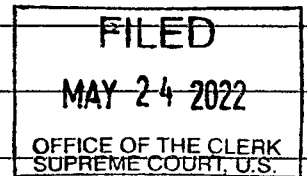


No. 22-5039
22-5039

ORIGINAL

IN THE
Supreme Court of the United States

Randy Scott Diehl, Petitioner



v

David Shinn, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI
(CORRECTED)

PETITIONER IN PRO SE:

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QUESTIONS PRESENTED FOR REVIEW

1. FOR PURPOSES OF RECEIVING A CERTIFICATE OF APPEALABILITY FROM THE 9TH CIRCUIT COURT OF APPEALS, HAS DIEHL MADE A "SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT" IN THIS CASE?
2. WHEN AN IDENTIFIED CONSTITUTIONAL ERROR "INSTRUMENTALLY" INFLUENCES A JURY VERDICT, HOW DOES THIS AFFECT THE RELATIONSHIP BETWEEN AEDPA AND BRECHT V ABRAHAMSON, 507 US 619?
3. PURSUANT TO NEIL V BIGGERS, 409 US 188 (1972), IS A "PRIOR DESCRIPTION" AN "ELEMENTAL FACT" IN THE RELIABILITY DETERMINATION OF SUGGESTIVE IDENTIFICATION PROCEDURES?
4. WAS DIEHL DENIED COUNSEL AT A "CRITICAL STAGE" WHERE THE TRIAL COURT RESPONDED TO A SUBSTANTIVE JURY NOTE DURING DELIBERATIONS AND WITHOUT NOTIFYING THE PARTIES?

(DESCENDING ORDER)
RELEVANT PRIOR PROCEEDINGS

1. PETITION FOR CERTIFICATE OF APPEALABILITY, DECIDED APRIL 29, 2022.
U.S. COURT OF APPEALS 9,
DIEHL v SHINN, # 21-16273 (APPENDIX, EX 5)
(REVIEW REQUESTED)
2. PETITION FOR WRIT OF HABEAS CORPUS, DECIDED JULY 22, 2021
U.S. DISTRICT COURT FOR ARIZONA (APPENDIX, EX 4)
DIEHL v RYAN/SHINN, # CV19-01568-PHX-DLR (JFM)
(REVIEW REQUESTED)
3. PETITION FOR ^{REVIEW OF DENIAL} ~~REVIEW OF DENIAL~~ OF POST-CONVICTION RELIEF PETITION
DECIDED ON JANUARY 22, 2019
ARIZONA COURT OF APPEALS, # ICA-CR18-0632 PRPC
STATE v DIEHL (APPENDIX, EX 7)
4. PETITION FOR POST-CONVICTION REVIEW, DECIDED AUGUST 7, 2018
MARICOPA COUNTY SUPERIOR COURT, # CR2015-1922-001-DT
STATE v DIEHL (APPENDIX, EX 6)
5. PETITION FOR REVIEW DECIDED NOVEMBER 17, 2017
ARIZONA SUPREME COURT, # CR17-0328-PR
STATE v DIEHL (APPENDIX, EX 2)
6. DIRECT REVIEW OF JURY CONVICTION, DECIDED JUNE 29, 2017
ARIZONA COURT OF APPEALS # ICA-CR16-0377
STATE v DIEHL (APPENDIX, EX 1)

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<u>EXHIBIT #</u>	<u>DESCRIPTION</u>
# 1	ARIZONA COURT OF APPEALS MEMORANDUM DECISION 6.29.2017
# 2	ARIZONA SUPREME COURT LETTER DENIAL OF PETITION FOR REVIEW 11.17.2017
# 3	U.S. DISTRICT COURT FOR ARIZONA MAGISTRATE'S REPORT & RECOMMENDATION 4.26.2021
# 4	U.S. DISTRICT COURT FOR ARIZONA ORDER DENYING HABEAS RELIEF 7.22.2021
# 5	U.S. COURT OF APPEALS 9 ORDER DENYING COA 4.29.2022
# 6	MARICOPA SUPERIOR COURT, PCR RULING, 8.7.2018
# 7	AZ. COURT OF APPEALS, PRPC DENIED 1.22.2019

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(Relevant)

CITATIONS OF THE REPORTS OF THE OPINIONS
ENTERED IN THIS CASE TO DATE

1. ORDER DENYING CERTIFICATE OF APPEALABILITY
9TH CIR NO. 21-16273 (REVIEW REQUESTED)
APRIL 29, 2022 (APPENDIX, EX 5).
2. ORDER DENYING WRIT OF HABEAS CORPUS
USDC NO. CV19-01568-PHX-DLR-JFM
JULY 22, 2021 (APPENDIX, EX 4). (REVIEW REQUESTED)
3. ORDER/LETTER DENYING PETITION FOR REVIEW
AZ. SUPREME CT NO. CR17-0328-PR
NOVEMBER 17, 2017 (APPENDIX, EX 2).
4. MEMORANDUM DECISION AFFIRMING CONVICTION
AZ COURT OF APPEALS NO. 1-CA-CR16-0377
JUNE 29, 2017 (APPENDIX, EX 1).

* (ALL OPINIONS ARE UNOFFICIAL/UNPUBLISHED)

STATEMENT OF JURISDICTION

PETITIONER DIEHL, PROCEEDING PRO SE, REQUESTS THE U.S. SUPREME COURT TO REVIEW THE FOLLOWING JUDGEMENTS OR ORDERS:

1. ORDER DENYING A CERTIFICATE OF APPEALABILITY DATED APRIL 29, 2022 (APPENDIX, EX 5); AND/OR
2. ORDER DENYING WRIT OF HABEAS CORPUS 2254 DATED JULY 22, 2021 (APPENDIX, EX 4).

THIS IS A HABEAS CORPUS ACTION UNDER 28 USC § 2254 BY A STATE PRISONER. DIEHL IS NOT CERTAIN, BUT BELIEVES JURISDICTION TO BE CONFERRED ON THE U.S. SUPREME COURT BY 28 USC § 1254(1) AND ALSO BY R10 OF THE SUPREME COURT RULES.

NOTIFICATION

PURSUANT TO SUPREME COURT RULE 29.4(b), DIEHL NOTIFIES THIS COURT THAT 28 USC § 2403(a) MAY APPLY IN THIS CASE AND THAT HE IS NOTIFIED OF HIS RESPONSIBILITY TO SERVE THE U.S. SOLICITOR GENERAL AS ANY OTHER PARTY.

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED IN THIS CASE

1) U.S. CONSTITUTIONAL AMENDMENT 5

"No person shall ... be deprived of life, liberty, or property, without due process of law."

