NO. 21-_____

In the Supreme Court of the United States

THOMAS CLAYTON STERES,

Petitioner,

v.

KEVIN CURRAN, WARDEN (ASPC-FLORENCE); ATTORNEY GENERAL'S OFFICE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ANDERS ROSENQUIST
COUNSEL OF RECORD
ROSENQUIST & ASSOCIATES
42104 N. VENTURE DRIVE, STE. A122
ANTHEM, AZ 85086
(480) 861-7115
ROSENQUISTLEGAL@GMAIL.COM

FEBRUARY 4, 2022 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether Thomas Steres received ineffective assistance of counsel in violation of the Sixth Amendment?

2. Whether the search of Mr. Steres' cell phone was illegal under the Fourth Amendment?

3. Whether the Ninth Circuit's denial of a Certificate of Appealability was unreasonable where Mr. Steres demonstrated a substantial showing of the denial of a Constitutional right?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 21-15675

Thomas Clayton Steres, *Petitioner-Appellant,* v. Kevin Curran, Warden (ASPC-Florence); Arizona Attorney General's Office, *Respondents-Appellees.*

Date of Final Order: November 9, 2021

United States District Court for the District of Arizona

No. CV-18-00161-TUC-RM

Thomas Clayton Steres, *Petitioner,* v. Kevin Curran, Et Al., *Respondents.*

Date of Final Judgment: March 26, 2021

Supreme Court of Arizona

CR-17-0180-PR

State of Arizona, *Respondent* v.
Thomas Clayton Steres, *Petitioner*

Date of Final Order: November 30, 2017

Arizona Court of Appeals, Division Two

No. 2 CA-CR 2016-0379-PR

State of Arizona, *Respondent* v.
Thomas Clayton Steres, *Petitioner*

Date of Final Order: March 30, 2017

Superior Court, State of Arizona, Cochise County

No. CR201400108

State of Arizona, *Plaintiff,* v.
Thomas Clayton Steres, *Defendant.*

Date of Final Order: October 24, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Thomas Clayton Steres (hereinafter "Mr. Steres" or "Steres") respectfully prays a writ of certiorari issue for review of his case.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Steres' Request for Certificate of Appealability is annexed as Appendix A at App.1a. A copy of the Judgment of the United States District Court for the District of Arizona is annexed as Appendix B at App.3a. A copy of the Order of the United States District Court for the District of Arizona denying Steres' Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is annexed as Appendix C at App.5a. The Report and Recommendation of the Magistrate Judge of the United States District Court for the District of Arizona is annexed as Appendix D at App.24a. The Order of the Arizona Supreme Court denying review of Steres' petition is annexed as Appendix E at App.68a. The Memorandum Decision of the Arizona Court of Appeals granting review but denying relief is annexed as Appendix F at App.70a. The Order of the Cochise County Superior Court for the State of Arizona dismissing Steres' Petition for Post-Conviction Relief as untimely is annexed as Appendix G at App.77a. These opinions were not designated for publication.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit, denied Mr. Steres a certificate of appealability was November 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment VI

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

A.R.S. § 13-1001 Attempt; classifications

A. A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person:

1. Intentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be; or

2. Intentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense; or

3. Engages in conduct intended to aid another to commit an offense, although the offense is not committed or attempted by the other person, provided his conduct would establish his complicity under chapter 3 if the offense were committed or attempted by the other person.

B. It is no defense that it was impossible for the person to aid the other party's commission of the offense, provided such person could have done so had the circumstances been as he believed them to be.

A.R.S. § 13-1105(A)(1)
First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an

> unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.

STATEMENT OF THE CASE

Steres was charged on March 6th, 2014, with Conspiracy to Commit First Degree Murder (A.R.S. §§ 13-1003(A) & 13-1105(A)(1)); Attempted with Premeditation to Murder A.Q. (First Stab Wound) (A.R.S. §§ 13-1001 & 13-1105(A)(1)); Attempted with Premeditation to Murder A.Q. (Second Stab Wound) (A.R.S. §§ 13-1001 & 13-1105(A)(1)); Aggravated Assault upon A.Q. with a Deadly Weapon or Dangerous Instrument, a knife (First Stab Wound) (A.R.S. §§ 13-1204(A)(2) & 13-1203(A)(1)); Aggravated Assault upon A.Q. with a Deadly Weapon or Dangerous Instrument, a knife (Second Stab Wound) (A.R.S. §§ 13-1204(A)(2) & 13-1203(A)(1)); Possession of Marijuana for Sale (A.R.S. §§ 13-3405(A)(2), (B)(4), (C), (D), (E) & 13-3401(19); and Possession of Drug Paraphernalia (A.R.S. §§ 13-3415(A)). (Doc. #1-4; Exhibit "A"—Indictment).[1]

