emphasis added). Rule 32 does not even discuss the issuance of a mandate. Relatedly, the Ninth Circuit has already held the mandate did not determine when an of-right PCR appeal was final under 28 U.S.C. § 2244(d)(1)(A) because the return of the record under Rule 32.9(h) "only provides for a ministerial function in the state appellate court." *See Hemmerle v. Schriro*, 495 F.3d 1069, 1077 (9th Cir. 2007); *White*, 281 F.3d at 924 (holding the ministerial issuance of a mandate did not signal finality under Guam's post-conviction rules). If the mandate does not determine when proceedings are "final," neither does it determine when they cease to be "pending." *See Welch v. Carey*, 350 F.3d 1079, 1080–83 (9th Cir. 2003) (concluding that state habeas proceeding was no longer pending when the petitioner "made no attempt to seek relief in a higher court").

It is true that in *Celaya v. Stewart*, 691 F. Supp. 2d 1046 (D. Ariz. 2010), the district court treated the issuance of the mandate as the moment PCR proceedings ceased to be pending. Respectfully, that decision was incorrect. *Celaya* did not discuss Rule 32.9(h) at all. 691 F. Supp. 2d at 1052–1054. The court instead largely relied on former Rule 31.23's provisions governing mandates. *Id*. at 1054.

But Rule 31 concerns direct appeals, not Rule 32 PCR proceedings, and the language regarding mandates in former Rule 31.23 (now Rule 31.22) is notably absent from Rule 32.9. The *Celaya* court's error was both that it identified the wrong state procedural rule (Rule 31 instead of Rule 32) and failed to apply it under the correct standard. *See Carey*, 536 U.S. at 214. Therefore, this Court should disregard *Celaya*.

Under the correct analysis, Sauceda's first round of PCR review ceased to be "pending" when the Arizona Court of Appeals denied relief on April 11, 2016, *not* when the mandate later issued on April 29.

4. 105 days lapsed between Sauceda's first and second rounds of PCR review.

The limitations period was not tolled between the two rounds of PCR proceedings. Generally, "[w]hen a petitioner files a second state habeas petition in the same court, rather than in a higher level of the [state] court system, statutory tolling is not appropriate for the period between two state habeas petitions, unless the second petition is limited to an elaboration of the facts relating to the claims in the first petition." *Hernandez v. Spearman*, 764 F.3d 1071, 1076 (9th Cir. 2014) (citations and internal quotation marks omitted); *accord Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012) (explaining there is no gap tolling between rounds of state collateral proceedings). Here, Sauceda's second PCR petition did more than merely elaborate upon the facts of the first petition; instead, he raised entirely new claims of newly discovered evidence, actual innocence, and ineffective assistance of first PCR counsel. *See Hernandez*, 764 F.3d at 1077 (finding no statutory tolling for the time between the prisoner's first and second state habeas filings because his second petition contained new claims). Accordingly, there was no gap tolling, and the statute of limitations ran between Sauceda's two rounds of PCR proceedings.

Therefore, 105 days elapsed between the conclusion of the first round of PCR review on April 11, 2016 and the beginning of the second round on July 25, 2016.

5. 331 days lapsed from the end of the second round of PCR review until Sauceda filed his habeas petition.

Sauceda's second round of PCR review ceased to be pending with the Arizona Court of Appeals's denial of relief on March 26, 2018. *See* § IV(A)(3), *supra*. From that date until Sauceda filed his habeas petition on February 19, 2019, 331 days passed.

6. Sauceda's habeas petition is 71 days untimely.

Adding the 105 days between the two rounds of PCR review with the 331 days from the end of the second round until Sauceda filed his habeas petition shows time ran for a total of **436 days**. Given the limitations period lasted for exactly 365 days, Sauceda's habeas petition is untimely by 71 days.

B. *There is no basis for equitable tolling.*

A petitioner will benefit from equitable tolling only if he can show both: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). The "extraordinary circumstance" must result from an external force rather than a petitioner's lack of diligence, *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and the petitioner must establish a causal connection between the extraordinary circumstance and his failure to file a timely petition. *Bryant v. Ariz. Att'y Gen.*, 499 F.3d 1056, 1060–61 (9th Cir. 2007). Courts are clear that "[e]quitable tolling is justified in few cases," and "the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

Sauceda does not acknowledge his habeas petition is untimely, let alone offer any grounds for equitable tolling. Nor does any basis for equitable tolling

appear in the record. Not only is the lack of counsel not a basis for equitable tolling generally, *see Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006), but Sauceda has been represented by the same counsel since the Arizona Supreme Court stage of his first round of PCR—encompassing both periods where the statute of limitations ran.

Further, while Sauceda invokes *Martinez v. Ryan*, 566 U.S. 1 (2012), to excuse any procedural defaults, *Martinez* is flatly inapplicable to excuse a time bar. *Martinez* held that, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17–18. But while *Martinez* announced an excuse for procedural defaults, it did not create an exception to AEDPA's statute of limitations or announce a rule of equitable tolling. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 945 (11th Cir. 2014) ("We have emphasized that the equitable rule established in *Martinez* applies only 'to excusing a procedural default of ineffective-trial-counsel claims' and, for that reason, has no application to other matters like the one-year statute of limitations period for filing a § 2254 petition."); *accord Alvarado v. Ryan*, No. CV-13-02190-PHX-SPL (DKD), 2016 WL 4059603, *3 (D. Ariz. July 29, 2016) (slip opinion). As the Seventh Circuit recently explained, extending *Martinez* to equitable tolling would effectively "exempt" petitioners from showing "extraordinary circumstances" (because an attorney's failure to file a timely, meritorious habeas petition would always be ineffective) and thus "no federal prisoner with a claim of ineffective assistance of trial counsel would *ever* have to establish any actual extraordinary circumstances in support of equitable tolling for such a claim." *Lombardo v. United States*, 860 F.3d 547, 560 (7th Cir. 2017) (emphasis in original). At any rate, Sauceda does not claim attorney

ineffectiveness was responsible for his untimely petition since he offers no explanation whatsoever.

Sauceda's delay in filing this petition was not prevented by an external impediment nor was it diligent. Therefore, Sauceda's habeas petition is time barred.

C. *Sauceda cannot establish a miscarriage of justice to excuse his time bar.*

A fundamental miscarriage of justice, in the form of actual innocence, may serve as a "gateway" to excusing a time bar, but only if a petitioner shows "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This standard is "demanding and seldom met." *Id.* at 1928 (citing *House v. Bell*, 547 U.S. 518, 538 (2006)) (internal quotation marks omitted). Actual innocence "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 622 (1998). Also, a defendant must "go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (citation omitted).

Thus, a petitioner must do more than just assert his innocence to satisfy this standard; he must prove it with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. This Court "considers all the evidence, old and new, incriminating and exculpatory, admissible at trial or not." *Lee v. Lampert*, 653 F.3d 929, 937 (9th Cir. 2011) (citing *House*, 547 U.S. at 538). This Court then makes "a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* (citing *House*, 547 U.S. at 538). This Court's function is not to "make an independent factual determination about what likely occurred," but instead to

"assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. As a result, a petitioner will only pass through the *Schlup* gateway in an "extraordinary case." *Id.* at 535; *accord*, *McQuiggin*, 133 S. Ct. at 1928 (cautioning that "tenable actual-innocence gateway pleas are rare").

This case is not extraordinary. Dr. Zacher's surgeon's report was not exculpatory. The report merely supported Sauceda's argument that the State had, and later lost, possession of fragments from a bullet that struck Carlos. This, in turn, supported the argument in state court that the trial court should have given a "*Willits* instruction." Uniquely, Arizona law requires trial courts to instruct that when the State destroys material evidence, even negligently, the jurors may infer the missing evidence was unfavorable to the State. *State v. Willits*, 393 P.2d 184 (Ariz. 1964). But evidence supporting a *Willits* instruction does not establish actual innocence.

A petitioner does not establish a fundamental miscarriage of justice when his proposed evidence merely supports reversal on appeal for a "procedural" reason. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("The miscarriage of justice exception is concerned with actual as compared to legal innocence."); *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) ("A petitioner who asserts only procedural violations without claiming actual innocence fails to meet this standard."). At any rate, a *Willits* issue is a creature of state law—not cognizable in federal habeas corpus—because the destruction of evidence only violates due process when the government acts intentionally. *State v. Glissendorf*, 235 Ariz. 147, 151, ¶ 14 (2014) (agreeing *Willits* "lacks a statutory or constitutional basis" and is instead a court-created evidentiary rule); *see Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

In addition, the proposed testimony contained in the witness declarations did not prove Sauceda's innocence. The girlfriend, Ulibarri, only claimed that she had not seen Sauceda with a gun before and that he left for the party without wearing red. However, neither statement is inconsistent with the possibility that Sauceda used guns outside her presence or put on his red bandana after leaving for the party.

Moreover, both her testimony and Deleon's contradicted the word of at least four witnesses who testified Sauceda wore red, was a member of the Phoeniquera, and was the sole shooter. At best Sauceda's additional witnesses could create additional conflict in the evidence, but their testimony was not so overwhelmingly exculpatory that any rational juror would have believed them over the inculpatory testimony of the trial witnesses. *Jones v. Taylor*, 763 F.3d 1242, 1251 (9th Cir. 2014) ("Evidence that merely undercuts trial testimony or casts doubt on the petitioner's guilt, but does not affirmatively prove innocence, is insufficient to merit relief on a freestanding claim of actual innocence."). That is especially true here, where the jury would have had good reason to doubt the word of two interested witnesses: Sauceda's long-time friend and girlfriend. *Cf.* *Musladin v. Lamarque*, 555 F.3d 830, 850 (9th Cir. 2009) (holding the testimony of a "close family member" had "questionable reliability").