2) U.S. CONSTITUTIONAL AMENDMENT 6

"In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defence."

3) U.S. CONSTITUTIONAL AMENDMENT 14

"... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(CONTINUED, NEXT PAGE)

CONTINUED —

4) 28 USC § 2254 (d)(1) AND (2)

"(d) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGEMENT OF A STATE COURT SHALL NOT BE GRANTED WITH RESPECT TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE COURT PROCEEDINGS UNLESS THE ADJUDICATION OF THE CLAIM —

(1) RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES; OR

(2) RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDINGS."

5) 28 USC § 2254 (d)(1)

"IN A PROCEEDING INSTITUTED BY AN APPLICATION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGEMENT OF A STATE COURT, A DETERMINATION OF A FACTUAL ISSUE MADE BY A STATE COURT SHALL BE PRESUMED TO BE CORRECT."

STATEMENT OF THE CASE

A.) PETITIONER RANNEY DIEHL WAS ARRESTED AND CHARGED IN OR AROUND OCTOBER 2015 FOR SELLING DANGEROUS DRUGS TO AN UNDERCOVER POLICE OFFICER ON DECEMBER 3, 2013, PURSUANT TO ARS 13-3407(A) OF ARIZONA'S REVISED STATUTES. AT HIS ARREST HE CLAIMED THAT HE HAS BEEN MISIDENTIFIED AND HAS MAINTAINED HIS ABSOLUTE INNOCENCE EVER SINCE. DIEHL DECLINED ALL OFFERED PLEA DEALS AND PROCEEDED TO JURY TRIAL.

JUST PRIOR TO TRIAL, THERE WAS AN EVIDENTIARY HEARING PERTAINING TO THE ONLY PIECE OF EVIDENCE WHICH CONNECTS DIEHL TO THIS CASE: A BOOKING PHOTO FROM A PREVIOUS AND UNRELATED ARREST. THIS PHOTO WAS PRESENTED AS THE PHOTO THE UNDERCOVER OFFICER ALLEGEDLY USED TO IDENTIFY DIEHL AS THE SUSPECTED DRUG DEALER, IN A SINGLE-PHOTO PROCEDURE CONDUCTED SEVERAL HOURS AFTER THE DRUG DEAL HAD TAKEN PLACE. IN ADDITION TO THE INHERENTLY SUGGESTIVE NATURE AS THE ONLY PHOTO SHOWN TO THE OFFICER, DIEHL'S APPOINTED COUNSEL ARGUED THAT IT WAS NOT PRECEDED BY A "PRIOR DESCRIPTION" BEING MEMORIALIZED OF THE SUSPECT WITH WHICH COULD BE COMPARED TO WHOMEVER THE POLICE MIGHT EVENTUALLY ARREST. (RT 4.8.2016)

THE SINGLE-PHOTO ID PROCEDURE WAS DETERMINED SUGGESTIVE BUT CONCURRENTLY RELIABLE BASED ON THE UNDERCOVER OFFICER'S TESTIMONY THAT HE HAD A GOOD OPPORTUNITY TO VIEW THE SUSPECT, THAT HE HAD A HIGH DEGREE OF ATTENTION DURING THE DRUG DEAL, THAT HE WAS 100% CERTAIN HE CHOSE THE CORRECT PERSON AS HIS SUSPECT, AND THAT IT WAS ONLY A MATTER OF HOURS AFTER THE CRIMINAL EVENT. (Id.)

B.) THE PHOTO EVIDENCE OF IDENTITY. ON FEBRUARY 19, 2016 AND MARCH 10, 2016, DETECTIVES EGGA AND AYALA PROVIDED RESPONSES TO DEFENSE QUESTIONS, WHICH WERE AUDIO RECORDED AND ALSO TRANSCRIBED BY A COURT REPORTER. DURING HIS OWN SESSION, DETECTIVE EGGA STATED THAT HE HAD NOT WITNESSED ANY CRIMINAL CONDUCT AND CLAIMED TO HAVE BEEN INVOLVED IN A CONVERSATION, ALONG WITH DETECTIVE AYALA AND THE SUSPECT, PRIOR TO THE SUSPECT AND DETECTIVE AYALA LEAVING TO GO TO AN APARTMENT TO CONDUCT THE NEGOTIATED DRUG DEAL. NOTABLY, MR. EGGA DID NOT MENTION THAT HE MIGHT HAVE SIGNED THE PHOTO HE HAD IDENTIFIED AS THE ALLEGED SUSPECT. (RT 2.19.2016)

MR. AYALA, AT HIS OWN SESSION, REFUTED THE FACTS PROVIDED BY MR. EGGA BY CLAIMING THAT HE ALONE HAD EXITED THE UNDERCOVER VEHICLE AND

THAT HE ALONE HAS APPROACHED AND SPOKE TO THE SUSPECT PRIOR TO GOING INTO AN APARTMENT TO CONDUCT THE NEGOTIATED DRUG DEAL. WITHOUT BEING SHOWN THE PHOTO EVIDENCE OF IDENTITY, MR AYALA CLAIMED THAT HE HAS "SIGNED THE PHOTO" OF THE SUSPECT HE HAS IDENTIFIED. THE INTERVIEW WAS PAUSED, BUT STAYED ON THE RECORD, BECAUSE THE PHOTO EVIDENCE IN THE POSSESSION OF THE PROSECUTOR AND THE DEFENSE BORE NO SIGNATURE OF ANY KIND. MR AYALA CLAIMED HE HAD BEEN STORING THIS EVIDENCE IN SOME OTHER PLACE HE DID NOT IDENTIFY ON THIS RECORD, AND GAVE NO EXPLANATION FOR WHY THIS EVIDENCE WAS BEING STORED SEPARATELY FROM THE OTHER EVIDENCE IN THE CASE FILE DELIVERED TO THE PROSECUTION WHICH CONTAINED THE "ORIGINAL" PHOTO EVIDENCE OF IDENTITY, NOW ENTIRELY IMPEACHED. (JA).

ON APRIL 7, 2016 DETECTIVE AYALA PRODUCED THE "NEW" PHOTO EVIDENCE OF IDENTITY, PROPERLY SIGNED AND DATED AS HE HAD PREVIOUSLY CLAIMED. MR. EGGA, ON THIS SAME DATE, ALSO PRODUCED A COPY OF THIS SAME "NEW" PHOTO EVIDENCE, EXCEPT THIS COPY WAS SIGNED BY MR. EGGA. PRIOR TO THIS PRODUCTION, NOBODY HAS CLAIMED MR. EGGA HAD SIGNED A PHOTO, NOT EVEN MR. EGGA HIMSELF.