Steres pled guilty to one count of Attempted with Premeditation to Murder an individual, A.Q. Specifically, stabbing A.Q. with a knife in the neck a "second time" after the victim was stabbed in the head a "first time" by co-defendant Katherine Francois.

---

[1] Citations to document numbers (Doc. #) are to the document's location on the Arizona District Court docket.

(Doc. #1-4; Exhibit "Q"—Plea Transcript at p. 23). Steres was sentenced to 15 years in prison beginning May 14, 2015. (Doc. #1-4; Exhibit "R"—Sentencing Transcript at p. 49).

Steres joined the Navy when he was 20 years old. He obtained a high-level security clearance vetting him to become a linguist/translator. He eventually dropped out of linguistics school because of his problem with ADD (Attention deficit disorder), which he was diagnosed with at age 4. He then served several years on a ship until he was discharged under Honorable Conditions, for being involved with illegal drugs.

Steres moved back home to Benson, Arizona, and lived with his mother. He got a job in a local grocery store, and within weeks met Katherine Francois ("Kate"), who was later charged as his co-defendant. They became romantically involved, and Steres moved in with her. Steres lived with Kate for three weeks before the incident occurred. During this time, Kate would brag about being tough and knowing mobsters. She also told Steres her parents owned a marijuana farm in Vermont.

One afternoon Steres met A.Q. A.Q. asked Steres if he knew where he could buy marijuana. Steres told him he could get marijuana from Kate's parents' marijuana farm. They reached an agreement where Steres would get a sample for A.Q. to look at, and if it was acceptable, A.Q. would buy a large amount. A.Q. apparently knew a dealer that would buy it from him. Steres told Kate about the deal and asked her to get a sample, and said the deal would get them enough money to move to California.

As time passed, A.Q. became persistent in seeing the sample and getting the deal done. Kate would make excuses for why she had not received the sample. Not wanting the deal to fall apart, Steres set up a meeting with A.Q. The plan was to show A.Q. some marijuana they already had as the sample. At that time, Steres did not know Kate was lying about her parents having a marijuana farm and being able to supply the marijuana.

A.Q. came to the house to look at the sample of marijuana on the evening of March 3rd, 2014. Steres came out of the house holding some marijuana in his hand and called A.Q. over to look at it. When A.Q. bent over to look at the marijuana in Steres' hand, Kate came up behind him and hit him in the head with a knife (the "first" stab wound). As the knife continued down it struck A.Q. on the neck (the "second" stab wound). A.Q. reacted by swinging his arm around to grab his head and hit Kate. When Steres saw A.Q. hit Kate, he did not know she had stabbed him. Steres then chased A.Q. as he ran away. When Steres returned to the house he learned what Kate had done. Kate begged him to take the blame for stabbing A.Q., telling him she was pregnant with his child and could not go to jail. (Kate was not pregnant). Because Steres was in love with Kate, and thought she was pregnant with his child, he agreed to take the blame for the stabbing.

The first officer on the scene was Officer Douglas. He separated Steres and Kate and had them write down what happened. The next officer on the scene was Sergeant Behr. He read their statements and briefly questioned them. Detective Williams (the lead detective) then arrived at the scene. He had notified

Police Assistant One (PA1) Traywick to go to the scene to be the 'Collector of Evidence.' After Det. Williams arrived, he read the statements and stated, "Neither account matched." (Doc. #1-4; Exhibit "B"—Det. Williams Report at pg. 3, 2nd line). He confronted Steres with the inconsistencies in the statements and asked to see the texts messages on his cellphone, Steres refused. Det. Williams seized Steres' cellphone, (*Id.* at last line of middle para.) and had Sgt. Behr take him to the police station. Sgt. Behr returned, and he and Det. Williams searched the scene, and Kate's house. Det. Williams cleared the scene and went to the police station, where he interviewed Steres. Steres told different stories about what happened. At the end of the interview Det. Williams told Steres, 'He was going to be booked on a charge of Aggravated Assault and the County Attorney may charge him with attempted murder.' (*Id.* at pg. 13, 1st full para., 1st line).