Sauceda's exhibits do not establish he is "probably innocent." *See id.* at 1246. He thus cannot meet the "extraordinarily high" standard of presenting "truly persuasive" evidence of actual innocence. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Therefore, he cannot pass through the gateway of actual innocence to excuse his untimely habeas petition.[1]

[1] Alternatively, Sauceda's evidence was not "new, reliable evidence" under *Schlup* because, as observed by the superior court, Sauceda knew the substance of all three exhibits before trial. It is true *Griffin v. Johnson* held that the pertinent standard was evidence not *presented* at trial rather than evidence not *available* at trial. 350 F.3d 956, 963 (9th Cir. 2003). The State respectfully asserts *Griffin* was wrongly

V. CONCLUSION.

Based on the foregoing authorities and arguments, the State respectfully requests this Court to deny the petition and dismiss it with prejudice. Alternatively, this Court should permit the State to supplement its answer with a response to Sauceda's claims on the merits. This Court should also decline to issue a certificate of appealability because the issue is not "debatable among jurists of reason"; "a court could [not] resolve the issue[] in a different manner"; and "the question[] [is not] adequate to deserve encouragement to proceed further." *Mendez v. Knowles*, 556 F.3d 757, 770 (9th Cir. 2009).

RESPECTFULLY SUBMITTED this 21st day of May, 2019.

Mark Brnovich
Attorney General

Joseph T. Maziarz
Chief Counsel

s/ Terry M. Crist III.
Assistant Attorney General
Attorneys for Respondents

decided and would urge the Ninth Circuit to adopt the approach of other circuits holding evidence must be newly discovered rather than newly presented. *See*, *Hancock v. Davis*, 906 F.3d 387, 390 & n.1 (5th Cir. 2018) (collecting cases and recognizing the Fifth Circuit's newly-discovered evidence rule), *cert. pending Hancock v. Davis*, No. 18-940 (U.S. 2019). However, the State is mindful this Court lacks authority to depart from *Griffin* and makes the argument here to preserve it for later review.

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2019, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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Petitioner, Pro Se

s/ N. Romero

7698682

LIST OF EXHIBITS

Exhibit A. Indictment.

Exhibit B. State's Notice of Intention to Seek the Death Penalty.

Exhibit C. R.T. 7/09/08 (pages 40, 62, 65–66, 81, 97, 119).

Exhibit D. R.T. 7/10/08 (pages 107–11).

Exhibit E. RT 7/14/08 (pages 17, 27, 44, 47, 52–57, 60, 68–69, 111, 125, 133–37, 146–47).

Exhibit F. R.T. 7/15/08 (pages 120–23, 138–41).

Exhibit G. RT 7/16/08 (pages 34, 43, 50, 60–62, 72–73.

Exhibit H. R.T. 7/17/08 (p.m.) (pages 24–26.)

Exhibit I. N/A

Exhibit J. R.T. 8/07/08 (pages 5, 15, 23).

Exhibit K. Minute Entry, 8/20/08.

Exhibit L. Minute Entry, 9/15/08.

Exhibit M. R.T. 11/10/08 (pages 35–39).

Exhibit N. Notice of Appeal.

Exhibit O. Notice of Post-conviction relief (2/12/12).

Exhibit P. Notice of Completion of Post-conviction review.

Exhibit Q. Mandate, 4/29/06.

Exhibit R. Mandate, 7/3/2018.

Exhibit S. Docket, No. CR–2005–112128–001 DT (Ariz. Super.)

Exhibit T. Docket, No. 1 CA–CR 08–1036 (Ariz. App.)

Exhibit U. Docket, No. 2 CA–CR 2017–0375–PR (Ariz. App.)

MARK BRNOVICH
ATTORNEY GENERAL
(FIRM STATE BAR NO. 14000)

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ATTORNEYS FOR RESPONDENT

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Isidro Sauceda,

Petitioner,

-vs-

Charles L. Ryan, et al.,

Respondents.

CV19–01132–PHX–NVW (CDB)

MOTION FOR EXTENSION OF TIME TO FILE ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS (First Request)

Respondents ("the State") respectfully request a first, 45-day extension of time, until May, 23, 2019, in which to file an answer or other dispositive pleading in response to the Petition for Writ of Habeas Corpus. The response is currently due on April 8, 2019. Undersigned counsel has begun drafting the State's response but needs the additional time due to prior involvement in other appeals and legal matters before the state and federal courts, including:

Black v. Ryan, No. CV 18–03416–PHX–SRB (JZB) (D. Ariz., habeas answer due 4/17/19).

Holland v. Ryan, No. CV18–04543–PHX–JJT (JZB) (D. Ariz., habeas answer due 4/26/19).

Dargen v. Ryan, No. CV18–04360–PHX–SRB (BSB) (D. Ariz., habeas answer, due 5/6/19).

State v. Dillion, No. 1 CA–CR 18–0620 (Ariz. App., answering brief due 5/13/19).

Opposing counsel does not object to the motion. Therefore, this Court should grant this extension request.

DATED this 5th day of April, 2019.

Respectfully submitted,

Mark Brnovich
Attorney General

Joseph T. Maziarz
Chief Counsel

s/ Terry M. Crist III.
Assistant Attorney General

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and served the attached document by mail on the following, who is not a registered participant of the ECF System:

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Attorney for Petitioner Isidro Sauceda

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isidro Sauceda, Petitioner, v. Charles L. Ryan, Director of the Arizona Department of Corrections, Respondent, And The Attorney General of the State of Arizona, Additional Respondent	**CASE NO.** **PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (NON-DEATH PENALTY)**

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: **Superior Court Of The State Of Arizona In And For The County Of Maricopa**.

   (b) Criminal docket or case number: **CR 2005-1121128-001 DT**

2. Date of judgment of conviction: **October 16, 2009**.

3. In this case, were you convicted on more than one count or crime? **Yes**.

4. Identify all counts and crimes for which you were convicted and sentenced in this case:

Count 1: **First Degree Murder**

Count 2: **Attempted First Degree Murder**

Count 3: **Attempted First Degree Murder**

Count 4: **Aggravated Assault**

Count 5: **Assisting a Criminal Street Gang**

5. Length of sentence for each count or crime for which you were convicted in this case:

Count 1: LIFE without the possibility of release until after 25 years from conclusion of sentence in counts 2, 3, and 4. Consecutive with counts 2, 3, and 4.

Count 2: 13.5 years. Concurrent with Count 5.

Count 3: 13.5 years. Consecutive to Count 2.

Count 4: 10.5 years. Consecutive to Count 3.

Count 5: 7.5. years. Concurrent with Count 2.

Total: 37.5 years, followed by LIFE.

6. What was your plea? **Not Guilty.**

7. Did you testify at the trial? **No.**

8. Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? **Yes.**

If yes, answer the following:

(a) Date you filed: **November 25, 2008**
(b) Docket or case number: **No. 1 CA-CR 08-1036**
(c) Result: **Review granted; relief denied**
(d) Date of result: **June 23, 2011**
(e) Grounds raised: Trial court erred and abused its discretion by: (1) denying motion to dismiss indictment; (2) refusing request for *Willits* instruction regarding lost or destroyed evidence; (3) improperly giving a *Portillo* instruction on reasonable doubt; (4) failing to instruct on a lesser-included offense in regard to the charges of attempted first degree murder. This violated Mr. Sauceda's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Appellant's Opening Brief (Exhibit A), Appellant's Supplemental Brief

(Exhibit B), and Memorandum Decision (Exhibit C), attached hereto.

9. Did you appeal to the Arizona Supreme Court? **Yes.**

If yes, answer the following:

(a) Date you filed: **August 17, 2011**
(b) Docket or case number: **CR-11-0217-PR**
(c) Result: **Review denied**
(d) Date of result: **January 10, 2012**
(e) Grounds raised: Trial court erred and abused its discretion by: (1) denying motion to dismiss indictment; (2) refusing request for *Willits* instruction regarding lost or destroyed evidence; (3) improperly giving a *Portillo* instruction on reasonable doubt; (4) failing to instruct on a lesser-included offense in regard to the charges of attempted first degree murder. This violated Mr. Sauceda's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Petition for Review (Exhibit D), Denial of Review (Exhibit E), attached hereto.

10. Did you file a petition of certiorari in the United States Supreme Court? **No.**

11. Other than the direct appeals listed above, have you filed any other petitions, applications or motions concerning this judgment of conviction in any state court? **Yes.**

(a) **First Petition**

(1) Date you filed: **August 4, 2012**

(2) Name of court: **Maricopa County Superior Court**

(3) Nature of the proceeding: **Rule 32**, Post-Conviction Relief

(4) Docket or case number: **CR2005-112129-001 DT**

(5) Result: **Relief denied**

(6) Date of result: **June 3, 2013**

(7) Grounds raised: Ineffective assistance of counsel: (1) failure to seek suppression of two witness out-of-court and in-court identifications; (2) untimely filing of motion to dismiss; (3) ineffective and concessionary cross-examination of a witness; (4) failure to object to failure to include lesser-included instructions. Ineffective appellate counsel: (1) failure to reference additional perjured testimony; (2) failure to challenge trial court's denial of intoxication instruction; (3) failure to appeal the trial court's denial of a motion for new trial. This violated his rights under the Fifth,

Sixth, and Fourteenth Amendments.

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Pro-Per Petition for Post-Conviction Relief (Exhibit F), Reply to the State's Response to Petitioner's Petition for Post-Conviction Relief (Exhibit G), Minute Entry Denying Relief (Exhibit H), attached hereto.