THIS PHOTO IS THE ONLY EVIDENCE PRODUCED

IN THIS CASE WHICH CONNECTS DIEHL TO THESE CHARGES, APART FROM DETECTIVE AGALA'S UNCORROBORATED ALLEGATIONS THAT "DIEHL SOLD HIM DRUGS." (RT 4.7.2016)

C.) JURY DELIBERATIONS. ONCE BOTH SIDES RESTED, THE JURY WAS INSTRUCTED BY THE TRIAL COURT THAT THEY MUST DETERMINE "EACH" OF THE ELEMENTS OF THE CHARGED OFFENSE BEYOND REASONABLE DOUBT IN ORDER TO CONVICT DIEHL. APPARENTLY, THEY WERE UNABLE TO DO SO BECAUSE DURING DELIBERATIONS THEY SENT A NOTE TO THE TRIAL COURT ASKING THE COURT'S PERMISSION WHETHER THEY MIGHT BE ABLE TO "OVERCOME REASONABLE DOUBT" ON THE BASIS OF "POSITIVE PHOTO IDENTIFICATION". HAD THE JURY BEEN ABLE TO DETERMINE ANY OF THE OTHER ELEMENTS OF THE OFFENSE OTHER THAN IDENTITY, THEY WOULD HAVE SIMPLY CONVICTED DIEHL WITHOUT NEED OF SENDING THIS QUESTION TO THE JUDGE. THE TRIAL JUDGE RESPONDED, WITHOUT BOTHERING TO NOTIFY COUNSEL, THAT IT WAS "UP TO THE JURY" TO DECIDE WHETHER THEY COULD DO AS THEY REQUESTED. CLEARLY, SUCH A RESPONSE RUNS CONTRARY TO THE WINSHIP/JACKSON STANDARD OF PROOF OF GUILT REQUIRED TO CONVICT. RELYING ON THE TRIAL COURT'S ACQUIESCENCE, THE JURY THEN DECIDED TO CONVICT DIEHL.

D.) DIRECT REVIEW. THE ARIZONA COURT OF APPEALS DETERMINED THAT THERE HAD BEEN NO ABUSE OF DISCRETION BY THE TRIAL COURT IN ALLOWING THE ADMISSION OF THE SINGLE-PHOTO ID PROCEDURE AS EVIDENCE AT NIEHL'S TRIAL, BUT THE COURT REMANDED THIS CASE BACK TO THE TRIAL COURT TO EXPAND THE RECORD ON A SINGLE QUESTION: DID THE TRIAL COURT NOTIFY COUNSEL OF THE COMMUNICATION WITH THE MID-DELIBERATION JURY OR NOT? THE PROSECUTOR, THE DEFENDANT'S TRIAL ATTORNEY, AND THE TRIAL JUDGE ALL AGREED THAT THE TRIAL COURT HAD FAILED TO NOTIFY COUNSEL AT ANY TIME THAT IT HAD HAD SUBSTANTIVE COMMUNICATION WITH THE MID-DELIBERATION JURY. (SEE MEM. OP. 6-29-2017, APPENDIX, EX 1).

ONCE REVESTED JURISDICTION, THE STATE APPELLATE COURT DETERMINED THAT THE COMMUNICATION BETWEEN JUDGE AND JURY, WITHOUT ANY NOTIFICATION TO COUNSEL, WAS ERROR. HOWEVER, THE APPELLATE COURT ALSO DETERMINED THE ERROR IS HARMLESS TO NIEHL, DESPITE NOT PERMITTING DISCUSSION WHILE ON LIMITED REMAND OF ANY TOPIC THAT MIGHT BE USED TO ASSESS POTENTIAL PREJUDICE RESULTING FROM THE ERRONEOUS COMMUNICATION. FURTHER, THE REASON THE STATE APPELLATE COURT PROVIDED IN SUPPORT OF

ITS HARMLESS FINDINGS ARE CONTRADICTIONARY TO THIS COURT'S DECISIONS DEFINING THE STANDARDS OF PROOF OF GUILT REQUIRED TO CONVICT. THE COURT STATED THAT THE TRIAL COURT'S RESPONSE WAS "LEGALLY ACCURATE AND CORRECT," WHEN IN FACT, THIS COURT'S PRECEDENTS REQUIRE MORE FROM A JURY THAN SIMPLY DETERMINING THE IDENTIFICATION ELEMENT OF AN OFFENSE IN ORDER TO CONVICT.

AND IN ANY EVENT, THE TRIAL COURT'S EX PARTE RESPONSE IS IRRELEVANT. IT IS THE VERY SUBSTANTIVE NATURE OF THE JURY'S REQUEST THAT TRIGGERS THE ABSOLUTE REQUIREMENT THAT COUNSEL BE NOTIFIED. HAD THE JURY NOTE PERTAINED TO A SICK JUROR, WE WOULD NOT BE HAVING THIS CONVERSATION. CONVERSELY, HAD THE TRIAL COURT RESPONDED TO "REFER TO THE INSTRUCTIONS" PREVIOUSLY PROVIDED, WE MAY OR MAY NOT BE HAVING THIS DISCUSSION. BUT WHERE THE JURY REQUESTS PERMISSION TO OVERCOME REASONABLE DOUBT ON THE EVIDENCE GOING TO IDENTITY — THE ONLY EVIDENCE IN THIS CASE CONNECTED TO THE ACCUSED AT ALL, COUNSEL ABSOLUTELY MUST BE NOTIFIED AND GIVEN AN OPPORTUNITY TO PARTICIPATE IN THE RESPONSE, IF ANY AT ALL, PROVIDED BY THE TRIAL COURT. PARTICULARLY WHERE THIS LONE PIECE OF EVIDENCE IS BEING CHALLENGED BY THE DEFENSE UNDER CONSTITUTIONAL ANALYSIS.

E.) ARIZONA SUPREME COURT. THIS COURT DENIES DIEHL'S REQUEST TO PROCEED ON A PETITION FOR REVIEW. (APPENDIX, EX 2).

F.) FEDERAL HABEAS CORPUS, 28 USC § 2254. IN HIS REPORT AND RECOMMENDATION, MAGISTRATE-JUDGE JAMES METCALF DETERMINED:

1. THAT THERE IS NO PHYSICAL EVIDENCE OF WRONGDOING BY DIEHL TO CORROBORATE THE TESTIMONY OF DETECTIVE AYALA. (APPENDIX, EX 3; R+R, PG 23)
2. THAT "AT LEAST SOME OF" DIEHL'S TRIAL JURORS WERE PREPARED TO CONVICT HIM ON THE EXCLUSIVE BASIS OF THE IDENTIFICATION EVIDENCE, BUT "ONLY IF THE TRIAL COURT WOULD PERMIT" SUCH. (R+R, PG 12; APPENDIX, EX 3).
3. THAT THE COURT'S RESPONSE WAS "TANTAMOUNT TO AN INSTRUCTION THAT THEY COULD PERMISSIBLY DO SO". (R+R, PG 12; APPENDIX, EX 3).
4. AND THAT THE COURT'S RESPONSE "MAY INDEED HAVE BEEN INSTRUMENTAL" IN THE JURY'S "DECISION TO CONVICT" DIEHL. (R+R, PG 12; APPENDIX, EX 3).

