

No.

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS ORVILLE. BASTIAN
Petitioner

v.

CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA

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

PETITION FOR WRIT OF CERTIORARI

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Issues Presented for Review

1. State courts denied Bastian the constitutional protections due to him under the Fifth Amendment by finding that it was Bastian who had initiated a discussion with law enforcement and he had therefore voluntarily waived the right to counsel even though state courts also found that law enforcement ignored Bastian's requests for counsel during eight interrogations conducted over a three-day period.

2. Does the procedural default doctrine preclude federal review where collateral review proceedings in Arizona are inadequate to vindicate the constitutional protections due to a criminal defendant after conviction and state courts denied Bastian the opportunity to litigate shackling-related claims in Rule 32 proceedings?

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Petition for Writ of Certiorari

Petitioner, Thomas Orville Bastian, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Memorandum Decisions and Orders Below

In an unpublished decision, the Ninth Circuit Court of Appeals affirmed the judgment of the district court denying Bastian's 28 U.S.C. § 2254 petition for a writ of habeas corpus on June 22, 2021. *Bastian v. Ryan*, 19-15385 (9th Cir., Jun. 22, 2021) is attached as Appendix A. The Ninth Circuit's order denying Bastian's request for panel rehearing is unpublished and attached as Appendix B. *Bastian v. Ryan*, 19-15385 (9th Cir., Sept. 17, 2021). The district court's order denying Bastian's petition for writ of habeas corpus is attached as Appendix C. *Bastian v. Ryan*, CV-16-02530-PHX-GMS (D. Ariz., Doc. 130, Oct. 16, 2018). The report and recommendation of the magistrate recommending denial of the petition for writ of habeas corpus is attached as Exhibit D. *Bastian v. Ryan*, CV-16-02530-PHX-GMS (D. Ariz., Doc. 120, Feb. 15, 2018). The state appellate court affirmed the trial court's denial of Bastian's successive petitions for post-conviction relief on July 23, 2015. The decision is attached as Exhibit E. *Arizona v. Bastian*, 2 CA-CR 2015-0215-PR (Ariz. App. Div. 2, Jul.

23, 2015). The trial court's ruling on Bastian's second (October 7, 2013) notice of successive post-conviction relief petition is attached as Exhibit F. *Arizona v. Bastian*, CR 2007-124159-003 DT (Maricopa County Superior Court Minute Entry Order, Dec. 4, 2013). The trial court's ruling on Bastian's first (May 23, 2013) notice of successive post-conviction relief petition is attached as Exhibit G. *Arizona v. Bastian*, CR 2007-124159-003 DT (Maricopa County Superior Court Minute Entry Order, Jul. 3, 2013). The state appellate court's ruling on the claims Bastian raised on direct appeal is attached as Exhibit H. *Arizona v. Bastian*, 1-CA-CR-09-0006, 1-CA-CR-09-0207 (Consolidated) (Ariz. App. Div. 1, Mar. 31, 2011.) The state court's ruling on Bastian's motion to suppress is attached as Exhibit I. *Arizona v. Bastian*, CR 2007-124159-003 DT (Maricopa County Superior Court Minute Entry Order, May, 19, 2008).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered judgment on June 22, 2021, and denied Bastian's request for panel rehearing on September 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Rule 13 of the Rules of the Supreme Court, the petition for a writ of certiorari to review a judgment entered by a United States court of appeals is due by December 15, 2021.

Constitutional Provisions Statement

The Fifth, Sixth, and Fourteenth Amendments are at issue in this habeas corpus proceeding. These provisions are reproduced in Appendix J.

Statement of the Case

A. Fifth Amendment Claim: failure to cease interrogation after clear invocation of the right to counsel

This Court has established a bright-line rule requiring all questioning to cease after an accused requests counsel. *Smith v. Illinois*, 469 U.S. 91 (1984); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436 (1966). Here, right after law enforcement advised Bastian of the *Miranda* warnings at 2:34 a.m. on April 14, 2007, he asked for an attorney and thereafter requested an attorney six additional times during the same interrogation:

- (1) First of all...I want my attorney here. I want an attorney here. I'll not—I won't answer questions, any of your questions but for the single fact...
- (2) [O]ne can be appointed to me, right?
- (3) I'd rather wait for an attorney, because if you're saying I committed a murder, I didn't commit a murder.
- (4) No, I want an attorney for the simple fact that I've been in prison already before, and I'm not trying to get caught up in any technicalities or any word play back and forth and stuff like that.
- (5) That's why I would rather have an attorney here.
- (6) That's why I want an attorney here.
- (7) Get my attorney or anything else, sit him down and talk to me in front of you guys, that's a whole different story.