(c) **Second Petition**

(1) Date you filed: **January 9, 2014**

(2) Name of court: **Arizona Court of Appeals**

(3) Nature of the proceeding: **Petition for Review**

(4) Docket or case number: **CA-CR 14-0027 PRPC**, transferred to **CA-CR 2015-0174 PR**

(5) Result: **Review granted, relief denied**

(6) Date of result: **June 11, 2015**

(7) Grounds raised: Ineffective counsel under 32.1(a): (1) failure to seek suppression of in-court and out-of-court identifications by two witnesses; (2) failing to timely file a motion to dismiss the indictment; (3) creation of a "conflict of interest" by cross-examining a witness in a manner favorable to the state's case; (4) failure to object to a lack of instructions for lesser-included offenses; (5) ineffective arguing motion to dismiss indictment. This violated his rights under the Fifth, Sixth and Fourteenth Amendments.

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Petition for Review (Exhibit I), Petitioner's Reply to State's Response (Exhibit J), Order of Transfer (Exhibit K), Decision (Exhibit L), attached hereto.

(d) **Third Petition**

(1) Date you filed: **August 13, 2015**

(2) Name of court: **Arizona Supreme Court**

(3) Nature of the proceeding: **Petition for Review**

(4) Docket or case number: **CR-15-0239-PR**

(5) Result: **Relief denied**

(6) Date of result: **April 29, 2016**

(7) Grounds raised: Ineffective counsel under Ariz. R. Crim. P. 32.1(a): (1) failure to object to lack of lesser-included offense instructions left the jury with no choice but to convict on greater charges; (2) constructive denial of counsel through special action to challenge the motion to dismiss the indictment; (3) public policy demands review for failing to follow a procedural rule when filing a *pro se* petition for review. This violated Mr. Sauceda's rights under the Sixth Amendment.

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Petition for Review (Exhibit M), (Proposed) Reply to State's Response to Petition for Review (Exhibit N), Denial of Petition (Exhibit O), attached hereto.

(b) **Fourth Petition**

(1) Date you filed: **July 25, 2016**

(2) Name of court: **Maricopa County Superior Court**

(3) Nature of the proceeding: **Rule 32,** Post-Conviction Relief

(4) Docket or case number: **CR2005-112128DT**

(5) Result: **Relief Denied**

(6) Date of result: **March 3, 2017**

(7) Grounds raised: (1) Ariz. R. Crim. P.32.1(e), newly discovered material facts exist which would have probably changed the verdict or sentence; (2) Ariz. R. Crim. P. 32.1(h), facts exist which establish by clear and convincing evidence that the defendant is actually innocent; (3) Ariz. R. Crim. P. 32.1(a), ineffective assistance of post-conviction relief counsel in Defendant's first post-conviction relief proceeding.

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Petition for Post Conviction Relief (Exhibit P), Reply in Support of Petition for Post Conviction Relief (Exhibit Q), Ruling / Criminal PCR (Exhibit R), attached hereto.

(e) **Fifth Petition**

(1) Date you filed: **May 8, 2017**

(2) Name of court: **Arizona Court of Appeals**

(3) Nature of the proceeding: **Petition for Review**

(4) Docket or case number: **CA-CR 17-0293 PRPC**, transferred to **CA-CR-2017-0375-PR**

(5) Result: **Review granted; relief denied**

(6) Date of result: **March 26, 2018**

(7) Grounds raised: (1) Newly discovered evidence under Ariz. R. Crim. P. 32.1(e); ineffective assistance under Ariz. R. Crim. P. 32.1(a); (3) actual innocence under Ariz. R. Crim. P. 32.1(h).

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court. See Petition for Review From Post-Conviction Relief Decision (Exhibit S), Reply in Support of Petition for Review From Post-Conviction Relief Decision (Exhibit T), Order of Transfer (Exhibit U), Review and Denial (Exhibit V), attached hereto.

12. For this petition, **state every ground on which you claim you are being held in violation of the Constitution, laws, or treaties of the United States**. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Ineffective Assistance

(a) Supporting FACTS:

First Rule 32 Petition: Mr. Sauceda was appointed Rule 32 counsel which was ineffective, and so Mr. Sauceda filed a Rule 32 Petition *pro per*. Mr. Sauceda provided an affidavit from trial counsel that swore that his performance fell below the reasonableness standards. Trial counsel failed to timely file a special action to challenge dismissal of a Rule 12.9 challenge of the grand jury proceedings. Trial counsel failed to object to no lesser-included offense instructions. Mr. Sauceda's trial counsel already has stated that his assistance fell below the objectively reasonable standard. Appellant counsel failed to include an issue of denied jury instruction on "intoxication" and "premeditation." Appellant counsel was ineffective when it failed to argue reversible error when it denied a request for new trial.

Second Rule 32 Petition: Mr. Sauceda obtained post-conviction counsel and filed a second Rule 32 Petition. Defense counsel failed to introduce the medical records of Carlos Sanchez and bring Dr. Zacher's report to the attention of the jury. Defense counsel failed to object to a lack of a *Willits* instruction to the jury, which would have allowed the jury to take a negative prejudicial inference and limited Mr. Sauceda's challenge to fundamental error rather than abuse of discretion. Then, post-conviction counsel filed a no-issue claim despite all of this. Mr. Sauceda was appointed counsel by statute and no has no remedy to challenge counsel's effectiveness.

(b) Did you present the issue raised in Ground One to the Arizona Court of Appeals? **Yes.**

(c) If yes, did you present the issue in a: **First Rule 32 Petition, Second Rule 32 Petition.**

(d) If you did not present the issue in Ground One to the Arizona Court of Appeals, explain why: **N/A.**

(e) Did you present the issue in Ground One to the Arizona Supreme Court? **Yes.**

GROUND TWO: Newly Discovered Facts

(a) Supporting FACTS: Mr. Sauceda presented three pieces of evidence newly discovered after trial that would have probably changed the verdict or sentence:

(i) **Dr. Zacher's Medical Report.** Mr. Sauceda was unaware during the trial that in the medical records of Carlos Sanchez was the report of Dr. Zacher, which stated the bullet fragments were turned over to the authorities. Mr. Sauceda's defense counsel never attempted to have the medical records admitted to evidence. The court and jury were never made aware of definitive proof that Dr. Zacher had turned the bullet fragments over to the police. On appeal, the medical report of Dr. Zacher was never brought to the appellate court's attention. The jury did not have before it the fact that bullet fragments were recovered from the head of one of the victims. The State's ballistics expert testified that certain shell casings had marks that he would never expect to see from a Glock. There are bullets that were never tested and shell casings that were not accounted for.

(ii) **The Declaration of Sherise Ulibarri.** Neither defense counsel nor the State called this witness at trial. While she was with Mr. Sauceda on the night of the incident, defense counsel did not subpoena her or call her as witness in the trial. The jury never heard any testimony she would give.

(iii) **The Declaration of Steven Deleon.** Neither defense counsel nor the State called this witness at trial. While he was with Mr. Sauceda on the night of the incident, defense counsel did not subpoena him or call him as witness in the trial. The jury never heard any testimony he would give.

All of these were attached to Mr. Sauceda's Petition.

(b) Did you present the issue raised in Ground Two to the Arizona Court of Appeals? **Yes.**
(c) If yes, did you present the issue in a: **Second Rule 32 Petition.**
(d) If you did not present the issue in Ground Two to the Arizona Court of Appeals, explain why: **N.A.**
(e) Did you present the issue in Ground Two to the Arizona Supreme Court? **No.**

GROUND THREE: Actual Innocence

(a) Supporting FACTS: Mr. Sauceda demonstrated through the medical report of Dr. Zacher and the declarations of Mr. Deleon and Ms. Ulibarri his actual innocence. Had this evidence been presented no reasonable jury would have convicted Mr. Sauceda. Contrary to the Court's statements, the testimony of Mr. Dominguez, Mr. Villagrana, and Mr. Borja were inconsistent with prior statements. The only testimony that could have been presented without impeachment is the testimony by Mr. Deleon and Ms. Ulibarri. Both of their declarations corroborate each other.
(b) Did you present the issue raised in Ground Three to the Arizona Court of Appeals? **Yes**.
(c) If yes, did you present the issue in a: **Second Rule 32 Petition.**
(d) If you did not present the issue in Ground Three to the Arizona Court of Appeals, explain why: **N/A.**
(e) Did you present the issue in Ground Three to the Arizona Supreme Court? **No.**

Please answer these additional questions about this petition:

13. Have you previously filed any type of petition, application or motion in a federal court regarding the conviction that you challenge in this petition? **No.**

14. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, as to the judgment you are challenging? **No.**

15. Do you have any future sentence to serve after you complete the sentence imposed by the judgment you are challenging? **No.**

16. TIMELINESS OF PETITION: If your judgment of conviction became final more than one year ago, you must explain why the one-year statute of limitations in 28 U.S.C. § 2244(d) does not bar your petition.*

*Section 2244(d) provides in part that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

17. Petitioner asks that the Court grant the following relief: or any other relief to which Petitioner may be entitled. (Money damages are not available in habeas corpus cases.)

RESPECTFULLY SUBMITTED this 19th day of February, 2019.

HORNE SLATON, PLLC

By: /s/ Sandra Slaton
Sandra Slaton
Attorney for Petitioner Isidro Sauceda

I declare under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 1 (month, day, year).