STATE RESPONDENT FAILED TO OBJECT TO ANY OF THESE DETERMINATIONS, AND SUPERVISING U.S. JUDGE DOUGLAS RAYES FAILED TO DETERMINE ANY OF THESE DETERMINATIONS TO BE EITHER "CLEARLY

ERRONEOUS OR CONTRARY TO LAW." IN FACT, HIS HONOR ACCEPTED THE MAGISTRATE'S REPORT AND RECOMMENDATION IN ITS ENTIRETY, WHICH ULTIMATELY SUGGESTED DEFERRAL TO THE STATE'S HARMLESS ERROR FINDING UNDER AEDPA, CONFLICTING WITH THE DETERMINATIONS DETAILED ABOVE. (APPENDIX, EX 4).

G.) PETITION FOR CERTIFICATE OF APPEALABILITY. THE NINTH CIRCUIT COURT OF APPEALS DENIED DIEHL A COA FOR THE REASON THAT DIEHL HAS NOT MADE "A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT." THIS FINDING IS OBVIOUSLY ERRONEOUS — THERE HAS BEEN ONE SIGNIFICANT ERROR AFTER ANOTHER IN PERPETUITY IN THIS CASE, TO INCLUDE A SIGNIFICANT CONSTITUTIONAL ERROR DETERMINED BY THE ARIZONA COURT OF APPEALS AND AGREED TO BY THE HABEAS COURT. THIS CASE DESERVES TO BE REVIEWED FURTHER. (APPENDIX, EX 5).

H.) WHILE THERE WERE STATE COLLATERAL POST-CONVICTION PROCEEDINGS IN THIS CASE PRIOR TO THE FEDERAL HABEAS PROCESS, NO PART OF THAT PROCESS IS BEING CHALLENGED. NONE OF THOSE ISSUES WERE ~~PRESENTED~~^{ADDRESSED} ON FEDERAL REVIEW. THERE ARE NO PROCEDURAL OR TIMELINESS ISSUES/BARS INVOLVED IN THIS CASE AT ALL. (APPENDIX, EXS 6, 7)

REASONS THIS WRIT SHOULD BE GRANTED

(Rule 10(a), Rules of Supreme Court)

- 1.) **CONFLICTING DECISIONS AMONGST VARIOUS FEDERAL COURTS OF APPEAL.** IN THE 1ST CIRCUIT, THAT COURT OF APPEALS INTERPRETS U.S. v CRONIC, 466 US 648 (1984) AS REQUIRING REVERSAL WHEN DEFENSE COUNSEL IS ABSENT DURING THE SUPPLEMENTARY REINSTRUCTION OF A TRIAL JURY. SEE CURTIS V DUVAL, 124 F3d 1, 17 (CA1, 1997). THAT COURT SPECIFICALLY STATED: "THEREFORE, WERE WE TO APPLY CRONIC, PENSON, AND PARENT, WE WOULD HOLD THAT THE ERROR REQUIRED REVERSAL." Id.

SIMILARLY, IN THE 6TH CIRCUIT, THAT COURT OF APPEALS SPECIFICALLY ANSWERED THE QUESTION: "IS JURY REINSTRUCTION A 'CRITICAL STAGE' UNDER CRONIC?" BY ANSWERING THAT "IT IS". CAVER V STRAUB, 349 F3d 340, 349-50 (CA6, 2003) (CITING FRENCH V JONES, 332 F3d 430 (CA6, 2003) (AFTER REMAND FROM THIS COURT)). THE CAVER COURT FOUND THAT "... UNDER CRONIC, ... IF PETITIONER'S TRIAL COUNSEL WAS, INDEED, ABSENT DURING THE REINSTRUCTION, A STRUCTURAL ERROR OCCURRED IN THE TRIAL COURT PROCEEDING, ... ANY CONCLUSION OTHERWISE WOULD BE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS STATED IN CRONIC." Id. AT 350.

FURTHERMORE, IN APPLYING THE BELL V CONE, 535 US 685 (2002) DEFINITION OF A "CRITICAL STAGE" UNDER CRONIC, CAVER

STATED THAT :

" IF WE ASSUME THAT RESPONDING TO A JURY REQUEST TO AMPLIFY A JURY INSTRUCTION INHERENTLY "Holds SIGNIFICANT CONSEQUENCES FOR THE ACCUSED," THEN IT WOULD ARGUABLY BE UNREASONABLE FOR A STATE COURT TO CONCLUDE, WHERE THE DEFENDANT'S ATTORNEY WAS ABSENT AT THAT TIME, THAT THE CONSTITUTION DID NOT REQUIRE A NEW TRIAL." 349 F3d AT 354. (ROGERS, J., CONCURRING).

SEE ALSO, CLARK V LINDSEY, 936 F3d 467 (CA 6, 2019) (DISTINGUISHING THIS CASE IN SUPPORT OF BOTH CAVER AND FRENCH). 936 F3d AT 472, 476.

CONVERSELY, THE 9TH CIRCUIT COURT OF APPEALS DOES RECOGNIZE THAT DEFENDANTS OR THEIR ATTORNEYS "HAVE A DUE PROCESS RIGHT TO BE PRESENT IN CONFERENCES WHEN JURORS NOTES ARE DISCUSSED," OR WHEN A TRIAL COURT PREPARES A SUPPLEMENTAL INSTRUCTION TO BE READ TO A DELIBERATING JURY." FRANTZ V HAZEN, 533 F3d 724, 743 (CA 9, 2008) (CITATIONS OMITTED). FURTHER, ABSENT THE DEFERENTIAL REVIEW REQUIRED BY AEDPA, THIS COURT HAS ALSO STATED THAT IF THEY WERE "REVIEWING THE QUESTION BEFORE US DE NOVO, WE WOULD FIND THAT MUSLADIN WAS DENIED COUNSEL AT A 'CRITICAL STAGE', THEREBY TRIGGERING CROWE'S RULE OF AUTOMATIC