(ER 805-811.) As memorialized by the state appellate court in its memorandum decision from the direct appeal, law enforcement interrogated Bastian seven more times over a three day period after he invoked the right to counsel during the first interrogation occurring at 2:34 a.m.:

- (1) April 14, 2007 at 2:34 a.m.
- (2) April 14, 2007 at 4:05 a.m.
- (3) April 14, 2007 at 11:00 a.m.
- (4) April 14, 2007 during Car Ride
- (5) April 15, 2007 at 3:39 p.m.
- (6) April 15, 2007 at 6:40 p.m.
- (7) April 15, 2007 at 7:30 p.m.
- (8) April 16, 2007 at 4:10 p.m.

(ER 105.)¹

Law enforcement had detained Bastian at 1:34 a.m. on April 14, 2007, approximately 20 hours after the death of Travis Wayne Seffren (Seffren). (ER 805.) They used two means to identify Bastian: (1) a “trap and trace” on the phone of the man who reported Seffren’s death: John Scott Hartline (Hartline); and (2) the business records at ABO Asphalt that listed Bastian as a company employee. (ER 1002-1003.)

During his detention, Bastian made a confrontation call to Hartline. (ER 837 n. 20.) After three days of interrogation, Bastian changed his original statement—that he drove a construction worker named Joe to the job site on the morning of the homicide—to another statement—that he drove Joe to the job site to beat up Seffren. (ER 840 n. 23.) On April 23, 2007, the prosecution indicted Bastian and another man on the charge of First Degree Murder, Class 1 Dangerous Felony. (ER 1063–64.) Bastian proceeded to a 20-day trial which

¹ Transcripts of all the interrogations were admitted into evidence during the suppression hearing by stipulation of the parties. (ER 805, n. 3.) At the district court level, the magistrate had directed the prosecution to file the transcripts with the district court. (2:16-cv-02530-GMS Document 56.) Although the prosecution filed a notice of compliance indicating it was submitting all the transcripts to the court, including the transcript of the 2:34 a.m. interview, it was not made part of the appellate record as Exhibit C as indicated. (2:16-cv-02530-GMS Document 62 at 3, 62-1-7.) Bastian had requested the appointment of counsel in district court but none was appointed. (ER 337-338.)

began on September 3, 2008. On October 8, 2008, the jury found Bastian guilty as charged. On December 12, 2008, the trial court imposed a sentence of natural life.

Bastian stands convicted of an accessory-to-murder charge arising from a homicide the media sensationally categorized as a “murder-for-hire” plot as certain facts came to light. Hartline and Seffren had met in prison. (ER 837.) Hartline was absolutely discharged from prison on April 1, 2003. After both men were released, Hartline and Seffren adopted each other and took the last name “Hartline Seffren.” (Id.) The men became business partners in two companies, the second being ABO Asphalt. (Id.)

Four years later, Hartline, 46, and Seffren, 26, were dead.

Sometime between 5:15 a.m. and 5:20 a.m. on Friday, April 13, 2007, Seffren was shot 15 to 16 times in the parking lot of an adult bookstore located in Scottsdale Arizona. (ER 805, 829 n 16, 836-837.) Hartline called the police at 5:48 a.m., and, when officers arrived, he conveyed the following: (1) that Seffren was his son and business-partner, and (2) they were scheduled to power-wash the parking lot of the business where Seffren was killed between 5:30 a.m. to 5:45 a.m. that morning. (ER 828.)

Within hours, law enforcement obtained cell phone subscriber records for a telephone number under an exigent circumstances exception to the search warrant requirement. (ER 1014.) Hartline reportedly dialed the telephone number immediately after calling the police. (Id.) Law enforcement proffered

the following rationales in support of exigency under 18 U.S.C §§ 2518, -2701, and -3125: (1) immediate danger of death or serious bodily injury to any person; (2) conspiratorial activities characteristic of organized crime; and (3) an immediate threat to a national security interest. (Id.)

As the police arrived to question him about Seffren's death, Hartline took his own life by slitting his throat at approximately 9:30 p.m. on April 14, 2007, in his residence in Mesa, Arizona. (ER 837 n. 20.) Three weeks before he was fatally shot, Seffren was overhead telling Hartline that he would no longer be his business partner, no longer wanted anything to do with him, that Hartline was not his brother, and that he (Seffren) would leave ABO Asphalt as soon as he found someone to work there. (ER 829.) According to a witness to the conversation, Hartline "got kind of mad about it." (ER 829-830.) The investigation would later reveal that Hartline purchased a \$500,000 life insurance policy on Seffren on December 7, 2006. (ER 829.) The insurance policy, however, did not become effective until March 13, 2007—exactly one month before Seffren was shot and killed on April 13, 2007. (Id.)