On March 5, 2014, Det. Williams had Det. Ingram accompany him to Kate's house. He told Det. Ingram to stay in the car while he talked to Kate. Det. Williams asked Kate for the code to her cellphone, so he could look at her text messages. He gave her the cellphone and she put in the code. He then told her he was going to keep her cellphone. Kate told Det. Williams she wanted to talk to him, and later went to the police station. In her interview, Kate told stories that 'did not make sense' to Det. Williams. He booked her on a charge of Attempted Murder. (*Id.* at pg. 23, second para.).

The next day, March 6, 2014, Steres was indicted. On March 7th, Det. Williams obtained a search warrant for Steres' and Kate's cellphones and had them

searched by another police officer. On March 11th, Det. Ingram obtained a search warrant for Steres' cellphone records from Verizon Wireless. On March 14th, Det. Williams received the Verizon records. (Doc. #1-4; Exhibit "F"—Det. Ingram Report & Search Warrants). Steres eventually plead guilty and was sentenced to 15 years in prison.

Steres filed a Notice of Post-Conviction Relief in the Superior Court of Cochise County Arizona on August 7, 2015. On October 24, 2016, the Court dismissed Steres' petition for post-conviction relief, finding, "The Defendant has not timely complied with the relevant Rules of Criminal Procedure." Appendix "G" at App.77a. Steres filed a Petition for Review with the Arizona Court of Appeals, and on March 30, 2017 the Court granted review but denied relief. Appendix "F" at App.70a. Steres then filed a Petition for Review with the Arizona Supreme Court, which denied review on November 30, 2017. Appendix "E" at App.68a.

On March 26, 2018, Steres filed a Petition for Writ of Habeas Corpus in Federal court pursuant to 28 U.S.C. § 2254. The Arizona District Court denied Steres' claims. Appendix "C" at App.5a. The District Court also denied Steres a certificate of appealability. *Id*.

Steres filed a Certificate of Appealability with the 9th Circuit Court of Appeals. On November 9, 2021, the Ninth Circuit denied Steres Certificate of Appealability. Appendix "A" at App.1a.

REASONS FOR GRANTING THE PETITION

I. STERES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

The right to effective assistance of counsel is guaranteed under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1994). To establish prejudice, a defendant must show the outcome of the plea process would have been different with competent advice. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (U.S. 2012).

A. Steres' Counsel Failed to Investigate His Case to Discover a Critical Defense.

The right to effective assistance of counsel is guaranteed under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1994). Defense counsel's performance is deficient if counsel fails to fulfill his duty to investigate defendant's most important defense—counsel has duty to investigate the case. *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994); *See also Powell v. Alabama*, 287 U.S. 45, 58 (1932) (to do no investigation at all on an issue that not only represents the accused only defense, but also his present competency, is not a tactical decision—tactical decisions must be made in context of a reasonable amount of investigation, "not a vacuum"). If Steres' counsel had done the necessary investigation and research, a critical defense would have been discovered: A Motion to Suppress based on law enforcement's failure to follow protocol set out in

Riley v. California, 134 S.Ct. 2473 (2014). A violation of Steres' 4th Amendment right against unreasonable search and seizure.

Steres' counsel failed to interview any of the police officers in the case or any other potential witnesses; did not file a Motion to Suppress the cellphone evidence obtained in violation of the 4th Amendment. Counsel convinced Steres to plead guilty based on counsel's false conclusions based only on police reports, which lead him to tell Steres he had no defense, and if he went to trial, he would be found guilty and face a sentence of life in prison. If Counsel had done a competent evaluation and investigation, he would have discovered the evidence set out herein, and if he had presented this evidence to Steres, Steres would not have plead guilty to the charges he did.

Steres counsel did not present evidence set out below that contradict the State's assertion that Steres intended to harm the victim or conspired to harm him. The evidence showed that Steres had no 'motive' to hurt the victim, because pursued the marijuana deal, he would have had the money to move to California. A.Q. and Steres had a friendly relationship. A.Q. stated, "He never got any hint that Clay [Steres] was upset or that there was any animosity between them, and that their conversations were cordial and polite." (Doc. #1-4; Exhibit "B"—Det. Williams Report at pg. 15). Also, when Steres was in the Navy he had a high security clearance to study linguistics, which meant he was vetted for any type of mental health problems, such as violence.