1·15·2019

Signature of Petitioner

1·15·2019

HORNE SLATON, P.L.L.C.
6720 N. Scottsdale Rd.
Suite 285
Scottsdale, AZ 85253

CERTIFICATE OF SERVICE

Counsel undersigned, Sandra Slaton, certifies, under penalty of perjury, pursuant to the requirements of Arizona Rules of Criminal Procedure, Rule 31.12 and 32.9(c) that she caused this Petition for Writ of Habeas Corpus, Petitioner's Memorandum in Support of Petition Under 28 U.S.C., § 2254 for A Writ of Habeas Corpus By a Person In State Custody (Non-Death Penalty) and Application To Proceed In District Court Without Prepaying Fees Or Costs to be mailed on the 19th day of February, 2019, and e-filed on the 19th day of February, 2019, with:

U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 W. Washington, SPC 10
Phoenix, Arizona 85003-2119

And served by U.S. Mail, first class two (2) copies of Petition for Habeas Corpus, Petitioner's Memorandum In Support of Petition Under 28 U.S.C. § 2254 For A Writ of Habeas Corpus By A Person In State Custody (Non-Death Penalty) and Application to Proceed In District Court Without Prepaying Fees Or Costs on this 19th day of February, 2019, to:

Assistant Attorney General
Criminal Appeals/Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007-2997

And served by U.S. Mail, first class two (2) copies of Petition for Habeas Corpus, Petitioner's Memorandum In Support of Petition Under 28 U.S.C. § 2254 For A Writ of Habeas Corpus By A Person In State Custody (Non-Death Penalty) and Application to Proceed In District Court Without Prepaying Fees Or Costs on this 19th day of February, 2019, to:

Gerald R. Grant
Deputy County Attorney
Maricopa County Attorneys' Office
301 W. Jefferson St., Ste. 800
Phoenix, AZ 85003
Last Appellate Brief

By:/s/ Sandra Slaton
Sandra Slaton
Attorney for Petitioner Isidro Sauceda

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isidro Sauceda,
Petitioner,

V.

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

The Attorney General of the State of Arizona,
Additional Respondent.

Case No.

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (NON-DEATH PENALTY)

Petitioner, ISIDRO SAUCEDA ("Mr. Sauceda"), through counsel undersigned, hereby submits his Memorandum in Support of his Petition Under 28 U.S.C. § 2254 For a Writ of *Habeas Corpus* By a Person in State Custody. Mr. Sauceda was taken into state custody on April 21, 2005, satisfying the custody requirement of § 2254, and seeks federal *habeas*.

I. INTRODUCTION

Mr. Sauceda petitions this Court for *habeas corpus* relief from his 5 (five) convictions under Arizona State law for first degree murder, attempted first degree murder, aggravated assault, and assisting a criminal street gang. An innocent man still sits in prison for a crime he

did not commit. The Arizona Courts dismissed Mr. Sauceda's Petitions for Review on the grounds that the issues raised were not colorable. This was in error, as Mr. Sauceda's claims of ineffective assistance and actual innocence were indeed colorable by the new discovery of crucial evidence contradicting the spurious foundations of the State's position.

The State based most of its trial arguments on "gang" affiliation, which Mr. Sauceda did, and does not have, supported by a theory of color-coded clothing. Specifically, the State in both its opening statement and closing argument told the jury that there was only one shooter, who was wearing a lot of "red" on the night in question. It cherry-picked witness testimony claiming that Mr. Sauceda was wearing red the night of the shooting. Two witnesses have attested that Mr. Sauceda could not have been the shooter. A medical report reveals additional bullets which the police reports did not disclose. State-appointed defense counsel failed to acquire or present this evidence demonstrating actual innocence at trial.

Furthermore, trial counsel failed to provide competent counsel at several critical junctures in Mr. Sauceda's defense, all to his prejudice and detriment. Trial counsel later filed an affidavit admitting to ineffective assistance. After conviction and appeal, Mr. Sauceda was also appointed Rule 32 counsel. Post-conviction counsel was also ineffective, having filed a "no-issue" claim. Under *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), Mr. Sauceda was entitled to an equitable post-conviction remedy based on ineffective assistance during initial-review collateral proceedings and deserves a retrial accounting for the newly discovered evidence demonstrating actual innocence.

Mr. Sauceda was denied his constitutional right to effective defense trial and appellate counsel under the Sixth Amendment to the Constitution of the United States. Failure of counsel to provide competent assistance caused actual prejudice to Mr. Sauceda, resulting in a

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fundamental miscarriage of justice. Mr. Sauceda has exhausted his state court remedies and now seeks federal *habeas* relief.

MATERIAL PROCEDURE AND FACTS

Mr. Sauceda was found guilty by a jury of one count of first-degree murder, two counts of attempted first-degree murder, one count of aggravated assault, and one count of assisting a criminal street gang. On November 8, 2008, Mr. Sauceda 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 on Count V to run concurrent with Count II. On October 16, 2009, following the State's withdrawal of its intent to seek the death penalty, Mr. Sauceda was sentenced to life without the possibility of parole until after 25 years from conclusion of sentences on Counts II, III, and IV.

Following conviction, Mr. Sauceda filed a timely appeal in the Arizona Court of Appeals. On February 12, 2012, Mr. Sauceda filed a notice of post-conviction relief and was appointed counsel. Former counsel filed a "no issue" claim and requested an extension of time. On August 24, 2012, Mr. Sauceda filed a *pro per* Rule 32 Petition for Post-Conviction Relief. Mr. Sauceda's post-conviction petition was denied together with his subsequent Motion for Reconsideration.

On January 9, 2015, Mr. Sauceda filed a Petition for Review *pro per*. Review was granted but relief was denied on June 11, 2014. *See* Case No. 2 CA-CR 2015-0174-PR. On January 28, 2015, counsel undersigned entered her notice of appearance. On August 13, 2015, Mr. Sauceda, through counsel undersigned, filed a Petition for Review of the appellate court's denial of relief, which was denied by the Supreme Court on April 11, 2016.

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On July 25, 2016, Mr. Sauceda filed a second Rule 32 Petition for Post-Conviction relief. On March 6, 2017, the trial court denied Mr. Sauceda's petition. On March 21, 2016, Mr. Sauceda moved for a rehearing. The rehearing was denied on April 6, 2017. On May 8, 2017, Mr. Sauceda filed a Petition for Review with the Arizona Court of Appeals. His petition was denied on March 26, 2018. This petition for *habeas* follows.

Mr. Sauceda submits he was forced to stand trial on an indictment based on perjured testimony before the grand jury. The indictment was returned on the following perjured testimony:

- First, Detective Lowe testified that Ivan Villagrana ("Villagrana") said, "All of the sudden Isidro Sauceda pulls out a gun and starts shooting." Villagrana's actual witness interview reveals that the detective asked "[d]id you actually see somebody pull out a gun?" Villagrana answered "[n]o, I never saw no."
- Second, Detective Lowe testified that Jose Peter Razo ("Razo ") "was shown a photo lineup … In the hospital and he identified Isidro Sauceda who had the gun and shot him." In the actual interview of Razo, Lowe asked Razo to "point to somebody he recognized" and asked if that person had a gun. Razo said "no."
- Third, the prosecutor asked Detective Lowe if Borja was able to describe how the shooter was dressed. Lowe answered, "German said that the person was wearing a black beanie and red bandanna." Additionally, on the next question Lowe answered "this is the exact description of Sauceda." However, in the actual interview German said "no" when asked if he saw the guy with the gun.

Furthermore, at trial the State prevailed on a tenuous theory of gang retribution and transferred intent. While former counsel found no colorable claim for post-conviction relief,

Mr. Sauceda *inter alia* challenged the effectiveness of his trial and appellate counsel finding three separate and critical instances where his counsel fell below the objective level of reasonableness. Mr. Sauceda even presented a sworn affidavit from trial counsel that his representation fell below that standard. "Matthew Affidavit" attached as Appendix Tab A. Not only did Mr. Sauceda challenge his conviction *pro per*, he diligently worked to demonstrate his innocence while incarcerated.

Following the dismissal of his initial post-conviction relief petition, Mr. Sauceda was finally able to locate and discover new evidence that was never presented to the jury during his trial. Specifically, Mr. Sauceda located a medical report written by Dr. Zacher (who testified at trial) that was never introduced to evidence. "Zacher Report" attached as Appendix Tab B. Dr. Zacher's report reads in pertinent part:

> It should be noted that during the initial dissection of the soft tissues two bullet fragments were identified, one of them was just under the galeal layer between the skin and the bone and this was removed, and then during removal of the large bone fragment overlying the brain at the inferior aspect of this bone fragment, another piece of bullet was identified and this was also removed. These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments.

Id at 2. The appellate court specifically observed during appeal:

> There was no evidence the fragments were actually given to the police. Nor was there any evidence the fragments are not still in the possession of the hospital. Absent evidence that the hospital does not have the fragments in its possession (and, therefore, available for testing by Defendant), there was no abuse of discretion by the trial court in refusing to give a *Willits* instruction.

During the trial, Detective Lowe admitted that the fragments were not in the possession of the Glendale police department. Specifically, when asked if the fragments were in the custody of the Glendale Police Department he stated: "Not that I'm aware of, no."

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Additionally, Dr. Zacher testified regarding the bullet fragments. However, his report was never offered or admitted to evidence. Dr. Zacher responded: "They were" when asked if the bullets were turned over to the authorities. Furthermore, Dr. Zacher testified directly about the standard protocol for turning over evidence to the authorities. However, the jury never received the medical report due to former trial counsel's failure to enter it into evidence.

Mr. Sauceda, while challenging the dismissal of his first petition for post-conviction relief by the trial court, was also able to secure affidavits from two witnesses who were actually with him on the night in question.

Steven Deleon, a friend of Mr. Sauceda, who accompanied him to the party, was located and was able to provide a detailed affidavit of what transpired on December 13, 2003. "Deleon Affidavit" attached as Appendix Tab C. Mr. Deleon stated in pertinent part:

> 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.
> 7. I happen to remember this fact about the tennis shoes because I liked them so much that I tried them on, and Isidro had to tell me to take those shoes off.
> 8. I remember that Isidro had the shoes on when we left for the party.
> 8. [sic] I remember arguing with Isidro on who would wear the new Jordan shoes on the night of December 13, 2003. Since they were Isidro's new shoes he wore them to the party.
> 9. I remember that Isidro was not wearing any garment that night which was red in color.

Id. at 1-2. Mr. Deleon never testified at trial and was only approached by an investigator whom he thought was working for Mr. Sauceda's defense briefly in 2006. Mr. Deleon told the investigator that, "Isidro did not commit any crime."