Trial counsel filed a number of motions including a motion to suppress statements on Bastian's behalf. (ER 1048.) The trial court conducted a suppression hearing over the course of three days and later denied the motion to suppress. (ER 118.) The trial court found that "the record is unclear why the Detective entered the cell at this time [4:05 a.m.]" but ruled that Bastian

initiated a discussion with law enforcement during that interrogation and thereby waived his earlier request for counsel. (ER 120-121.)

As summarized by trial counsel, clarity could not be had because not one prosecution witness directly testified that Bastian himself had initiated further communication with the interrogating detective:

During direct examination, Detective Salazar testified that Mr. Bastian initiated contact with him after the first interrogation ended by telling Officer Soderman that he wanted to talk to Detective Salazar. However, Officer Soderman testified that she did not remember Mr. Bastian making that request and she did not remember telling Detective Salazar anything about Mr. Bastian wanting to speak with him. Before speaking to Mr. Bastian again, the police failed to clarify, as in Smith [*v. Illinois*, 469 U.S. 91(1984)], that Mr. Bastian was really waiving his previously invoked right and wanted to talk to them.

(ER 986.) On direct appeal, the defense continued to contend that the evidence presented did not support a finding that Bastian initiated dialogue with the interrogating detective:

Detective Salazar's account contradicted the testimony of Detention Officer Laura Sodeman, who testified that she went to Appellant's cell to take pictures of his tattoos at midnight on April 14, 2007. She didn't remember speaking to Appellant or Appellant asking her to get the detectives.

(ER 811 n. 7.)²

² In an affidavit he prepared ten years later for federal habeas proceedings, the lead detective did not expressly refute Bastian's assertion that he did not re-initiate communication with officers. (ER 235-238.) Nor did he refute video evidence Bastian obtained through a FOIA request that supported Officer Soderman testimony that she did not have a conversation with Bastian pertaining to summoning the lead detective to the holding cell at 4:05 a.m. on April 14, 2007.

(continued ...)

The state appellate court affirmed the finding of waiver and also found that the statements Bastian made in subsequent interviews were voluntary. (ER 108, 2011.) The state appellate court did, however, “strongly disapprove of the tactics of the Scottsdale detectives in ignoring Bastian’s requests for counsel.” (ER 110.) The Ninth Circuit affirmed ruling that the findings of the state court, “taken together, could lead a reasonable jurist to conclude that Bastian had reinitiated contact under *Edwards*.” (9:19-15385 Doc. 61.)

B. Fourteenth Amendment Claims: Shackling During Trial and Inadequacy of State Court Procedures to Vindicate the Constitutional Protections Due to a Criminal Defendant After Criminal Conviction.

Arizona has designated Rule 32 proceedings as the tribunal to present claims premised on violations of constitutional rights. A.R.S. §§ 13-4231 to 13-4240; Ariz. R. Crim. P. 32.1; *State v. Mata*, 916 P.2d 1035, 1048 (Ariz. 1996); *State v. Krum*, 903 P.2d 596, 600 (Ariz. 1995). Post-conviction relief (PCR) proceedings are part of the original action rather than a separate action. Ariz. R. Crim. P. 32.3(a) (“A post-conviction proceeding is part of the original criminal action and is not a separate action. It displaces and incorporates all trial court post-trial remedies except those obtainable by Rule 24 motions and habeas corpus.”); accord, *Moreno v. Gonzalez*, 962 P.2d 205, 208 ¶ 16 (Ariz. 1998). As a matter of state procedural law, a constitutional claim falling under Rule 32.1(a)

(... continued)

(Id.) Bastian was not granted an evidentiary hearing in federal court although the district court did consider the lead detective’s affidavit but ultimately did not find it persuasive. (19-15385 Doc. 26-56–58, 66, Ninth Circuit Opening Brief citing District Court 2:16-cv-02530-GMS Document 119-4.)

may be raised in a successive PCR under Rule 32.2(a)(3) and it is not subject to preclusion under Rule 32.2(a)(2).³ Ariz. R. Crim. P. 32.2(a)(3). In response to a certified question from this Court, Arizona had clarified that the question of whether an asserted ground is of “sufficient constitutional magnitude” to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3) does not depend on the merits of the particular ground. *Stewart v. Smith*, 46 P. 3d 1067, 1071 ¶ 10 (Ariz. 2002). “Sufficient constitutional magnitude” depends merely on the particular right alleged to have been violated. *Id.*

The rule of preclusion in effect at the time Bastian pursued collateral review is at issue here because throughout the entirety of the 20-day trial that took place during the fall of 2008, the government used a remote-activated stun-belt and another shackling device on Bastian. (ER 568 at 3D.) The use of restraints was not litigated during trial proceedings. Bastian raised the claim in successive PCR notices filed on May 22, 2013, and October 7, 2013. (ER 638; ER 568-569.) The trial court had summarily dismissed the initial PCR petition—accompanied by a request to permit discovery and a notice of intent to amend the petition—on April 16, 2013. (ER 90, 95, 672, 677.)