On 6/23/2014 investigator Randy Downer interviewed Dave Kanugh, a friend of Steres in the Navy, who had lived with Steres for over a year while they

were in the Navy. He stated, Steres was intelligent and trustworthy, and he considered Steres' text messages (used by the Government) a joke. (Doc. #1-4; Exhibit "J"—Affidavit of Randy Downer).

At sentencing the State argued racism was the motive for the crime. If racism was Steres' motive, then it would have to be concluded he wanted to kill A.Q. just because he was black, which makes no sense considering the above. Also, an investigation would have shown Steres had black friends in the Navy and on Facebook. If racism was a motive to hurt A.Q., it was Kate's motive. Kate was the one who committed the violent act of hitting A.Q. on the head with a knife. As set out herein, an investigation would have shown that a month before the incident, Kate made a racist post on Facebook on 2/1/2014. In response to a photo of an African American child in a KFC fried chicken container, Kate wrote "Like." (Doc. #1-4; Exhibit "L").

An investigation would have revealed Kate had the capacity to commit a violent act because she suffered from serious mental health problems. She was emotionally unstable, a pathological liar, and was obsessed with killing people. On Facebook, Kate made the following posts: On 1/26/2012, "God, grant me the serenity to not storm out of my house in my underwear, and murder my crazy hillbilly neighbors using nothing but my bare hands . . . ." (Doc. #1-4; Exhibit "M"). On 3/6/2012, " . . . and by the way, when you see my dad tell him that I slit his throat in this dream I had . . . ," and " . . . father of mine, rot in hell," (Doc. #1-4; Exhibit "N"). On 2/25/2014, Kate responded to a picture of a man who had lost his legs by saying, " . . . #Classic killers . . . #ladies of homicide . . . #women

think kill" (Doc. #1-4; Exhibit "O"). On 3/13/2014, a photo Kate posted of herself sheds light on her mental state. (Doc. #1-4; Exhibit "P").

On 6/30/2014, Investigator Randy Downer interviewed Kate's father, Christopher Francois. During the interview her father stated, " . . . Kate is a total and pathological liar." (Doc. #1-4; Exhibit "J"—Affidavit of Randy Downer). On 6/5/14 Randy Downer interviewed Windy Todd, Kate's jail cellmate. In the interview she described Kate as delusional and said she would ramble on and on about things like how tough she was, having connections with mobsters, bad things she had done, and threats to hurt people.

This information was easily discoverable but was never presented to support the conclusion that Steres did not have the requisite intent to hurt the victim, nor did he conspire to hurt the victim. Instead, Kate, because of her mental health problems acted in an irrationally way when she hit the victim with a knife, for no logical reason. These facts contradict the argument that Steres intended to harm the victim.

B. Steres' Counsel Failed to Recognize His Plea Was Deficient.

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Hill v. Lockhart*, 474 U.S. 52, 56 (U.S. 1985). The voluntariness of a guilty plea depends on the adequacy of counsel's advice. *Id.* Relief may lie where the defendant's waiver is based upon misrepresentations of

counsel, off the record. *See Marrow v. United States*, 772 F.2d 525, 529-30 (9th Cir. 1985).

The following excerpt from Steres' plea comprises the factual basis defense counsel provided the court.

> COURT: "You are charged with . . . attempting with premeditation to murder the victim . . . To wit, you stabbed the victim with a knife in the back of the head a second time. Mr. Steres, to that charge, how do you plead?"
>
> DEFENDANT: "I plead guilty, sir."
>
> COURT: "Mr. Chapman can share that factual basis with us?"
>
> DEFENSE COUNSEL: (Chapman), "Judge, what happened in this case . . . And at some point it was determined that Ms. Francois (Kate), who had previously said she had access to this Marijuana, was lying about it. She started to panic and brought up the idea of killing this guy that was the vic—ended up being the victim in this case. And I guess the fear was—there was a fear that he would retaliate if they didn't have the Marijuana. So it culminated . . . There was a discussion about prior to the assault of them killing him . . . The victim was invited into the house. And Francois, when he wasn't looking, hit him in the head with a baseball bat. And then as he was fleeing from the house. Mr. Steres attempted to stab him in the back of the neck with a knife and did cause a laceration on the back of the neck."

