No. 22-6655

IN THE
SUPREME COURT OF THE UNITED STATES

THEODORE WASHINGTON,
PETITIONER,
-vs-

RYAN THORNELL[1], et al.,
RESPONDENTS.

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

BRIEF IN OPPOSITION

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[1] On January 30, 2023, Ryan Thornell replaced David Shinn as Director of the Arizona Department of Corrections, Rehabilitation & Reentry.

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Does this Court have jurisdiction to consider the merits of Washington's claim that the Ninth Circuit failed to apply the presumption of correctness to the state court's factual findings?

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Respondents supplement Washington's statement of the opinions below with the following:

The Ninth Circuit's amended opinion denying habeas relief on Washington's claim of ineffective assistance of counsel is reported at *Washington v. Shinn*, 46 F.4th 915 (9th Cir. 2022). Pet. App. 1a–44a. The Ninth Circuit's opinion denying habeas relief on Washington's claim of ineffective assistance of counsel is reported at *Washington v. Shinn*, 21 F.4th 1081 (9th Cir. 2021). Pet. App. 45a–84a. The Ninth Circuit's opinion following en banc review, granting habeas relief on Washington's claim of ineffective assistance of counsel, is reported at *Washington v. Ryan*, 922 F.3d 419 (9th Cir. 2019). Pet. App. 94a–138a. The Ninth Circuit's 6-5 *en banc* opinion remanding this matter to the district court for entry of Rule 60(b) relief is reported at *Washington v. Ryan*, 833 F.3d 1087 (9th Cir. 2016). The Ninth Circuit panel's opinion affirming the district court's denial of Rule 60(b) relief is reported at *Washington v. Ryan*, 789 F.3d 1041 (9th Cir. 2015).

The district court's orders are unpublished. On May 26, 2017, the court entered judgment dismissing Washington's "Amended Petition for Writ of Habeas Corpus, nunc pro tunc to June 9, 2005." Pet. App. 146a. On February 24, 2006 (2006 WL 8424617), and March 1, 2007 (2007 WL 9650349), the court denied Washington's motions seeking to reenter judgment under Rule 60(b) for the sole purpose of rendering his appeal timely. The district court denied Washington's habeas petition and his motion to alter

or amend the judgment in unpublished orders dated, respectively, April 22, 2005 (2005 WL 8147365; *see* Pet. App. 147a–94a) and June 8, 2005 (2005 WL 8147364).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the merits of Washington's claim. Washington's notice of appeal to the Ninth Circuit was not filed within the time period allowed by Federal Rule of Appellate Procedure (FRAP) 4(a)(1)(A), and Washington did not file a motion to extend the time to file a notice of appeal as permitted by FRAP 4(a)(5). Accordingly, the untimely notice did not vest jurisdiction in the Ninth Circuit over Washington's appeal. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."). "When the lower federal court lacks jurisdiction, [this Court has] jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (quotation and alteration marks omitted). Thus, this Court has jurisdiction only to "correct" the Ninth's Circuit's improper exercise of jurisdiction over Washington's claims, and not to consider the merits of his claim.

INTRODUCTION

In 1987, Petitioner Theodore Washington and two other men invaded the home of Ralph and Sterleen Hill, forced them to lay face down on their bedroom floor, tied their hands and feet, and ransacked their house before shooting them at close range, killing Sterleen and seriously injuring Ralph. Washington challenged his convictions in a habeas petition filed before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). After the district court denied relief, Washington filed an untimely notice of appeal that failed to confer jurisdiction in the Ninth Circuit. Nevertheless, that court decided the merits of Washington's claims, ultimately affirming the district court's denial of relief.

Washington now claims—for the first time—that both the district court and the court of appeals failed to afford deference to the state courts' factual findings. In so arguing, Washington focuses on the post-conviction court's *opinion* that the evidence linking him to the crimes was no greater than that linking his codefendant (whose convictions were reversed by the Arizona Supreme Court), while ignoring that the state courts found that "Washington entered the Hill residence while armed with a .38 caliber pistol and, though present with knowledge of the possibility or probability of a killing, did nothing to stop the same." Pet. App. 199a.

Because the Ninth Circuit lacked jurisdiction over Washington's appeal, this Court has jurisdiction only to correct the Ninth Circuit's error in considering Washington's claims. But no correction is necessary here, because the Ninth Circuit's ruling leaves Washington in the same position he would be in had the Court not

considered his claims. Moreover, Washington presents no compelling reason for this Court to grant review on his mine-run, fact-specific claim that the Ninth Circuit erred by denying habeas relief. This Court should deny review.