In support of his shackling claim, Bastian secured affidavits from the two attorneys who represented him during trial. (ER 586-589.) Each attorney averred that they did not file a motion requesting a hearing for an independent

³ The procedural rule of preclusion in effect at the time Bastian pursued collateral review in 2013 is set forth in the appendices under Appendix K.

finding of compelling circumstances which would necessitate the use of the electronic remote-activated stun-belt device and other restraint. (Id.) One of the attorneys recalled that Bastian expressed discomfort, but he did not take any action in the form of addressing the matter with the trial court. (ER 587.)

The trial court dismissed successive PCR proceedings on the notice. (ER 88.) The trial court ruled that the attempt to commence a successive proceeding was untimely and successive:

Defendant claims, pursuant to Rule 32.1(f), Arizona Rules of Criminal Procedure, he should be excused from the timeliness requirement because the failure to timely file the notice of post-conviction relief was without fault on his part. Defendant's notice is not "of right." Therefore, he is not entitled to any relief under Rule 32.1(f). See Ariz. R. Crim. P. 32.1(f); *Moreno v. Gonzalez*, 192 Ariz. 131, 962 P.2d 205 (1998). Defendant fails to state a claim for which relief can be granted in an untimely or successive Rule 32 proceeding. Rule 32.4(a).

Defendant also claims, pursuant to Ariz. R. Crim. P. 32.1(a), that he received ineffective assistance of counsel. Defendant cannot raise this claim in an untimely or successive Rule 32 proceeding because an untimely notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a).

IT IS ORDERED dismissing the Defendant's Notice of Post-Conviction Relief.

(Id.)

On October 7, 2013, Bastian filed a second PCR notice. (ER 562–620.) Bastian again contented that trial counsel rendered ineffective assistance for failing to contest the use of a stun belt and leg restraints and again contented that trial counsel's ineffectiveness denied him his Fourteenth Amendment right

to due process. (ER 565-566.) Bastian resubmitted the attorney affidavits. (ER 586-589.)

The trial court ruled that the shackling claim was precluded under Rule 32.2(a)(2) of the Arizona Rules of Criminal Procedure:

In addition, the claim the defendant has raised was required to be raised in a timely Rule 32 proceeding. Therefore, the defendant is procedurally precluded from raising this claim now. Ariz. R. Crim. P. 32.2(a)(2).

(ER 84.) Disposing of the ineffective-assistance portion of the claim, the trial court ruled that the claim was untimely:

Defendant claims, pursuant to Ariz. R. Crim. P. 32.1(a), that he received ineffective assistance of counsel. Defendant cannot raise this claim in an untimely or successive Rule 32 proceeding because an untimely notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a).

(Id.)

Bastian's petitions for review were transferred to an appellate division that did not have the jurisdiction to rule on them.⁴ The appellate division adopted the trial court's finding that Bastian had not presented claims that may be raised in a successive and untimely proceeding. (ER 74.)

The Ninth Circuit affirmed the finding that Bastian procedurally defaulted his claim that trial counsel was ineffective in failing to challenge the use of a stun

⁴ Bastian's petitions for review from collateral review proceedings were transferred between Arizona's two appellate divisions pursuant to an agreement between the appellate divisions. (ER 77, 82). However appellate jurisdiction is statutorily prescribed and the transfer of jurisdiction can only be authorized by the Arizona Supreme Court after a finding of necessity. A.R.S. §§ 12-120(C); -120(E); -12-120.21(B)). The Arizona Supreme Court has held that practices in the lower courts of Arizona that differ from enumerated procedural rules are invalid. *State ex rel. Romley v. Ballinger*, 97 P.3d 101, 102 ¶ 6 (Ariz. 2004) (invalidating a local rule establishing an expedited review procedure).

belt and leg shackles during the trial. (9:19-15385 Doc. 61-4.) The federal court found that Bastian had not substantiated his claim that post-conviction review in state court was inadequate to vindicate his constitutional rights. It first held that Bastian cited no case where Arizona permitted a shackling claim, or something substantially similar to a shackling claim, to be raised in a successive post-conviction relief petition. (Id.) The federal court then held that its review of Arizona state law did not suggest that the preclusionary rule was applied inconsistently. (Id.) The court also ruled that Bastian waived any shackling claim as an independent claim, finding that he did not raise such a claim in his habeas petition before the district court. (Doc. 61-5.)