Furthermore, Mr. Deleon was also able to recall the following concerning the night in question, December 13, 2003:

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> 10. [sic] On December 13, 2003 I was with Isidro and other friends when we were all searched at the front door of the party for weapons.
> 12. 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 to the party search Isidro, myself and other. I did not see any gun emerge from the person of Isidro at the time.
> 13. Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my best personal knowledge he did not own a weapon of any type.
> 14. To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

Id. at 2-3. Finally, Mr. Deleon, having known Mr. Sauceda for years, stated: "I never remember observing Isidro wearing a red bandana or handkerchief around his head or anywhere on his body, including December 13, 2003." *Id*. at 2.

Mr. Sauceda also secured an affidavit from his former girlfriend Ms. Cherise Ulibarri who was with Mr. Sauceda prior to him leaving for the party. "Ulibarri Affidavit" attached as Appendix Tab D. Ms. Ulibarri was only a witness during the penalty phase and was never called during the guilt phase by either the State or defense counsel. However, Ms. Ulibarri recalled in pertinent part:

> 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.
> 8. I personally tied Isidro's new shows [sic] right before Isidro left for the party on December 13, 2003.
> 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.

Id. Furthermore, Ms. Ulibarri after stating that she had known Mr. Sauceda for over a year during the relevant time in question declared:

> 12. 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.
> 13. 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 or [sic] any type.

Id. at 2. The jury never heard any of this crucial information.

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The State's case was based upon circumstantial evidence including red clothing and gang affiliation. Detective Lowe specifically attested that the Glendale police department never had any information that Mr. Sauceda was "claiming" any gang. Virtually the State's entire case was predicated on tying Mr. Sauceda to a gang through the color of his clothing.

The State's use of the color "red" and "red rag" throughout the trial was illustrative of the circumstantial evidence used to connect Mr. Sauceda as the shooter. The State argued in closing to the jury:

> 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.

The State continued in its closing argument: "[e]ven people who did not point him out they described the person who was doing the apologizing with the gun and the red bandanas, okay. (emphasis added). The State argued: "[t]here was one person wearing red bandana okay." (emphasis added).

The State further argued that the description of Mr. Sauceda given by Marcus Dominguez was: "[h]e said he was, the defendant, 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 that cap." (emphasis added). The State's argument focused on one thing, one color: "It was the red." (emphasis added).

II. ARGUMENT

The Arizona Courts have dismissed Mr. Sauceda's claims of (1) ineffective assistance of post-conviction counsel; (2) newly discovered evidence; and (3) actual innocence as not

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colorable.[1] However, Mr. Sauceda's procedural default was due to ineffective counsel during initial-review collateral proceedings, and therefore his claims establishing cause and actual prejudice should be considered on federal habeas. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012).

A. <u>Mr. Sauceda Did Not Receive Effective Assistance Of Counsel During His Trial And Appeal, Nor During His Initial Rule 32 Proceeding, And Is, Therefore, Not Barred From Federal Habeas Relief.</u>

The Arizona Courts dismissed Mr. Sauceda's Petitions for Review, thus procedurally defaulting his federal claim of ineffective assistance. "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. *See* Ariz. Rule Crim. Proc. 32.2(a). However, in *Martinez v. Ryan*, the United States Supreme Court carved out an equitable remedy for preventing procedural default for precisely the occasion presented here. *Martinez v. Ryan*, 566 U.S. at 17. The Court opined in pertinent part:

> [w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the clai[m]" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review ... are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error.

Id., 132 S.Ct. at 1317. The Supreme Court stated: "By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally

[1] Mr. Sauceda incorporates by reference all issues and claims raised in his Petitions for Post-Conviction Relief and the Replies in support of the same as if set forth in full herein.

guaranteed, the State significantly diminishes prisoners' ability to file such claims." *Id.* at 1318.

To state a colorable claim of ineffective assistance of counsel the defendant must "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (Ariz. 2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *See generally May v. Ryan*, 245 F. Supp. 3d 1145, 1153 (D. Ariz. 2017). Here, Mr. Sauceda has received ineffective assistance of trial and post-conviction counsel and requests precisely the equitable remedy observed by *Martinez*.

1. **Mr. Sauceda was entitled to jury instructions for attempted second-degree murder, and Defense Trial Counsel's failure to object and make a record fell below the standard of care required for representation, amounting to ineffective assistance of counsel which prejudiced Mr. Sauceda.**

Lesser-included offense instructions are required if the jury could find: (a) the State failed to prove an element of the greater offense, and (b) the evidence is sufficient to support a conviction on the lesser offense. *State v. Wall*, 212 Ariz. 1, ¶ 4, 126 P.3d 148, 151 (2006); *see also Dahnad v. Ryan*, CV1401294PHXDJHDMF, at *12 (D. Ariz. July 28, 2016) (quoting *State v. Speers*, 238 Ariz. 423, 429, 361 P.3d 952, 958 (Ariz. App. 2015)).

"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 v. Alabama*, 447 U.S. 625, 634 (1980). Defense counsel must seek a lesser-included offense instruction to avoid the risk of "unwarranted conviction." *Id*. at 638. Even though Mr. Sauceda's defense at trial was one of mistaken identity, the State was required to prove every element of the charged crimes beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *see also State v. McPhaul*, 174 Ariz. 561, 851 P.2d 860 (Ariz. Ct. App.

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1992) (holding failure to include lesser-included offense instruction was reversible error because an element was in doubt).

A defendant is not precluded from receiving a lesser-included offense instruction even where he asserts an all-or-nothing defense. *Wall*, 212 Ariz. at ¶¶ 25-31; *see also United States v. Crutchfield*, 547 F.2d 496, 501 n. 4 (9th Cir. 1977) (holding that reliance on a defense for a greater offense did not require concession of all the elements of the offense charged, nor did the defendant do so). For instance, the jury determines if an element was credibly established. *See State v. Dugan*, 125 Ariz. 194, 195 608 P.2d 771, 773 (1980) (holding conflicting evidence in the record warranted a lesser-included offense instruction).

In the instant case, there is no question second-degree murder is a lesser-included offense to first-degree murder. A charge of attempt in either case requires that the defendant acted with the type of culpability to complete the offense attempted. *See* A.R.S. § 13-1001. The only difference between the elements of first-degree murder and those of second-degree murder is the latter lacks premeditation. *See* A.R.S. § 13-1104; A.R.S. § 13-1105.

The record at Mr. Sauceda's trial contains evidence putting the element of premeditation in doubt. Borja testified there was a struggle for the gun. During the struggle the gun fired and that is how two of the victims were shot. The trial court and prosecutor both agreed to the lesser-included offense instruction of second-degree murder, *which lacks the element of premeditation*. However, in successfully convicting Mr. Sauceda of first-degree murder, such conviction was based on transferred intent *as a means of proving the existence of premeditation which was otherwise absent*. In other words, the State's own reliance on transferred intent in order to show premeditation—based on conjecture and nothing more—*de facto* illustrates that there was conflicting circumstantial evidence regarding premeditation.

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The trial court should have followed the reasoning in *Wall*, given this conflicting circumstantial evidence, and there should have been a lesser-included offense instruction for attempted first-degree murder given to the jury.

Trial counsel's failure to object to the lack of lesser-included offense instructions forced the appellate court on direct review to determine if the lack of jury instruction rose to the level of "fundamental error." *State v. Lucas*, 146 Ariz. 597, 604, 708 P.2d 81, 88 (Ariz. 1985). An objection at trial would have allowed the appellate court to review under an abuse of discretion standard. *Wall*, 212 Ariz. at ¶ 12. An abuse of discretion can be found in an error of law committed in reaching a discretionary conclusion. *Id*.

The trial record is *devoid* of any denial of the request for lesser-included offense instruction for attempted first-degree murder. Counsel requested that the lesser-included offenses for charge one, first-degree murder, and charges two and three, attempted first-degree murder, must be included in the jury instructions. The trial court stated the instructions would be given for second-degree murder and manslaughter because "there were enough theories to support the instruction" and the question was one for the jury. Furthermore, the State made no objection to including the instruction for the lesser-included offenses of attempt. The record is silent as to why the judge omitted the lesser-included offense instructions as applying to attempted first-degree murder. Counsel failed to object to the lack of instruction on counts two and three. Furthermore, defense counsel made no record of this omission or judicial denial – if there was one.

A necessary instruction was omitted from the minds of the jury allowing an innocent man to be convicted without a full complement of instruction on how to apply the facts presented at trial. This is exactly the danger the Supreme Court warned about in *Beck*. The

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jury only had one option for attempted murder – first-degree. Therefore, counsel's errors prejudiced Mr. Sauceda by allowing a jury to convict him without full instruction and being denied relief on direct appeal because defense counsel–by his own admission—*failed to do his job and make an objection* to ensure Mr. Sauceda a just result.

2. Defense Counsel's failure to timely file a special action to challenge the motion to dismiss constructively denied Mr. Sauceda of counsel.

The constitutional guarantee of assistance of counsel cannot be satisfied by "mere formal appointment." *Avery v. Alabama*, 309 U.S. 444, 446 (1940). Lawyers in criminal cases "are necessities, not luxuries." *United States v. Chronic*, 466 U.S. 648, 653 (1984). Without counsel to protect the other rights of the accused the right to a trial is meaningless. *Id*. at 654. Counsel must be reasonably competent, and their advice must be "within the range of competence" demanded of attorneys in criminal cases. *Id*. at 655 (quoting *McCann v. Richardson*, 397 U.S. 759, 770 (1970). The trial is unfair if the accused is denied counsel at a critical stage. *Id*.

Here, counsel was not competent, leaving Mr. Sauceda without an advocate at a critical stage of the proceeding: specifically, competent counsel knows that challenge to an indictment must be filed within twenty-five days of the arraignment. *See* Ariz. R. Crim. P. 12.9(b). Furthermore, competent counsel knows that the proper procedure after the trial court denies a Rule 12.9 Motion to dismiss the indictment for denying a substantial procedural right is to file a special action. *See State v. Moody*, 208 Ariz. 424, 439-40, ¶ 31, 94 P.3d 1119, 1134-35 (Ariz. 2004).