REVERSAL." MUSLASHIN V LAMARQUE, 555 F3d 830, 842 (CA 9, 2009). (IT SHOULD BE NOTED THAT MUSLASHIN'S CASE IS DISTINGUISHABLE HERE BECAUSE THE TRIAL COURT'S SUPPLEMENTAL EX PARTE RESPONSE MERELY REFERRED THE JURY TO "REFER TO THE INSTRUCTIONS" THAT THE MUSLASHIN TRIAL JUDGE HAD PREVIOUSLY PROVIDED, WHILE THE SUPPLEMENTAL EX PARTE RESPONSE IN DIEHL'S CASE ACQUIESCED IN THE JURY'S REQUEST TO BE ALLOWED TO CONVICT ON THE EXCLUSIVE BASIS OF A SINGLE ELEMENT OF THE CHARGED OFFENSE ("POSITIVE PHOTO IDENTIFICATION")). TO DATE, THE 9TH CIRCUIT HAS NOT AGREED A JURY REINSTRUCTION IS A "CRITICAL STAGE." WHILE DIEHL BELIEVES THAT IT IS THE "SUBSTANTIVE NATURE" OF THE JURY NOTE RATHER THAN WHATEVER THE TRIAL COURT'S RESPONSE WAS, WHICH SHOULD TRIGGER ~~ANOTHER CRITICAL STAGE DETERMINATION~~ ^{A CRITICAL STAGE DETERMINATION} UNDER CRONIC/BELL, THE NINTH CIRCUIT AND THE DISTRICT COURT EVEN FAILED TO APPLY ITS OWN PRECEDENTS ON THIS POINT, ALBEIT PRECEDENTS THAT DO NOT FULLY EMBRACE THE CRONIC STANDARDS AND CONFLICT WITH THE APPLICATION OF THE CRONIC STANDARD AS APPLIED IN THE 1ST AND 6TH CIRCUITS, PURSUANT TO BELL.

HAD DIEHL BEEN GEOGRAPHICALLY WITHIN EITHER THE 1ST OR 6TH CIRCUITS, HE WOULD HAVE BEEN GRANTED RELIEF/A NEW TRIAL ON THE SAME FACTS PRESENTED.

2). (Rule 10(c), Rules of Supreme Court). THE STATE COURT, THE HABEAS COURT, AND SANCTIONED BY THE 9TH CIRCUIT COURT OF APPEALS, COLLECTIVELY AND SEPARATELY, HAVE DECIDED IMPORTANT FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH VARIOUS RELEVANT DECISIONS FROM THE U.S. SUPREME COURT, AS FOLLOWS:

A.) U.S. v Cronin, 466 US 648 (1984); BEIL v CONE, 535 US 685 (2002); RUSHEN v SPAIN, 464 US 114 (1983); AND ARIZONA v FULMINANTE, 499 US 279 (1991): COLLECTIVELY, THAT INTERFERENCE WITH/DENIAL OF COUNSEL DURING JURY REINSTRUCTION, BY ENGAGING IN SUBSTANTIVE EX PARTE COMMUNICATION ABOUT EVIDENCE/ELEMENTS SUB JUDICE, POSSES SIGNIFICANT CONSEQUENCE TO THE ACCUSED, IS STRUCTURAL ERROR, AND RELIEF IS TO BE AUTOMATIC BECAUSE THIS ERROR CANNOT BE HARMLESS UNDER ANY STANDARD.

B.) REMMER v U.S., 347 US 227 (1954); AND JAYNER v BARNES, 576 US 1065 (2015): COLLECTIVELY, THAT ANY PRIVATE COMMUNICATION WITH A JUROR, ABOUT EVIDENCE/ELEMENTS SUB JUDICE, IS PRESUMPTIVELY PREJUDICIAL.

C.) TOT v U.S., 319 US 463 (1943); IN RE WINSHIP,

397 US 358 (1970); AND JACKSON V VIRGINIA, 443 US 307 (1979): Collectively, THAT EVERY ELEMENT OF A CHARGED OFFENSE MUST BE PROVEN WITH EVIDENCE BEYOND REASONABLE DOUBT, NOT MERELY BY DEMONSTRATING THE IDENTIFICATION ELEMENT EXCLUSIVELY, IN ORDER TO CONVICT.

D.) NEIL V BIGGERS, 409 US 188 (1972); AND MANSON V BRATHWAITE, 432 US 98 (1977): Collectively, THAT A SUGGESTIVE, SINGLE-PHOTO IDENTIFICATION PROCEDURE ALSO POSSESSING NO PRIOR DESCRIPTION IS UNRELIABLE AND INADMISSIBLE AS EVIDENCE BECAUSE A PRIOR DESCRIPTION IS AN "ELEMENTAL FACT" IN THE RELIABILITY DETERMINATION OF AN UNCONSTITUTIONALLY SUGGESTIVE ID PROCEDURE.

E.) KOTTEAKOS V U.S., 328 US 750 (1946); BRECHT V ABRAHAMSON, 507 US 619 (1993); AND DAVIS V AYALA, 576 US 257 (2015): Collectively, WHERE A CONSTITUTIONAL ERROR IS DETERMINED "INSTRUMENTAL" IN THE JURY'S DECISION TO CONVICT, AND WHERE THERE ARE FURTHER DETERMINATIONS THAT THERE IS NO CORROBORATING, INCULPATORY EVIDENCE OF WRONGDOING BY THE ACCUSED, AND THAT "SOME OF THE JURORS" WERE "PREPARED TO CONVICT" EXCLUSIVELY ON THE

BASIS OF THE IDENTITY ELEMENT OF THE CHARGES OFFENSE IF THE TRIAL COURT WOULD PERMIT SUCH, AND THAT THE TRIAL COURT'S EX PARTE AND SUPPLEMENTAL REINSTRUCTION (THE ERROR IN THIS CASE), WAS "TANTAMOUNT TO AN INSTRUCTION THAT THEY COULD PERMISSIBLY DO SO," AND THAT PERMISSION TO CONVICT ON A REDUCED STANDARD WAS DONE WITHOUT NOTIFYING COUNSEL, THE ERROR CANNOT POSSIBLY BE HARMLESS, BUT RATHER "INJURIOUSLY INFLUENCES" THE VERDICT OF DIEHL'S JURY.