Reasons for Granting the Writ of Certiorari

I

State courts' determination that Bastian voluntarily waived the right to counsel during eight interrogations conducted over a three-day period is contrary to or involved an unreasonable application of federal law as this Court requires the prosecution to present evidence that the accused himself initiated further communication after invoking the right to counsel.

“Clearly established law” pertains to “the holdings, as opposed to the dicta, of th[e Supreme] Court's decisions.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), instructs that state-court decisions are measured against the precedents of the Supreme Court as of “the time the state court renders its decision.” (citing *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)).

To determine whether a particular decision is “contrary to” then-established law, a federal court must consider whether the decision “applies a rule that contradicts [such] law” and how the decision “confronts [the] set of facts” that were before the state court....If the state-court decision “identifies the correct governing legal principle” in existence at the time, a federal court must assess whether the decision “unreasonably applies that principle to the facts of the prisoner's case.”

Pinholster, 563 U.S. at 182 (citations omitted).

The Fifth Amendment provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. In a long line of cases, this Court has established the procedures to be followed during custodial interrogation and unequivocally stated that questioning must cease after an accused requests counsel:

If the accused indicates that he wishes to remain silent,
"the interrogation must cease." If he requests counsel,
"the interrogation must cease until an attorney is
present."

Edwards, 451 U.S. at 482 (quoting *Miranda*, 384 U.S. at 474); *Smith*, 469 U.S. at 98; U.S. Const. amend. XIV, § 1.

This Court issued the bright-line rule because “[i]n the absence of such a bright-line prohibition, the authorities through ‘badger[ing]’ or ‘overreaching’—explicit or subtle, deliberate or unintentional might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.” *Smith*, 469 U.S. at 98. This “bright-line rule” is thus an essential “protective devic[e]...employed to dispel the compulsion inherent in custodial surroundings” and to thereby assure that any statements by an accused are the product of free will rather than subtle coercion. *Miranda*, 384

U.S. at 458. As a precondition to a finding of waiver of the invocation of the right to counsel, a court must find that the accused, rather than the police, reopened dialogue about the subject matter of the investigation. *Edwards*, 451 U.S. at 485; *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (“To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the ‘high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*, 304 U.S. 458 (1938).”)

Shatzer reaffirmed that the traditional standard for waiver is not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel:

The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to “increase as custody is prolonged,” *Minnick v. Mississippi*, 498 U.S. 146, 153 [] (1990). The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of “prolonged police custody,” [*Arizona v.*] *Roberson*, 486 U.S. [675,] 686 [(1988)], by repeatedly attempting to question a suspect who previously requested counsel until the suspect is “badgered into submission,” *id.*, at 690 [].

559 U.S. 105 (parenthetical information both added and deleted).

Here, state courts identified the correct standard (ER 109, 119) but failed to apply it. A court's recitation of the proper governing legal standard does not

insulate its holding from habeas review where the record demonstrates that the court actually applied an unconstitutional standard. *Sears v. Upton*, 561 U.S. 945, 952 (2010) (per curiam) (“Although the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case.”); *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (noting that the state court assessed a federal claim against the wrong standard and then made an irrelevant observation about counsel's performance at trial and mischaracterized the respondent's claim).

From Bastian’s first request for counsel, it was clear that the officers understood that Bastian was invoking the right to counsel. Bastian’s request was not ambiguous or equivocal. As a result, Bastian was not to be subjected to further questioning by law enforcement until a lawyer had been made available.

Miranda/Edwards requires evidence that “the accused himself initiates further communication, exchanges, or conversations with the police.” The trial court did not make this finding. In fact, the trial court stated that “the record is unclear why the Detective entered the cell at this time [4:05 a.m.]” (ER 120.) The trial court nevertheless ruled that Bastian initiated a discussion with law enforcement and thereby waived his earlier request for counsel. However, not one prosecution witness testified that Bastian himself initiated further communication with officers. The district court would later find that the affidavit the lead detective prepared for habeas proceedings did not expressly refute

Bastian's assertion that Bastian did not reinitiate communication with officers.⁵
(2:16-cv-02530-GMS Document 96-1, 119-4.)