In the instant case, counsel failed to timely file the Rule 12.9 motion timely; instead counsel waited a full two years after the extension to the deadline to file had passed. The State responded alleging the challenge was untimely. Counsel replied with a *two-paragraph answer*

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addressing neither the timeliness error nor any extenuating circumstances for the late filing. Moreover, after the denial of the motion, counsel advised Mr. Sauceda that a special action *was not available to him*. While counsel was correct that the denial of the motion could be reviewed on direct appeal, counsel still should have filed the special action. *See Moody*, 208 Ariz. at 439-40, ¶ n31, 94 P.3d at 1134-35 (one exception is when an indictment is based on perjured material testimony to the grand jury). The special action would have allowed the appellate court to review the motion based on pre-trial investigation instead of relying on the trial testimony to find no perjured testimony at the Grand Jury.

Mr. Sauceda asserts Detective Lowe's Grand Jury testimony was fraught with perjured material testimony. For instance, the Detective testified at the Grand Jury, "Villagrana said, 'All of the sudden Isidro Sauceda pulls out a gun and starts shooting.'" When in fact Villagrana said in his interview with the Detective he "never saw" anybody pull out a gun. Additionally, the Detective testified, "Razo was shown a photo lineup … and identified Isidro Sauceda … had the gun and shot him." Razo was merely asked to "point to somebody he recognized."

Criminal defendants have a Constitutional right not to stand trial on an indictment the government knows is based on perjured testimony. *United States v. Basurto*, 497, F.2d 781, 785 (9th Cir. 1974). Mr. Sauceda asserts there was perjured material testimony presented to the Grand Jury. It is plain to see the testimony given by the Detective is not what the witnesses actually said. Moreover, the prosecutor failed to correct any misleading testimony. *See generally Crimmins v. Superior Court*, 137 Ariz. 39, 668 P.2d 882 (Ariz. 1983).

Counsel failed to test the indictment in an adversarial setting before the trial began allowing the State to try Mr. Sauceda on a defective indictment based on perjured testimony,

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which the prosecutor failed to correct. *See Crimmins, supra*. Where there is a lack of adversarial testing of the State's case, there is a breakdown in the system and the Constitution demands remedy. No prejudice need be shown. *Strickland*, 466 U.S. at 691; *See also Chronic*, 466 U.S. at 653-55. Therefore, counsel's actions are tantamount to the complete denial of counsel.

The Constitution requires counsel to act as an advocate. *Chronic*, 466 U.S. at 655. Where no assistance is provided for the defendant the guarantee of the right to counsel is violated and the trial is unfair. *Id*. Here, the advice given by counsel was not competent and diametrically opposed to the advice that should have been given.

3. Mr. Sauceda did not receive effective assistance of counsel at trial, nor during initial-review.

Mr. Sauceda did not receive effective assistance of trial counsel pursuant to the Sixth Amendment of the federal Constitution. *See* U.S. Const. amend. VI. At trial, Mr. Sauceda was appointed Rule 32 (post-conviction) counsel pursuant to A.R.S. §13-4031. Trial counsel requested a *Willits* instruction but failed to argue the court's denial. Trial counsel did not offer the medical records of Carlos Sanchez and bring Dr. Zacher's report to the attention of the court and jury, evidence which would have necessitated a *Willits* instruction. A *Willits* instruction would have allowed the jury to make a negative inference against the state. This was surely below the objective level of reasonableness given the materiality of ballistic evidence in this shooting crime. Moreover, failing to object to the lack of a *Willits* instruction only allowed Mr. Sauceda to challenge the judgment on a showing of fundamental error, which is a much higher standard to meet than abuse of discretion. Furthermore, trial counsel provided an affidavit swearing that his performance fell below the reasonableness standards

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for effective assistance of counsel in failing to object to no lesser-included offense instructions. These deficiencies in trial counsel's performance undeniably prejudiced Mr. Sauceda.

Additionally, Mr. Sauceda did not receive effective assistance of post-conviction counsel. Post-conviction counsel filed a no-issue claim. She, too, completely missed Dr. Zacher's report and its exculpatory importance. The filing of an *Anders*[2] brief occurs where actual trial counsel admitted that his representation falls well below any objective standard of reasonableness.[3] Any of the aforementioned claims of ineffectiveness of trial counsel could (and should) have been claimed by post-conviction counsel. Because the initial-review collateral proceeding is a prisoner's "one and only appeal" as to an ineffective-assistance claim, *Martinez v. Ryan*, 566 U.S. at 8 (quoting *Coleman v. Thompson*, 501 U.S. 722, 756 (1991)), post-conviction-counsel's performance harmfully prejudiced Mr. Sauceda.

Mr. Sauceda, a prisoner untrained in the law, was forced to appeal a procedurally defaulted case while simultaneously challenging both his trial and appellate counsel. Being forced to challenge his constitutional right to effective assistance of counsel without aid of an attorney prejudiced Mr. Sauceda. As Justice Kennedy stated:

> [t]o present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.
>
> The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. [citation omitted] While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

[2] An *Anders* brief is filed to seek permission to withdraw when counsel appointed for state appeal, after conscientious examination, finds his case to be wholly frivolous. *Anders v. State of Cal.*, 386 U.S. 738, 744 (1967).

[3] Mr. Sauceda challenged trial counsel's effectiveness on initial post-conviction relief, which was denied without the help of counsel.

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Martinez, 566 U.S. at 12 (emphasis added). The black letter law established by *Martinez* holds that:

> [w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id., 566 U.S. at 17. Here, Mr. Sauceda is in the exact situation protected by this narrowly defined remedy. Mr. Sauceda urges this Court to honor the Supreme Court's ruling in *Martinez* and allow a defendant to challenge the effectiveness of post-conviction counsel.

B. Colorable Claims Based On Newly Discovered Material Evidence Of Actual Innocence Demonstrates Cause and Prejudice Resulting From The State's Procedural Default, and Necessitates Federal *Habeas* To Prevent A "Fundamental Miscarriage of Justice."

Generally, a state procedural default of any federal claim does not bar federal habeas where the petitioner demonstrates cause and actual prejudice, or where default would result in a "fundamental miscarriage of justice." *See Weddington v. Zatecky*, 72 F.3d 456, 465 (7th Cir. 2013); *Henderson v. Palmer*, 730 F.3d 554, 559 (6th Cir. 2013). A petitioner is able to overcome a procedural default by demonstrating actual innocence of the crime underlying his conviction. *Vosgien v. Persson*, 742 F.3d 1131, 1134 (9th Cir. 2014). One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime. *Id.*

Here, newly discovered material evidence demands federal *habeas* review. Based on the below newly discovered evidence, Mr. Sauceda presented colorable claims in his Petition for Post-Conviction Relief. A colorable claim is one where if all facts are taken as true it might have changed the outcome. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (Ariz.

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1990); *see also Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005). "When doubts exist, 'a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.'" *State v. Watton*, 793 P.2d at 85. So too, here, the trial court should have at the very least ordered an evidentiary hearing to allow Mr. Sauceda to raise these issues. Here, as in *Vosgien*, where the evidence demonstrates actual innocence, the Arizona Courts' denial of Mr. Sauceda's Rule 32 Petitions has resulted in a "fundamental miscarriage of justice."

1. **Newly discovered material evidence exists that would probably have changed the verdict or sentence.**

   Newly discovered material facts exist where:

   (1) The newly discovered material facts were discovered after the trial.
   (2) The defendant exercised due diligence in securing the newly discovered material facts.
   (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony, which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

Ariz. R. Crim. Pro., Rule 32.1(e). A defendant must demonstrate that the evidence was discovered following the trial and that the evidence was discovered with due diligence. *State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (Ariz. 1995); *see also Vega v. Ryan*, 757 F.3d 960, 968 (9th Cir. 2014). Due diligence is illustrated by the defendant actively seeking a remedy under Rule 32. *State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (Ariz. 2016).

Mr. Sauceda presented three pieces of evidence attached to his Rule 32 Petitions: (A) Dr. Zacher's Medical Report, (B) the declaration of Steven Deleon, and (C) the declaration of Sherise Ulibarri. Appendix Tabs B, C, and D, respectively. As in *Bilke*, Mr. Sauceda diligently challenged his conviction on appeal, followed by his initial post-conviction relief petition. The latter challenge, including the effectiveness of trial and appellate counsel, was

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without the help of an attorney. While appealing the dismissal of his first post-conviction petition, Mr. Sauceda discovered new evidence in the report of Dr. Zacher (never entered into evidence by his trial counsel) and the affidavits of Mr. Deleon and Ms. Ulibarri. All of this evidence was crucial on the merits to the State's proof against Sauceda, was discovered after trial with due diligence, and would probably have changed the outcome.

The court relied on *State v. Saenz*, 197 Ariz. 487, 4 P3d 1030 (Ariz. Ct. App. 2000), in determining that no colorable claim was presented. However, *Saenz* is distinguishable from the present matter. In *Saenz*, the defendant was aware during his trial of another individual's confession to the crime he was being tried for. *Id.* at ¶ 14. The defendant did nothing to bring this other individual's confession forward. *Id.* Therefore, the Arizona appellate court determined that where the defendant did nothing to alert the court, the prosecutor, or his attorney of the confession, it was not newly discovered evidence. Such is not the case here.