COURT: "The plea agreement mentions a second time. Do we need to address this?"

DEFENSE COUNSEL: " . . . there was some issue as to whether both wounds on the back of the head were knife wounds, or one was a bat wound and one a knife wound. It's a matter of dispute. But there's no question that he did stab the victim in the back of the neck after Ms. Francois hit him with a baseball bat."

COURT: . . . "Mr. Steres, you heard Mr. Chapman?"

DEFENDANT: "Yes, sir."

COURT: "Is what Mr. Chapman said accurate?"

DEFENDANT: "It is sir."

COURT: "Would you add anything to it?"

DEFENDANT: "No. sir, I think he covered everything."

COURT: "Would you detract or take away from anything Mr. Chapman shared with us?"

DEFENDANT: "No, sir."

(Doc. #1-4; Exhibit "Q"—Plea Transcript at p. 23-27).

This factual basis is significantly different than the facts of the case. An adequate investigation by defense counsel would have shown material discrepancies in the factual basis for the plea: Steres did not stab the victim or hit him with a baseball bat. A.Q. gave two statements about what happened and neither statement supported a second stabbing by Steres. A.Q. told Sgt. Behr that, "Tom [Steres] went in the

house and came out with the weed in his hand . . . It was hard to see since it was dark, so he bent over to take a closer look and feel it . . . when he was struck from behind . . . . He did not know who struck him or what he was struck with." (Doc. #1-4; Exhibit "C"—Sgt. Behr's Report at p. 1). A.Q. told Detective Williams that, "[Steres] came out of the house, called him over to his location, held out his left hand, telling [A.Q.] the marijuana was in his palm. It was dark, so he could not see what [Steres] was holding, so he got close to [Steres], and reached into his palm to feel the contents, and before he could ask what the substance was or comment on its feel, he was struck from behind . . . He then staggered and ran . . . The impact was very hard . . . He did not know he was cut, or by what, or by who . . . [Steres] chased him, and when he yelled 'help' 'police', [Steres] stopped chasing him." (Doc. #1-4; Exhibit "B"—Det. Williams Report at p. 17). Both of A.Q.'s statements show that it was impossible for Steres to hit A.Q. in the head from behind. (Counsel told Steres to agree to everything he said so the plea would not be rejected).

DPS Officer Bryce Peterson said he was requested to follow up with A.Q. at the Benson Hospital. He stated in his report: "There were two different lacerations, one was on the back, right side, angling down, and back toward the center . . . The second laceration was below the first, in a similar angle line, on the middle of the neck." Officer Peterson also stated, "The Benson Hospital Doctor said it looked like the laceration was probably made by a razor blade, and was a single pulling down, slashing movement." (Doc. #1-4; Exhibit "E"—Officer Peterson's Report, 1st full para.). The doctor's conclusion supports the fact that

A.Q. was not hit with a baseball bat, and not stabbed a second time. Photographs showing A.Q.'s injuries validate the doctor's conclusion: that there was only one blow, with a sharp object, to the back of A.Q.'s head. The two cuts shown in the photographs are consistent with Kate hitting A.Q. with the knife, and the knife continuing in the same direction inflicting the second cut. (Doc. #1-4; Exhibit "K"—Photographs of A.Q.'s injuries). This evidence is a significant contradiction of the facts give to support the factual basis of the plea.

Steres' guilty plea was not knowingly or intelligently entered. It was merely a subterfuge by defense counsel to effectuate the plea. (It also shows how ineffective Steres' counsel was in not discovering critical facts in the case). 'It was the product of such factors as misunderstanding, duress, or misrepresentations by others to make the waiver a constitutionally inadequate basis for imprisonment.' *Blackledge v. Allison*, 431 U.S. 63, 74 (1973).

Steres would not have plead guilty if his counsel had done a competent investigation to find existing evidence in the case, and had not told Steres he had no defense, and could go to jail for life if he did not plead guilty to the charges.