State courts deviated from federal law by failing to identify *when* Bastian purportedly initiated contact with law enforcement after invoking his right to counsel during interrogation. In fact, the state court described the circumstances leading to the detective entering the holding cell to speak to Bastian after his repeated requests to proceed with the assistance of counsel as "unclear." (ER 120.) If the reason for law enforcement's entry into the holding cell was unclear to the fact-finder, it was not a constitutionally valid determination that Bastian *himself* had initiated contact with law enforcement. Under the governing legal analysis, the state court was required to first assess whether law enforcement complied with the bright-line directive before determining whether Bastian's responses to law enforcement constituted a waiver of the right to counsel.

The state appellate court likewise violated federal law when it found that law enforcement had ignored Bastian's requests for counsel, but, nonetheless, proceeded to a conclusion of voluntary waiver. (ER 110.) Under federal law, whatever happened after law enforcement "ignored" a detainee's requests for counsel cannot constitute evidence that the detainee initiated contact with law

⁵ Bastian had obtained evidence further refuting the lead detective's assertions that Bastian reinitiated the interrogation but the district court denied Bastian an evidentiary hearing after concluding that the decision of the state court was not contrary to clearly established law under § 2254(d)(1)). (ER 19-20.)

enforcement. The analyses state courts conducted rendered their adjudication contrary to clearly established federal law.

The error in the Ninth Circuit's analysis is apparent in its statement that state court findings, "taken together, could lead a reasonable jurist to conclude that Bastian had reinitiated contact under *Edwards*." (9:19-15385 Doc. 61-3.) The Ninth Circuit overlooked a material point of law when it considered the totality of circumstances arising during the three-day, eight-interview interrogation instead of applying the bright-line rule that all questioning must cease after an accused requests counsel.

Few "clearly established Federal law" rise to as rigid a stature of prophylactic rule as *Miranda/Edwards*. *Martinez v. Cate*, 903 F.3d 982, 983 (9th Cir. 2018). There is "no possibility fairminded jurists could disagree that the state court's decision conflicts with the precedents of the Supreme Court." *Harrington v. Richter*, 562 U.S. 86, 100 (2011). State court decisions were "contrary to" the decisions of the Supreme Court because they confronted identical facts as a prior Supreme Court case and reached a different decision. *Williams*, 529 U.S. at 406. State court decisions were also "contrary to" because they arrived at a conclusion opposite that reached by the Supreme Court on a question of law. Further state court decisions were an "unreasonable application" of the decisions of the Supreme Court because although they identified the correct governing legal principle from the decisions of the Supreme Court, they unreasonably applied those principles to the facts of Bastian's case.

Williams, 529 U.S. at 407-08. Given the specificity of the governing legal test, state courts do not have leeway to deviate from federal law. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *see also Shinn v. Kayer*, 592 U. S. ___, 141 S. Ct. 517, 523 (2020) (“When a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court's decision unless its error lies ‘beyond any possibility for fairminded disagreement.’”); *Richter*, 562 U. S. at 103. In toto, the decisions of the state courts were not merely incorrect or erroneous; they were “objectively unreasonable.” *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003) (citing *Williams*, 529 U.S. at 409).

The constitutional error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967). Bastian stands convicted of an accessory-to-murder charge arising from a homicide sensationally categorized as a "murder-for-hire" plot. The prosecution recited Bastian's post-invocation statements verbatim during closing arguments to establish a nexus between the homicide and Bastian's complicity. (ER 916-928.) Use of Bastian's statements in such a manner after he repeatedly invoked his right to counsel at the outset of interrogation violated his Fifth Amendment rights under *Miranda/Edwards*, and habeas relief is warranted. *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007). Bastian requests that the Court grant his petition for certiorari and thereafter vacate his conviction and sentence.

II

Collateral review proceedings in Arizona are inadequate to vindicate the constitutional protections due to a criminal defendant after conviction and state courts denied Bastian the opportunity to litigate shackling-related claims in Rule 32 proceedings.

States and the Federal government accord an individual due process and equal protection of the laws through the exercise of the right to appeal after conviction. U.S. Const. amend. XIV, § 1; see also U.S. Const. amend. V; *Carter v. Illinois*, 329 U.S. 173, 175-76 (1946). Accord, Ariz. Const. art. 2 § 24; *Montgomery v. Sheldon*, 893 P.2d 1281, 1282 (Ariz. 1995). Rules of procedure instruct litigants to “present their contentions to the right tribunal at the right time,” *Massaro v. United States*, 538 U.S. 500, 504 (2003) (quoting *Guinan v. United States*, 6 F. 3d 468 (7th Cir. 1993)) and this Court has admonished against interpreting procedural prescriptions to “trap the unwary pro se prisoner.” *Slack v. McDaniel*, 529 U. S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U. S. 509, 520 (1982)). This Court has also cautioned the judiciary that the adversarial character of litigation precludes a court from raising a defense forfeited or waived by the government. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008); accord *United States v. Sineneng-Smith*, 590 U.S. ___, 140 S.Ct. 1575, 1579 (2020). To the extent courts depart from the party presentation principle, the justification is usually the protection of the rights of pro se litigants. *Greenlaw*, 554 U.S. at 244.