- 3) THE DENIAL OF A CERTIFICATE OF APPEALABILITY BY THE 9TH CIRCUIT COURT OF APPEALS IS CLEARLY AND OBVIOUSLY ERRONEOUS. WHILE THERE ARE MULTIPLE ERRORS IN THIS CASE, ONLY ONE HAS BEEN SPECIFICALLY IDENTIFIED AS SUCH, TO DATE, IN THIS CASE. THERE WAS INDISPUTABLY SUBSTANTIVE COMMUNICATION BETWEEN THE TRIAL JUDGE AND DIEHL'S MID-DELIBERATION JURY WITHOUT NOTIFICATION TO COUNSEL. YET, THE DETERMINATION BY THE FEDERAL APPELLATE COURT WAS THAT DIEHL HAD FAILED TO MAKE A "SUBSTANTIAL SHOWING OF THE ^{Denial} ~~Denial~~ OF A CONSTITUTIONAL RIGHT." WHETHER THIS ERROR IS DETERMINED STRUCTURAL OR NOT, THE ERROR IS A CLEAR VIOLATION OF DUE PROCESS UNDER THE 5, 6 AND 14TH AMENDMENTS TO THE FEDERAL CONSTITUTION,

AND THE ERROR IS THE ACTUAL REASON THE JURY CONVICTED DIEHL OF THIS OFFENSE. THE FACT THAT NO STATE OR FEDERAL COURT WITHIN THIS CIRCUIT HAS HAD THE COURAGE TO GRANT RELIEF IN THIS CASE IS SHAMEFUL, BECAUSE AN UNCONSTITUTIONAL CONVICTION AND IMPRISONMENT IS BEING ENFORCED ON AN ABSOLUTELY INNOCENT CITIZEN IN THIS CASE.

4). THE BIGGERS "RELIABILITY" TEST IS BEING MANIPULATED, RESULTING IN MANY INNOCENT CITIZENS, INCLUDING THIS PETITIONER, BEING IDENTIFIED AS SUSPECTS IN CRIMES THEY DID NOT COMMIT. DIEHL REQUESTS THIS COURT TO RECONSIDER ITS POSITION ON THIS TEST.

WHEN ASSESSING THE RELIABILITY/ADMISSIBILITY OF AN IDENTIFICATION PROCEDURE THAT HAS BEEN DETERMINED CONSTITUTIONALLY FLAWED DUE TO BEING UNDUALLY SUGGESTIVE (AS WAS DETERMINED BY THE STATE TRIAL COURT IN THIS CASE), THIS COURT REQUIRES APPLICATION OF A "TOTALITY OF THE CIRCUMSTANCES" APPROACH TO 5 FACTORS ENUNCIATED IN NEIL V BIGGERS, 409 US 188, 199-200 (1972). DIEHL BELIEVES JUDGE RAYES, FOLLOWING THE STATE APPELLATE AND TRIAL COURT, HAS MISAPPLIED THE BIGGERS TEST IN THIS CASE AND IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN BIGGERS.

AMONGST THE 5 FACTORS "TO BE CONSIDERED" ARE:

"3. THE ACCURACY OF THE PRIOR DESCRIPTION OF THE CRIMINAL."

409 US AT 199-200. IN DICTUM, AND WITHIN A FOOTNOTE OF THE PLURALITY BIGGERS DECISION (JUSTICE MARSHALL DID NOT PARTICIPATE IN THE BIGGERS DECISION), THE AUTHORIZING JUSTICE STATED THAT THE 5 RELIABILITY FACTORS ARE "ELEMENTAL FACTS" IN THIS DETERMINATION.

IN THE DISSENTING/CONCURRING PORTION OF THE BIGGERS CASE, THIS AUTHORIZING JUSTICE SPECIFICALLY CITED A "PRIOR DESCRIPTION" AS AN "ELEMENTAL FACT" IN THIS DETERMINATION. ALL 8 OF THE PARTICIPATING JUSTICES SIGNED ONTO ONE OR THE OTHER OF THESE OPINIONS COMPRISING THE BIGGERS DECISION. THEREFORE, WE DON'T NEED TO GUESS, WE CAN KNOW THAT A PRIOR DESCRIPTION IS ESSENTIAL TO THE BIGGERS RELIABILITY DETERMINATION, BECAUSE 8 OF THE 9 SCOTUS JUSTICES AGREED THAT IT IS AN "ELEMENTAL FACT."

HOWEVER, NO SUCH PRIOR DESCRIPTION WAS EVER MEMORIALIZED IN THIS CASE, PRIOR TO EMPLOYING THE SINGLE-PHOTO ID PROCEDURE USED TO IDENTIFY DIEHL AS THE SUSPECTED DRUG DEALER IN THIS CASE, WHICH COULD HAVE BEEN USED

TO COMPARE TO WHOMEVER WOULD EVENTUALLY BE ARRESTED,
FOR THE PURPOSE OF TESTING (OBJECTIVELY) THE ACCURACY
AND RELIABILITY OF THE FLAWED PROCEDURE.

FOR THIS REASON, AND WITH ALL DUE RESPECT FOR HIS HONOR,
DIEHL BELIEVES U.S. JUDGE RAYES' FINDING OF THERE BEING
NO PRIOR DESCRIPTION HERE NOT BEING "NECESSARY" IN THE
BIGGERS DETERMINATION IS A MISAPPLICATION OF, AND
CONTRARY TO THE BIGGERS DECISION. *Id.* "ELEMENTAL"
= "NECESSARY", RIGHT?

MOREOVER, IT IS NOT THE "EXISTENCE OF" A PRIOR DESCRIPTION
THAT MUST BE CONSIDERED IN THE BIGGERS DETERMINATION; RATHER,
IT IS THE "ACCURACY OF" THE PRIOR DESCRIPTION THAT MUST
BE WEIGHED. BIGGERS SPECIFICALLY AND UNAMBIGUOUSLY
HOLDS THAT IT IS THE "ACCURACY OF" THE PRIOR DESCRIPTION
WHICH MUST BE CONSIDERED WITHIN THE TOTALITY OF ALL THE
OTHER CIRCUMSTANCES. IT IS PRESUMED THAT THERE EXISTS
SOME SORT OF PRIOR DESCRIPTION WHOSE "ACCURACY" MUST BE
WEIGHED WITHIN THE TOTALITY OF THE CIRCUMSTANCES,
BECAUSE WITHOUT A PRIOR DESCRIPTION AT ALL THIS
"ELEMENTAL FACT" WOULD REQUIRE THAT THE SUGGESTIVE
PROCEDURE BE EXCLUDED AS EVIDENCE DUE TO FAILING
THE BIGGERS TEST, ACCORDING TO THE CLEAR AND PLAIN
LANGUAGE AS STATED BY THIS COURT. 409 US AT 199-200.