Mr. Sauceda was not aware of Dr. Zacher's report until he discovered the page while he was challenging the dismissal of his initial post-conviction petition. Mr. Sauceda was not informed that defense counsel did not subpoena Mr. DeLeon and Ms. Ulibarri at the trial. Unlike the defendant in *State v. Saenz*, Mr. Sauceda was not aware of this crucial evidence at trial and he was not actively keeping it from the trial court or his attorney. 197 Ariz. at 490, 4 P.3d at 1033. Therefore, Mr. Sauceda has presented newly discovered evidence, which justifies the re-opening of his case and a new trial.

a. The medical report of Dr. Zacher would probably have changed the outcome.

Evidence discovered only after the trial in Dr. Zacher's medical report of the surgery of Carlos Sanchez would probably have changed the outcome. The Glendale police

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department did not have the bullet fragments. The loss or destruction of evidence warrants a *Willits* instruction for the defendant.

Mr. Sauceda's ineffective trial counsel failed to even offer the medical record, which was the best evidence for the jury to see that the hospital had turned the bullet fragments over to the authorities.[4] The court and jury were never made aware of definitive proof that the undisclosed bullet fragments had been turned over to the police. Appellate counsel also failed to raise this issue.

The trial court denied Mr. Sauceda's request for a *Willits* instruction and the appellate court denied any abuse of discretion because counsel had not produced any evidence that the police department ever had the bullet. The appellate court and trial court made their decisions despite the fact that Detective Lowe testified that the Glendale Police Department did not have the bullet fragments from Sanchez's skull, and Dr. Zacher testified that protocol was to deliver them to the authorities.

Evidence is material if it concerns the crime charged or the defense presented. *See State v. Romero*, 77 Ariz. 229, 234-35, 269 P.2d 724, 728 (Ariz. 1954). In *Romero*, the Arizona high court upheld the granting of a new trial on the fact that a person who was allegedly being protected was not actually at the scene. *Id*. The affidavits containing new evidence were material because they called into question which person, the defendant or the victim, was actually the aggressor of the fight. *Id*. Here, the bullet fragments from a shooting are certainly material as they lead back to the gun that fired them.

[4] *Cf.* No. 1 CA-CR 08-1036 No. 1 CA-CR 10-001, p. 10-11.

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Furthermore, these bullet fragments have exculpatory value. The State's theory was predicated on only one gun being present. However, John Tew, the State's ballistics expert stated in pertinent part:

> However, my notes I have a little bit additional information about some marks that I did find on some of my projectiles, but I cannot explain where that mark came from. It's not a mark that I normally expect to see. I've seen it in some types of things, but it's – but it's normally some form of an attached or part of loading process to indicate I have some nice marks and some nice photographs of a comparison, but my – my notes are is I don't know where this mark came from. It's not – I would never expect to see this mark on a standard Glock that I would either go buy in the store or whatever so I don't know what it is. So – but my results are still inconclusive. (emphasis added).

The State's own expert testified that some of the projectiles had markings he would "never expect to see" from the only type of gun the State claims was used, a "Glock."

The testimony regarding ballistics evidence does not support the one-gun theory. There were **seven** bullet wounds. Kristopher Dominguez was shot once. Sanchez was shot twice. Borja testified two bullets grazed his head, one graze his arm, and one entered his wrist. The wounds on Dominguez and Borja were through-and-throughs; no bullets were recovered on their person. There were **six** bullets found in the den. Two of the bullets fired in the den were inside the skull of Sanchez. Dr. Zacher testified that there were no exit wounds. Regarding three other bullets, Detective Lowe stated:

> 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.

One bullet was found under the pant leg of Kristopher Dominguez. There were only **five** shell casings found inside the small den.

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Two more casings were found outside the house. Two bullets were recovered from Razo's body outside. Another bullet was recovered from outside of the house, embedded in an exterior wall.

The appellate court's reasoning hinged on, in addition to Dr. Zacher's report, a theory that five bullets and seven casings were recovered. Adding the two bullets recovered from Dr. Zacher's report, this created a clean, even "seven bullets, seven casings, seven wounds." This reasoning is contradicted by the facts, given that neither seven bullets nor seven casings were discovered in the den where all seven wounds occurred.

Only four bullets were found in the den: the three mentioned by Detective Lowe and the one found under Kristopher Dominguez. In counting five bullets, the appellate court included the bullet which was recovered from outside of the house. There was no evidence in the record indicating that this was one of the bullets fired in the den.

The State's main claim was one shooter, one gun. The jury did not have before it the fact that Dr. Zacher's report actually confirmed that the bullet fragments recovered from the head of one of the victims were given to the police. Without the bullet fragments, together with the lack of any gun being recovered, and the inability of Mr. Sauceda to test the bullet fragments lost, or destroyed, by the State, it is clear that his conviction was secured on a house of cards built on gang affiliation and "red" clothing without more. Mr. Sauceda should have received a *Willits* instruction based on the fact that the fragments were not available. The *Willits* instruction permits the jury to take missing or tampered evidence as a negative inference and the State's theory of a single gun would have been placed in reasonable doubt by the jury.

b. The affidavits of Steven Deleon and Cherise Ulibarri would probably have changed the outcome.

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The affidavits of Mr. Deleon and Ms. Ulibarri regarding the night in question would also probably have changed the outcome. Both declarations were discovered after trial and after defense counsel failed to subpoena or call them as witnesses at trial. Neither Mr. Deleon nor Ms. Ulibarri testified prior to the jury finding Mr. Sauceda guilty. Ms. Ulibarri only testified during the guilt phase. As in *Romero*, the testimony of these two witnesses is material. Their testimony involved Mr. Sauceda on the day and night in question.

The State directly relied on witnesses who had given multiple inconsistent statements prior to trial. Marcus Dominguez, Ivan Villagrana, Jose Peter Razo, and German Borja all had inconsistent testimony and prior statements.

Mr. Dominguez initially testified: "They [the shots] were coming from Isidro from up here, from on top" On cross-examination Mr. Dominguez testified that he never saw Mr. Sauceda shoot. Mr. Dominguez again switched his testimony back to Mr. Sauceda being the shooter.

Furthermore, Mr. Dominguez testified that Mr. Sauceda was wearing a lot of grey on the night in question. This is in direct contradiction to the State's description of the shooter and a "lot of red."

Mr. Villagrana admitted on cross-examination that when police interviewed him, he could not identify the shooter. On cross-examination, Mr. Villagrana was asked; "You don't know who the shooter was, correct?" To which he responded, "Correct." (emphasis added).

Mr. Razo did not make an in-court identification, and only described what the shooter was wearing: "Looked like a lot of red." (emphasis added).

Mr. Razo was asked if the person who shot him was in the courtroom and he said: "No." (emphasis added).

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Mr. Borja actually told police officers that he did not even know that Mr. Sauceda was at the party. Again, during a later police interview, Mr. Borja still did not remember Mr. Sauceda even being at the party. Mr. Borja was asked at trial: "No isn't it true you didn't know it was Cheeto at the time? He responded, "I still don't know." (emphasis added).

Furthermore, the declarations of Sherise Ulibarri and Steven Deleon were newly discovered. Neither defense counsel nor the State called either witness at trial. Moreover, Steven Deleon's declaration states:

> Other than the brief interview that the defense investigator had with me in 2006, as mentioned above, I was never contacted again by any representative for either the defense or State until approximately early October 2015, when I was contacted by the defense[5] on behalf of Isidro.

Deleon Affidavit at 3. Mr. Deleon was not contacted for over nine years. Although he was with Mr. Sauceda on the night in question, trial counsel did not subpoena him or call him as witness in the trial. The jury never heard any testimony that he would give. Similarly, Ms. Ulibarri was never called as a witness during the guilt phase of the trial. Her testimony was never heard.

Had the jury received the material testimony, described above from Mr. Deleon and Ms. Ulibarri (and fully stated in their respective affidavits incorporated herein), the outcome would have surely been different. Contrary to the State's witnesses, these two witnesses did not have multiple inconsistent statements. A colorable claim is one where if all facts were taken as true it might have changed the outcome. *Wotton*, 164 Ariz. at 328; *see also Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005). Here, the Arizona courts violated Mr. Sauceda's constitutional rights in dismissing the credibility of the newly discovered evidence.

[5] That defense would have been through counsel undersigned.

2. Mr. Sauceda has demonstrated by clear and convincing new evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact finder would have found him guilty.

Mr. Sauceda has always asserted his actual innocence and that he was not the shooter. As fully illustrated above, Mr. Sauceda has demonstrated his actual innocence by clear and convincing evidence. Mr. Sauceda has not only presented colorable claims, but evidence which actually illustrates that he was not the shooter on the night in question.

Mr. Deleon was indeed present with Mr. Sauceda at the party during the shooting. Mr. Deleon directly states, under penalty of perjury, that he informed the defense investigator in 2006, that: "Isidro did not commit any crime." Furthermore, both Mr. Deleon and Ms. Ulibarri corroborated what Detective Lowe testified to: Mr. Sauceda was not a member of a gang.

The affidavits of Ms. Ulibarri and Mr. Deleon also demonstrate that Mr. Sauceda was not wearing any red colored clothing on the night in question. Virtually all of the State's case was predicated on "red" clothing and a "red rag." Contrary to the trial court's statements, the testimony of Mr. Dominguez, Mr. Villagrana, and Mr. Borja were inconsistent with prior statements. The only testimony that could have been presented without impeachment is the testimony by Mr. Deleon and Ms. Ulibarri. Both of their declarations corroborate each other.

Finally, Dr. Zacher's report illustrates that there is lost or destroyed evidence in this matter. The State's theory of one gun is severely hampered by the State's own expert witness, James Tew's testimony of the bullet casings with marks he would never expect to see on a bullet fired from a Glock. As discussed above there are two bullets and two casings missing from the crime scene. The above demonstrates Mr. Sauceda's innocence to his convictions.