In successive PCR proceedings, Bastian, pro se,⁶ raised a successive claim of ineffective assistance of counsel wherein he contended that trial counsel were ineffective in failing to object to the use of a stun belt and leg restraints during voir dire and trial. (ER 638-641.) Bastian identifies the physical restraints as a full leg-locking device and a 50,000-volt, remote-activated stun belt. (ER 638.) Bastian checked a box on a county-provided PCR form to indicate he had previously filed a PCR petition and the successive petition fell under the “Default External to the Petitioner” exception to the timely filing rules. (ER 627.) The PCR form did not have an option for a petitioner to indicate that a claim of significant constitutional magnitude was being raised in a successive petition under Rule 32.2(a)(3).

As a matter of state law, a constitutional claim falling under Rule 32.1(a) may be raised in a successive petition under Rule 32.2(a)(3), and it is not subject to preclusion under Rule 32.2(a)(2) if it is of sufficient constitutional magnitude. Ariz. R. Crim. P. 32.2(a)(3) (2000); *Smith*, 46 P. 3d at 1071 ¶ 10. Eight years before Bastian raised the claim on collateral review, the Arizona Supreme Court vacated a death sentence after examining the record and failing to determine that the case was an exceptional case “where the record itself makes clear that there are indisputably good reasons for shackling.” *State v. Gomez*, 123 P.3d 1131, 1135 ¶¶ 49-51 (Ariz. 2005).

⁶ Appointed PCR counsel had filed a notice of completion of review asserting there were no colorable claims to pursue. (9:19-15385 Doc. 26-41.)

Visible shackling in the presence of a jury deprives a defendant of his rights to due process, as guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution. *Deck v. Missouri*, 544 U.S. 622, 628-29 (2005). A shackling claim is a claim of “sufficient constitutional magnitude” that must be knowingly, voluntarily, and intelligently waived by the defendant before it may be precluded pursuant to Rule 32.2(a)(3). *Deck*, 544 U.S. at 635 (visible shackling unconstitutional because the record contained no “formal or informal findings” indicating that the trial judge had required shackling in response to security or decorum concerns); *Gomez*, 123 P.3d at 1135 ¶¶ 49-51 (vacating death sentence after examining the record and failing to determine that the case was an exceptional case “where the record itself makes clear that there are indisputably good reasons for shackling.”); *See also State v. Dixon*, 250 P.3d 1174, 1181 ¶ 27 (Ariz. 2011) (holding that under fundamental error review a petitioner must show that physical restraint was visible to the jury where he did not object to the use of a stun belt).

The right to be free from restraint is a fundamental right and a defendant is entitled to a determination that restraints are justified by a state interest specific to the particular defendant on trial. *Deck*, 544 U.S. at 622; *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). The routine use of shackling undermines the presumption of innocence and the related fairness of the fact-finding process, interferes with the defendant’s ability to communicate with their lawyer and participate in their defense, and affronts the dignity and decorum of judicial

proceedings. *Id.* at 630-32; U.S. Const. amend. VI.

While it is clear that the trial attorneys forfeited⁷ Bastian's constitutional right to be free from physical restraints during trial (see ER 586-589), Bastian did not forfeit the right to raise claims arising from the use of physical restraints merely because he presented them in a successive PCR petition. Under Rule 32.2(a)(3) (2000), a defendant is precluded from relief based on any ground that has been waived at trial, on appeal, or in any previous collateral proceeding. However, this is not a case where the prosecution has "simply show[n] that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding," as the Arizona Supreme Court provided in *Smith*. See 46 P. 3d at 1070 and in the 2002 Comments to Rule 32.2.

Here, the state court's conclusion of law was erroneous. At the time Bastian pursued collateral review, Arizona's procedural rules were "clear" and "well-established" that a claim of significant constitutional magnitude may be raised in a successive petition under Rule 32.2(a)(3). *Smith*, 46 P. 3d at 1071 ¶ 10. Personal waiver is not necessarily at issue, but the use of physical restraints impinges on a basic element of due process. *Deck*, 544 U.S. at 629. Bastian's shackling-related claims were not untimely and should have been adjudicated on the merits.