THE BIGGERS "EXPERIMENT" WAS DESIGNED TO INCENTIVIZE POLICE OFFICIALS TO NOT CONDUCT UNNECESSARY AND UNDULY SUGGESTIVE ID PROCEDURES, BUT IT HAS FAILED IN THAT ENDEAVOR. HERE'S WHY:

POLICE IDENTIFICATION WITNESSES, IN PARTICULAR, NEVER, NEVER TESTIFY TO ANYTHING OTHER THAN HAVING HAD A "GREAT OPPORTUNITY" TO VIEW THE SUSPECT; THAT THEY HAD A "VERY HIGH" DEGREE OF ATTENTION; THAT THEY ARE "100% CERTAIN" OF THEIR IDENTIFICATION; AND, THAT THEY IDENTIFIED THE SUSPECT "SOON" AFTER THE CRIMINAL EVENT. WHILE ANY/ALL OF THESE BIGGERS FACTORS COULD VERY WELL BE TRUE, A POLICE OFFICER/PROFESSIONAL WITNESS KNOWS THAT ANY OTHER RESPONSE JEOPARDIZES THE WHOLE CASE. THESE 4 CRITERIA FROM BIGGERS SERVE NO REALISTIC PURPOSE IN OBJECTIVELY ASSESSING THE RELIABILITY OF A SUGGESTIVE ID PROCEDURE. THE SIMPLE RECITATION OF THESE 4 STATEMENTS ABSOLUTELY SERVES THE INTEREST OF THE GOVERNMENT, WHILE REMAINING UTTERLY UNCHALLENGEABLE ON CROSS-EXAMINATION. THE ONE EXCEPTION TO THIS UNASSAILABILITY IS THE "ACCURACY OF" THE PRIOR DESCRIPTION. THIS IS, EXCLUSIVELY, THE OBJECTIVE FACTOR IN THE BIGGERS RELIABILITY DETERMINATION.

IN ARIZONA, HOWEVER, EVEN WHEN THE REQUIRED PRIOR DESCRIPTION DOES NOT EXIST AT ALL, ARIZONA COURTS WILL

Simply proclaim the error "Harmless", the suggestive procedure "Reliable", and the defendant "Guilty!" Add to these circumstances the AEDPA requirement of deference to state harmless findings and all appellate/collateral review becomes futile, despite prejudice being a legal determination, not a fact one entitled to deference.

The Biggers experiment, with all due respect, has not achieved the result this court intended. There's just too much ~~documenting~~ ^{Empirical Evidence} documenting the fact that the police are not properly incentivized to conduct fair ID procedures because challenging a suggestive procedure is literally impossible, as long as the witness provides these standard, boilerplate responses similar to those provided in Diehl's case. And government-employed witnesses know this is true, which motivates their testimony.

Since 1988, more than 3,000 exonerations have been documented by the "National Registry of Exonerations." Every single one of them included eyewitness identifications that were "reliable," "certain," "positive", and as it turned out: "wrong." Please consider replacing the Biggers test with a "per se" exclusionary rule, which will finally and properly incentivize the police to only use fair ID procedures.

IF, ON THE OTHER HAND, THIS COURT'S CONTINUED PREFERENCE IS THE RELIABILITY APPROACH OVER THE PER SE EXCLUSIONARY APPROACH, MIGHT THIS COURT THEN CONSIDER ADDING TO/ CHANGING THE FACTORS REVIEWING COURTS WOULD BE REQUIRED TO CONSIDER, WHICH ARE MORE OBJECTIVE AND TRANSPARENT FOR CONFIRMATION PURPOSES? SUCH FACTORS WILL ONLY ASSURE THAT THE GOVERNMENT HAS THE CORRECT CULPABILITY AND THE IDENTIFICATION EVIDENCE WILL BE FAR MORE CONVINCING AND STRONG.

5.) (RULE 10(C), RULES OF SUPREME COURT) ON DIRECT REVIEW, THE ARIZONA COURT OF APPEALS DETERMINED THE ERROR WHICH THEY IDENTIFIED IN THIS CASE IS HARMLESS TO PETITIONER DIEHL. HOWEVER, THEY CONCLUDED THIS LEGAL DETERMINATION AFTER BEING REVESTED JURISDICTION FOLLOWING A LIMITED REMAND TO EXPAND THE RECORD ON A SINGLE QUESTION: DID THE TRIAL COURT NOTIFY THE PARTIES OF THE MID-DELIBERATION COMMUNICATION WITH THE JURY? THE STATE, THE DEFENSE, AND THE TRIAL JUDGE ALL AGREED THAT THERE WAS NO NOTIFICATION MADE. HOWEVER, THE TRIAL COURT ALSO ALLOWED NO DISCUSSION OF ANY OTHER MATTER, PARTICULARLY, WHETHER DIEHL COULD HAVE BEEN PREJUDICED BY THE TRIAL JUDGE COMMUNICATING SUBSTANTIVELY WITH THE MID-DELIBERATION JURY? IT IS ABSOLUTELY REASONABLE TO EXPECT THE COURT

TO DETERMINE WHETHER DIEHL'S JURY IS LIKELY TO HAVE UNDERSTOOD THE EX PARTE RESPONSE AS PERMITTING THEM THEIR REQUEST TO CONVICT DIEHL ("OVERCOME REASONABLE DOUBT") ON A STANDARD OF GUILT WHICH IS INFERIOR TO THAT REQUIRED BY WINSHIP/JACKSON (BASED EXCLUSIVELY ON "POSITIVE PHOTO IDENTIFICATION"). SUCH A FINDING OF HARMLESSNESS BY THE ARIZONA COURT OF APPEALS IS OBJECTIVELY UNREASONABLE UNDER ARIZONA v FULMINANTE, 499 US 279 (1991) BECAUSE A DENIAL OF COUNSEL AT A CRITICAL STAGE IS A STRUCTURAL ERROR NOT EVEN SUBJECT TO HARMLESS REVIEW, AND ALSO UNDER WILLIAMS v TAYLOR, 529 US 362 (2000), BECAUSE IT IS NOT REASONABLE TO DETERMINE AN ERROR HARMLESS AFTER NOT ALLOWING DISCUSSION OF ANY MATTER THAT COULD BE USED TO ASSESS POTENTIAL PREJUDICE. THIS ACTION REQUIRES THE HARMLESS DETERMINATION TO THE LEVEL OF "CONJECTURE" OR "BOILERPLATE" RESPONSES NOT ENTITLED TO DEFERENCE.