III. CONCLUSION

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Absent this Court's intervention, Mr. Sauceda will have been denied his constitutional right to counsel and, far worse, been held guilty for crimes to which he can claim actual innocence. Mr. Sauceda asks that this Court grant him *habeas corpus* relief, in accordance with the precedent set by *Martinez v. Ryan* granting an exception to the procedural bar where trial and post-conviction counsel were ineffective, and where newly discovered evidence would have probably changed the outcome of the trial.

Respectfully submitted this 19th day of February,

HORNE SLATON, PLLC

By: /s/ Sandra Slaton
Sandra Slaton
Attorney for Petitioner Isidro Sauceda

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Attorney for Petitioner Isidro Sauceda

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Isidro Sauceda,
Petitioner,

V.

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

And

The Attorney General of the State of Arizona,
Additional Respondent.

Case No.

APPENDIX TO PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (NON-DEATH PENALTY)

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TAB A

LAWRENCE S. MATTHEW, Bar #10058
Deputy Public Defender
620 West Jackson, Suite 4015
(602) 506-7711 ext. 3-6463

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA,	)	**No. CR 2005-112128-001-DT**
	)	
Plaintiff,	)	**AFFIDAVIT OF LAWRENCE MATTHEW**
v.	)	**IN SUPPORT OF POST-CONVICTION**
	)	**PETITION**
	)	
ISIDRO SAUCEDA,	)	(Assigned to Judge Rayes)
	)	
Defendant.)		

STATE OF ARIZONA)
) **ss.**
COUNTY OF MARICOPA)

Lawrence S. Matthew, being first duly sworn, upon oath, deposes and says:

1. I am an attorney licensed to practice in the State of Arizona.

2. I am a Deputy Public Defender assigned to the Capital Unit of the Office of the Maricopa County Public Defender. I was assigned as lead counsel for the trial in this case, *State of Arizona v. Isidro Sauceda,* CR 2005-112128-001-DT.

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, 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.

I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

5/8/2012
DATE

LAWRENCE S. MATTHEW

Subscribed and sworn to before me this 8 day of May, 2012

NOTARY PUBLIC

OFFICIAL SEAL
MICHELLE K. PAGE
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires May 17, 2014

TAB B

St. Joseph's Hospital and Medical Center
CHW
350 W. Thomas Rd. Phoenix, AZ 85013

The incision was opened using a #10 blade scalpel extending in a curvilinear fashion from just anterior to the right ear to the midline in the right frontal region. Bovie electrocautery was then used to further elevate the soft tissues and reflect them anteriorly. At this point, the defect in the bone was readily notable and, in fact, as the restriction from the soft tissues was released, the bone fragment actually popped away from the patient's head resulting in oozing of hemorrhagic brain and hematoma from around the bone fragment. After the entire craniotomy flap had been elevated anteriorly and retracted with fishhooks and a Leyla bar, the temporalis muscle was also incised using Bovie electrocautery and was also reflected anteriorly with fishhooks. The bone fragment was then disconnected from the remaining periosteum and this was removed. This revealed hemorrhagic brain and hematoma in the right frontal region, along with shredded dura. There was a small amount of acute arterial bleeding from several small arteries around the perimeter of the incision. These were all cauterized using Bovie electrocautery.

Once gross hemostasis on the surface had been obtained, the dura that was remaining intact was opened in the center of the defect and reflected laterally, and then gentle suction and irrigation were used to evacuate the hematoma and macerated brain from the central portion of the right frontal lobe. Only tissue which already appeared to be disconnected was evacuated at this time. Multiple rounds of irrigation were carried out. Bipolar electrocautery was used to obtain hemostasis throughout the resection bed. Once this had been achieved, it was felt that the desired decompression had been achieved and, therefore, the dura was reapproximated. Duragen was then placed over the exposed areas of brain. Hemostasis was excellent at the time of closure.

The bone fragment that had been removed which measured approximately 5 x 6 cm was then carefully sculpted to close the cranial defect, and multiple small plates and screws were used to hold this bone fragment in place to effectively close the craniotomy site.

The temporalis muscle was then reapproximated using interrupted 2-0 Vicryl suture. The skin flap was reapproximated, and the galeal layer was reapproximated using interrupted 2-0 Vicryl suture, and then staples were placed in the skin.

It was at this time that the oozing from the left frontal region appeared to have slowed and was now primarily just bleeding. This incision was closed using staples.

It should be noted that during the initial dissection of the soft tissues, two bullet fragments were identified, one of them was just under the galeal layer between the skin and the bone and this was removed, and then during removal of the large bone fragment overlying the brain at the inferior aspect of this bone fragment, another piece of bullet was also identified and this was also removed. These bullets were sent to the authorities via the standard protocol. The only specimens from this procedure were the bullet fragments.

TAB C

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MARICOPA COUNTY SUPERIOR COURT

FOR THE STATE OF ARIZONA

STATE OF ARIZONA, **Plaintiff,** **v.** **ISIDRO SAUCEDA,** **Defendant.**	**No. CR2005-112128-001-DT** **AFFIDAVIT OF STEVEN DELEON**

I, STEVEN DELEON, do hereby declare upon my duly sworn oath the following:

1. That I have known Isidro Saucedo ("Isidro") for approximately 24 years as a friend.

2. That I accompanied Isidro, with other individuals, on December 13, 2003, to a party which took place in the area of 90th Avenue in Glendale, Arizona.

3. I learned subsequently from other third parties that Isidro was convicted of murder and other related crimes from what happened at that party.

4. In approximately early 2006 I was contacted by a defense investigator who I believed was working on behalf of Isidro in this case.

5. I remember telling the investigator that Isidro did not commit any crime. I do not

remember being asked at that time anything about what Isidro was wearing in terms of color, type of clothing, or shoes.

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 Ulibarri.

7. I happen to remember this fact about the tennis shoes because I liked them so much that I tried them on, and Isidro had to tell me to take those shoes off.

8. I remember that Isidro had the shoes on when we left for the party.

8. I remember arguing with Isidro on who would wear the new Jordan shoes on the night of December 13, 2003. Since they were Isidro's new shoes he wore them to the party.

9. I remember that Isidro was not wearing any garment that night which was red in color.

10. Having known Isidro since we were children together, I had an opportunity to regularly observe what Isidro would wear in clothing type and color. I never remember observing Isidro wearing a red bandana or handkerchief around his head or anywhere on his body, including December 13, 2003.

10. On December 13, 2003 I was with Isidro and other friends when we were all searched at the front door of the party for weapons.

12. 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 to the party search Isidro, myself and others. I did not see any gun emerge from the person of Isidro at that time.

13. Also, I did not see any gun on Isidro Sauceda ever, including December 13, 2003, and to my best personal knowledge he did not own a weapon of any type.

14. To my personal knowledge Isidro was not then, nor has he ever been, a gang member or affiliated with any gang.

15. To my personal knowledge I never heard Isidro utter any apology whatsoever to Marcus Dominguez or any other person at the party on the night in question.

14. I was not asked by either the Defense or the State to be a witness in this matter.

15. The police did not interview me.

16. On the night in question and early morning hours of the next day, December 13 and 14, 2003, I was present at the party while police were there and no police officer, or anyone else for that matter, asked for my statement .

17. Had I been subpoenaed by any party I would have testified to these facts.

18. Other than the brief interview that the defense investigator had with me in 2006, as mentioned above, I was never contacted again by any representative for either the defense or the State until approximately early October, 2015, when I was contacted by the defense on behalf of Isidro.

19. This Affidavit follows.

20. I make this Affidavit based upon own personal knowledge except as to those facts based upon my information and belief, and as to such facts, I believe them to be true.

21. I make this Affidavit voluntarily and of my own free will.

10-6-2015
Date

Steven Deleon

STATE OF ARIZONA)
) ss:
County of MARICOPA)

Personally came before me, the undersigned, on October 6, 2015, the above-named Steven Deleon, who appeared before me with evidence of his/her identification.

Notary Public

My Commission Expires:
July 28, 2019

Notary Public State of Arizona
Maricopa County
Dale Ann Andrade
My Commission Expires 07/28/2019

TAB D

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Attorneys for Defendant Isidro Sauceda

UNITED STATES COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, **Plaintiff,** **v.** **ISIDRO SAUCEDA,** **Defendant.**	**No. 1 CA-CR 14-0027 PRPC** District of Arizona, Phoenix **DECLARATION OF CHERISE ULIBARRI**

I, CHERISE ULIBARRI, do hereby declare under penalty of perjury the following:

1. That I am the Mother of a common daughter with Isidro Sauceda, Azeriah Sauceda, who is 9 years old.

2. That I was the girlfriend of Isidro Sauceda on or about December 13, 2003, the night he went to a party.

3. I learned later that Isidro was later convicted of murder and other related crimes from what happened at that party.

4. I learned later that Isidro was accused of being in a gang.

5. I also learned that Isidro was accused of wearing red garments and red shoe laces to that party.

6. During that time Isidro and I were living together.

7. On that particular day, December 13, 2003, I personally bought Isidro a pair of Jordon tennis shoes as a Christmas present. The shoes were all black with black shoe laces.

8. I personally tied Isidro's new shows right before Isidro left for the party on December 13, 2003.

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.

11. On December 13, 2003 I was 18 years old and had known Isidro for approximately a year.

12. 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.

13. 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 or any type.

14. I was only called to testify during the aggravation phase in Isidro Sauceda's trial. If I had been subpoenaed to testify during the guilt phase by either side, including Isidro Sauceda's lawyers, I would have testified to these facts.

5·28·15
Date

Sherise Ulibarri
Sherise Ulibarri

STATE OF New Mexico)
) ss:
County of Bernalillo)

Personally came before me, the undersigned, on May 28, 2015, the above-named Sherise N. Ulibarri, who appeared before me with evidence of his/her identification.

Jazmin Marquez
Notary Public

My Commission Expires:

02/26/2019

OFFICIAL SEAL
JAZMIN MARQUEZ
NOTARY PUBLIC - State of New Mexico
My commission expires: 02/26/2019