The adequacy of state procedural bars to the assertion of federal claims is

⁷ *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'")

at issue because the state trial court applied the rule of preclusion to Bastian inconsistently. Substantive amendment of PCR petitions is permitted under state law but the PCR judge failed to grant Bastian the opportunity to raise, investigate, and litigate federal claims in state courts. Bastian documents in his Opening Brief before the Ninth Circuit that he was denied procedural safeguards on collateral review. (9:19-15385 Doc. 26-37–45.) He was not permitted to amend his PCR petition, even though he was proceeding pro se and the prosecution had no objection to his request to file an amended petition. (Id.) State courts told him that there was no mechanism to conduct discovery in collateral proceedings when in actuality, such a mechanism did exist. (Id.) He repeatedly notified state courts that prison officials did not permit him to review the voluminous files the attorneys sent him. (Id.) The FBI had also seized Bastian’s legal files and thereafter withheld portions of his legal files. (Id.) The PCR petition Bastian submitted to state courts was drafted under difficult circumstances and state courts were aware of the substantive impediments Bastian encountered. In asking state courts to permit amendment and discovery, Bastian relied on state procedural rules and seminal Arizona Supreme Court cases such as *Canion v. Cole*, 115 P.3d 1261 (Ariz. 2005). Nonetheless, the state court ruled that he had failed to present sufficient supporting evidence to support his claims, despite Bastian’s express notification that he could not immediately develop his claims and would need to amend his petition in the future. (Id.)

Because the PCR court did not adopt the liberal policy toward the

amendment of PCR petitions as mandated by the Arizona Supreme Court, Bastian was left with the choice of filing successive PCR petitions in an attempt to secure review of his constitutional claims. The state-issued PCR forms themselves led Bastian, proceeding pro per, to categorize his claims incorrectly. (See ER 562, 626.) But for the trial court's failure to permit Bastian to amend his PCR—or directing PCR counsel to assist Bastian in presenting federal claims—the claims at issue would have been incorporated into the initial PCR. Further, the PCR court did not perform the gatekeeping function required by state procedural rules, as it applied the rule of preclusion without examining whether the constitutional right alleged to have been violated was of such “sufficient constitutional magnitude” that the claim could be raised in successive proceedings.

Both the Arizona Rules of Criminal Procedure and case law permitted Bastian to raise shackling claims on collateral review, and state court compliance with the rules permitting amendments of PCR petitions would have ensured that Bastian had an opportunity to identify, investigate, and litigate federal claims in state courts. The ineffective assistance of counsel claim related to the failure to contest shackling during trial is a derivative claim and likewise not categorically barred by Rule 32.2(a)(3).

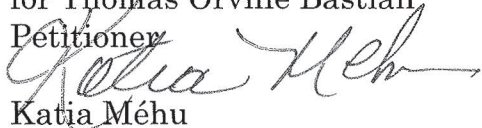
The asserted state procedural grounds are inadequate to preclude federal

review⁸ and Bastian respectfully requests the Court grant his petition for writ of certiorari. Bastian’s role in the events that led to the homicide consisted of dropping off the person who killed the decedent at the behest of the man who orchestrated a murder-for-hire plot. The mastermind took his own life when the police approached his home, and the man who shot the decedent pled guilty to the charge and is currently serving a natural life sentence. Bastian’s role in the homicide—extracted from him after three days of interrogation was aggrandized by visually casting him as a danger to the community—both present and future.

⁸ The district court noted that the record before it did not include the pleading wherein Bastian presented the shackling claim to state courts. (ER 28–29.) It was incumbent on the prosecution to submit the state court record to federal court. Rule 28 U.S.C. § 2254 and 2255 Cases, Rule 5(d). The prosecution failed to comply with the habeas rules and the district court analysis was not tethered to the state court record. As a result, the magistrate’s finding of procedural default (ER 29-30) is erroneous. The district judge’s “cause” analysis (ER 8-9) is flawed as well because the district judge did not review state procedural rules but responded to the objections of a pro se defendant. *Greenlaw*, 554 U.S. at 244.

Conclusion

Based on the foregoing authorities and arguments, Bastian respectfully requests that this Court grant the writ of certiorari and thereafter direct Arizona to apply the bright-line rule of *Miranda/Edwards* and abandon the totality of the circumstances standard it applied. A writ of certiorari is also warranted to permit Bastian to vindicate shackling-related claims in collateral review proceedings.

Respectfully submitted,
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