II. THE SEARCH OF STERES' CELL PHONE WAS ILLEGAL UNDER THE FOURTH AMENDMENT.

The case of *Riley v. California*, 134 S.Ct. 2473 (2014), discusses appropriate police protocol when securing a defendant's cell phone incident to arrest. "Once an officer has secured a cell phone and eliminated any potential threats, data itself can harm no one". *Id.* at 2485. Specifically, officers should secure

cell phones when seized incident to arrest while seeking a warrant. *Id*. at 2486. The protocol and law set out in *Riley* for securing a cell phone and examining its data, was completely ignored by Det. Williams.

At the scene Det. Williams seized Stere's cell phone and arrested him, and kept his cell phone in his possession until he turned it over to a police officer from another jurisdiction to be searched. At the scene Det. Williams did not turn the cell phone over to the police officer designated the Collector of Evidence. While the cell phone was in Det. Williams possession, he examined text messages on it before a search warrant was issued.

The evidence is undeniable that Det. William's searched Steres' cell phone before a search warrant was issued, based on his and other police officers' reports, documents, and Verizon cell phone records.

On March 3, 2014, at 11:46 p.m. a 911 call reported the incident. When Det. Williams arrived at the scene, Officer Douglas, Sgt. Behr and PA1 Traywick were there. Det. Williams was briefed by Sgt. Behr. (Doc. #1-4; Exhibit "B"—Det. Williams' Report at pg. 2). Det. Williams then questioned Steres and asked to see his cell phone. Steres gave it to him. Det. Williams then asked if he could look at the text messages in the cell phone, Steres said "No." Det. Williams then said, "(He) . . . would be seizing the phone as evidence pending a search warrant." (*Id*. at pg. 3). Steres was then arrested and taken the police station for questioning.

When Det. Williams seized Steres' cell phone it was unlocked and accessible. Det. Williams did not turn it off or place it in a special protective evidence

bag to secure the information on the cell phone. At the scene Det. Williams did not turn Steres' cell phone over to PA1 Traywick who he had designated the "Collector of Evidence". Traywick's Photograph and Impound list for the incident does not show Steres' cell phone listed. (Doc. #1-4; Exhibit "G"—PA1 Trawick Report & Impound List).

Verizon Wireless records of Steres' text messages, (Doc. #1-4; Exhibit "H"), show messages 'coming in' and 'going out' from Steres' cell phone and the time they occurred. Text messages around the time of the incident show four text messages came in, and one 'text' going out. The incoming text messages came in on March 3rd at 21:58, 22:10, 22:31p.m., and March 4th at 12:35 a.m. The one outgoing text was sent on March 4th at 2:08 a.m., an hour and a half after the last text message had come in. It lasted only a few seconds and had no message. (Doc. #1-4; Exhibit "H"). The outgoing text could only have been sent by Det. Williams, because Steres' cell phone had been seized by him and was in his possession at the time the text was sent. (Doc. #1-4; Exhibit "B"—Det. Williams Report at pg. 3, middle of 1st full para. & pg. 6, last two lines). Apparently, Det. Williams sent the 'text' when he inadvertently pressed 'Send' when he was examining the text messages on Steres' cell phone.

According to police officer reports the scene was cleared before the 'outgoing' text was sent. The scene was cleared at 2:02 a.m. The outgoing text was sent at 2:08 a.m. (Doc. #1-4; Exhibit "B"—Det. Williams Report at top of 1st page) & (Doc. #1-4; Exhibit "H"—Verizon records), which further proves Steres' cell

phone was searched by Det. Williams while it was in his possession.

In addition to the above evidence, Det. Williams' report provides irrefutable evidence that shows he searched Steres' cell phone while it was in his possession, before a search warrant was issued. The search warrant for Steres' cell phone was issued on March 7th, 2014. On March 5th, 2014, Det. Williams questioned A.Q. In Det. Williams report he stated, "[A.Q.] said [Steres] insisted the meeting take place that night as he had to be at work at 10am." Det. Williams had to have searched Steres' cell phone before he interviewed A.Q., because in his report of the interview of A.Q., he made the following comment, " . . . per his own text message to his mother . . . " (Doc. #1-4; Exhibit "B"—Det. Williams Report at pg. 13, beginning of second full para & pg. 15, middle of 1st full para). This statement by Det. Williams clearly shows he had read the text messages on Steres cell phone before he talked to A.Q. and before he obtained a search warrant, on March 7th, 2014.