6.) BRECHT v AEDPA. IN WOOD v ALLEN, 558 US 290 (2010), THIS COURT GRANTED CERT FOR THE EXPRESS PURPOSE OF "ADDRESSING THE RELATIONSHIP BETWEEN 2254(d)(2) AND (c)(1)," AND "RESOLVING THE QUESTION OF HOW 2254(d)(2) AND (c)(1) FIT TOGETHER". HOWEVER, THE COURT ULTIMATELY DECLINED TO REACH THIS ISSUE IN WOOD BECAUSE, AS THE COURT EXPLAINED, ITS RESOLUTION OF THE CASE DID NOT "TURN ON ANY INTERPRETIVE DIFFERENCE REGARDING THE RELATIONSHIP

BETWEEN THESE PROVISIONS." IN EXPRESSLY RESERVING THE QUESTION FOR THE FUTURE, THE COURT EXPLAINED THAT ANY "STATEMENTS WE HAVE MADE [IN PRIOR OPINIONS] ABOUT THE RELATIONSHIP BETWEEN [THESE PROVISIONS] SHOULD NOT BE VIEWED AS DISPOSITIVE" BECAUSE PRIOR CASES "DID NOT SQUARELY PRESENT THE ISSUE." 558 US AT 193-301. THE COURT ALSO MADE CLEAR THAT IT WAS "EXPLICITLY LEAVING OPEN THE QUESTION WHETHER 2254(a)(1) APPLIES IN EVERY CASE PRESENTING A CHALLENGE UNDER 2254(d)(2)." DIEHL NOW SQUARELY PRESENTS THAT QUESTION FOR THIS COURT'S REVIEW.

MORE RECENTLY, THIS COURT GRANTED CERT IN THE CASE OF BROWN V DAVENPORT, 142 S Ct 1510 (2022), DECIDED ON APRIL 21, 2022. CERT WAS GRANTED FOR THE EXPRESS PURPOSE OF "CLARIFYING THE RELATIONSHIP BETWEEN THE AEDPA/CHAPMAN STANDARD OF REVIEW AND THE BRECHT RULE OF HARMLESS ERROR." HOWEVER, THE DECISION IN DAVENPORT APPEARS TO ONLY FURTHER LIMIT A STATE PRISONER'S ABILITY TO HAVE VALID CONSTITUTIONAL VIOLATIONS REVIEWED BY THE FEDERAL COURTS. PERHAPS THE NEXT STEP IN THE PROCESS WILL BE TO SIMPLY ELIMINATE THE BILL OF RIGHTS ALTOGETHER, RATHER THAN TO DO SO INCREMENTALLY.

2254(a)(1) IS UNCONSTITUTIONAL AND SIMPLY GOES TOO

FAR, TO THE POINT OF MAKING HABEAS RELIEF FOR A STATE PRISONER, EVEN UNDER THE MOST EGREGIOUS OF CIRCUMSTANCES, AN UTTERLY FUTILE PROCESS.

FOR EXAMPLE, IN THIS CASE, MAGISTRATE-JUDGE JAMES METCALF DETERMINED IN HIS REPORT AND RECOMMENDATION (APPENDIX, EX 3), THAT:

- A.) THERE IS NO CORROBORATING, INCULPATORY EVIDENCE OF WRONGDOING BY DIEHL (PG 23);
- B.) THAT AT LEAST "SOME OF" DIEHL'S TRIAL JURORS WERE PREPARED TO CONVICT HIM ON THE EXCLUSIVE BASIS OF THE IDENTITY ELEMENT OF THE CHARGED OFFENSE (PG 12), BUT ONLY IF THE TRIAL COURT WOULD ALLOW THEM TO (Id);
- C.) THAT THE ERRONEOUS SUPPLEMENTAL RE-INSTRUCTION IS "TANTAMOUNT TO AN INSTRUCTION THAT THEY COULD PERMISSIBLY DO SO" (PG 12);
- D.) AND THAT THE ERRONEOUS REINSTRUCTION MAY INDEED HAVE BEEN "INSTRUMENTAL" IN THE JURY'S DECISION TO CONVICT DIEHL (PG 12).

EVEN IN LIGHT OF THESE DETERMINATIONS, HOWEVER,

JUDGE METCALF RECOMMENDED DEFERRAL TO THE STATE'S UNMOORED PROCLAMATION THAT THE ERROR WAS "HARMLESS" TO DIEHL. *Id.*

NONE OF THE ABOVE DETERMINATIONS BY JUDGE METCALF WERE OBJECTED TO BY RESPONDENT STATE, NOR WERE THEY DETERMINED BY JUDGE RAYES TO BE CLEARLY ERRONEOUS OR CONTRARY TO LAW UNDER 28 USC § 636 (b)(1)(A). THESE CIRCUMSTANCES IMPLY AGREEMENT AND ACCEPTANCE OF JUDGE METCALF'S DETERMINATIONS BY BOTH THE RESPONDENT STATE AND ALSO BY JUDGE RAYES, WHO ADOPTED THE ENTIRE REPORT AND RECOMMENDATION UNALTERED BY DIEHL'S OBJECTIONS. (APPENDIX, EX 4).

STILL, 2254(c)(1) REQUIRES WHAT IS, EFFECTIVELY, THE ABDICATION OF FEDERAL AUTHORITY TO GRANT HABEAS RELIEF TO DIEHL, EVEN IN THE FACE OF FINDINGS SUCH AS THOSE DETAILED ABOVE, MADE BY JUDGE METCALF AND ADOPTED BY JUDGE RAYES.

IT IS THIS IRRECONCILABLE CONFLICT BETWEEN 2254 (c)(1) AND BOTH 2254(d)(2) AND BRECHT'S HARMLESS ERROR RULE THAT IS AT ISSUE IN THIS CASE AND HAS ALSO BEEN THE BASIS OF SO MANY REVERSALS BY THIS COURT, OF DECISIONS BY THE VARIOUS COURTS OF APPEAL, BUT PARTICULARLY THOSE IN THE 6TH AND

9TH CIRCUITS. DIEHL Respectfully Requests THIS COURT TO GRANT HIS PETITION FOR CERTIORARI FOR THE ADDITIONAL PURPOSE OF RECONSIDERING ITS POSITION RECENTLY ANNOUNCED IN BROWN V DAVENPORT, UNLESS IT REALLY IS THIS COURT'S INTENTION TO ALLOW THE DEFERENCE REQUIRED BY AEDPA TO, EFFECTIVELY, ABROGATE ALL OF THE PROTECTIONS ENUMERATED BY THE BILL OF RIGHTS. PLEASE RECONSIDER THIS POSITION, IN ADDITION TO ADDRESSING ANY/ALL OTHER REASONS PROVIDED FOR WHY THIS COURT WILL HOPEFULLY GRANT CERTIORARI TO REVIEW THIS CONVICTION OF AN ABSOLUTELY INNOCENT AND WRONGLY CONVICTED PETITIONER.

Respectfully Submitted ON JUNE 13, 2022.

DIEHL AFFIRMS UNDER PENALTY OF PERJURY THAT ALL INFORMATION AND STATEMENTS MADE BY HIM WITHIN THIS DOCUMENT ARE TRUE TO THE BEST OF HIS INFORMATION, KNOWLEDGE AND BELIEF.

R Diehl

Randy Diehl

PETITIONER IN PRO SE