Det. Williams turned Steres' cell phone over to Det. Barron, a police officer from the nearby town of Sierra Vista, to be searched. Det. Williams could have had Steres' cell phone examined by the Department of Public Safety, which is a qualified agency of the State of Arizona that examines cell phones. When Det. Barron searched Steres' cell phone he did not edit the information he gave Det. Williams, to remove personal and private information not relevant to the investigation. After Steres' cell phone was searched the data and cell phone were turned over to Det. Williams. In Det. Williams' report he stated, "The phones were then returned to the Benson Police

Department where they were 'reviewed further' and later submitted to police property as evidence." This was the first time Steres' cell phone was placed in property. (Doc. #1-4; Exhibit "B"—Det. Williams Report at pg. 24).

Protocol set out in *Riley v. California*, 134 S.Ct. 2473 (2914) was violated multiple times, and completely ignored by Det. Williams after he seized Steres' cell phone: He did not secure the cell phone; did not give it to the collector of evidence; did not place it in evidence after seizing it; and kept it in his possession until he turned it over to another police officer to be searched. After Steres' cell phone was examined, the officer returned it to Det. Williams, and Det. Williams 'searched it further'. In his report, Det. Williams stated, " . . . reviewed [it] further before placing [it] in property." Det. Williams' conduct in Steres' case was a blatant and brazen violation of all the protections the U.S. Supreme Court set out in *Riley v. California*, 134 S.Ct. 2473 (U.S. 2014).

The Fourth Amendment requires where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant. *Vernonia School Dist. 471 v. Acton*, 515 U.S. 646, 653 (1995); *Riley v. California*, 134 S.Ct. 2473, 2482 (2014). In *Riley* this Court was clear, when it stated, 'When a cell phone is seized incident to arrest, the police must obtain a search warrant before its contents can be searched'. *Riley v. California*, 134 S. Ct. 2473, 2495 (U.S. 2014).

III. THE NINTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY WAS UNREASONABLE WHERE MR. STERES DEMONSTRATED A SUBSTANTIAL SHOWING OF THE DENIAL OF CONSTITUTIONAL RIGHTS.

The Ninth Circuit's denial of Steres' request for a certificate of appealability was unreasonable and conflicts with this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Steres challenges the District Court's denial of his petition for writ of habeas corpus on the claims that he received ineffective assistance of counsel in the trial court and that the law enforcement search of his cell phone incident to his arrest was illegal. The Ninth Circuit's denial of a certificate of appealability was erroneous. Steres demonstrates, with irrefutable evidence that he meets the standard required for issuance of a certificate of appealability. He has made a substantial showing, with independent, credible, evidence, of the denial of his constitutional rights, and therefore the Petition for a Writ of Certiorari should be granted.

Pursuant to 28 U.S.C. § 2253(c)(1)(B). In order for Steres to appeal the District Court's denial of his petition for a writ of habeas corpus, a circuit justice or judge must first issue a certificate of appealability. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A movant must demonstrate that an issue is debatable among jurists of reason or that the question deserves encouragement to proceed further. *Miller-El*, 537 U.S. at 327. A movant does not have to demonstrate that the appeal would succeed to obtain a certificate of appealability. *Id.* at 337.

As set forth herein, Steres made a substantial showing of a denial of his constitutional rights. Namely, his right to the effective assistance of counsel as guaranteed by the Sixth Amendment, and his Fourth Amendment right to be protected against unreasonable searches. Defense counsel's deficient representation and Det. Williams' illegal search of Steres' cell phone are issues that are debatable among jurists of reason, based on the undeniable credible evidence presented herein, which meets the standards for a certificate of appealability. Accordingly, this Court should grant Steres' petition for certiorari and reverse the judgment of the Ninth Circuit. *See Miller-El*, 537 U.S. at 348.

CONCLUSION

For the foregoing reasons, Mr. Steres respectfully requests this Court grant certiorari on the issues presented herein.

Respectfully submitted,

ANDERS ROSENQUIST
COUNSEL OF RECORD
ROSENQUIST & ASSOCIATES
42104 N. VENTURE DRIVE, STE. A122
ANTHEM, AZ 85086
(480) 861-7115
ROSENQUISTLEGAL@GMAIL.COM

COUNSEL FOR PETITIONER

FEBRUARY 4, 2022