STATEMENT

On the evening of June 8, 1987, Theodore Washington, Fred Robinson, and Jimmy Lee Mathers traveled from Banning, California to Yuma, Arizona "to take care of some business." *State v. Robinson* (*Robinson I*), 796 P.2d 853, 856–57 (Ariz. 1990). In Yuma, the men arrived at the home of Ralph and Sterleen Hill and their teenaged son, LeSean. Ralph was the father of Susan Hill, Robinson's common law wife. Robinson and Susan had a "stormy relationship" in which Robinson verbally and physically abused Susan. *Id.* Susan attempted to leave Robinson, but each time Robinson used threats of violence against her and her family to force her return.

At about 11:45 p.m., Washington and at least one of the other men forced their way into the Hills' home. *Id.* at 857. LeSean escaped and ran to a neighbor's house to call for help. In the house, the men forced Ralph and Sterleen to lie face down on the floor, tied their hands and feet behind their backs, and ransacked their bedroom looking for valuables before shooting them both at close range with a .12-gauge shotgun, killing Sterleen and seriously injuring Ralph. *Id.*

A jury convicted all three men of first-degree murder and other offenses arising from the home invasion, and the trial court sentenced them to death. *Id.* at 858. The Arizona Supreme Court vacated Mathers' convictions, finding the evidence against him insufficient. *State v. Mathers*, 796 P.2d 866, 873 (Ariz. 1990). The Ninth Circuit

granted habeas relief on Robinson's claims that the cruelty aggravating circumstance was improperly applied to his conduct and that his counsel was ineffective at sentencing. *Robinson v. Schriro* (*Robinson II*), 595 F.3d 1086, 1113 (9th Cir. 2010).

The district court dismissed Washington's habeas petition. Washington filed a motion to amend the judgment, which the district court denied on June 8, 2005. *Washington v. Ryan* (*Washington I*), 789 F.3d 1041, 1043 (9th Cir. 2015). Washington filed an untimely notice of appeal on July 11, 2005. *Id.* Over the next 10 years, Washington attempted to render the notice timely, including filing a Federal Rule of Civil Procedure 60(b) motion asking the district court to reenter judgment one day later, which the court denied. *Id.* at 1043–44. A three-judge panel of the Ninth Circuit affirmed the district court's denial of Rule 60(b) relief, found that it lacked jurisdiction over Washington's appeal, and dismissed the appeal on that basis. *Id.* at 1048. However, in a 6-5 decision, an *en banc* panel reversed the district court's denial of Rule 60(b) relief and ordered the district court to "vacate and reenter its judgment denying Washington's petition for writ of habeas corpus, *nunc pro tunc*, June 9, 2005" to render the notice of appeal timely. *Washington v. Ryan* (*Washington II*), 833 F.3d 1087, 1102 (9th Cir. 2016). This Court denied Respondents' petition for writ of certiorari. *Ryan v. Washington*, 137 S. Ct. 1581 (2017).

The case returned to the three-judge panel, which initially granted habeas relief, in a divided opinion, on Washington's claim that counsel was ineffective in failing to obtain Washington's education and incarceration records. *See* Pet. App. 110a–12a. In a separate memorandum decision, the panel denied relief on Washington's other claims,

including his claim that his convictions were not supported by sufficient evidence. *See* Pet. App. 87a–93a. Both Washington and Respondents filed petitions for rehearing, to which the panel ordered responses. The petitions for rehearing were still pending when this Court issued its opinion in *Shinn v. Kayer*, 141 S. Ct. 517 (2020), holding that the Ninth Circuit had resolved a claim of ineffective assistance of counsel "in a manner fundamentally inconsistent with AEDPA." 141 S. Ct. at 523. On January 15, 2021, the Ninth Circuit panel withdrew its opinion, reopened the appeal, denied Washington's petition for rehearing, and denied Respondents' petition for rehearing as moot. Pet. App. 85a–86a. The panel requested that the parties file supplemental briefs addressing *Kayer*'s significance to this case, and it again heard arguments. *Id.*

After oral argument, the panel issued its opinion denying Washington relief. Pet. App. 45a–84a. Specifically, the panel held (contrary to the holding in the withdrawn opinion) that counsel was not ineffective in failing to obtain and review Washington's school and incarceration records. Pet. App. 66a–67a. Washington filed a petition for rehearing and petition for rehearing en banc. Dkt. 291. The panel denied rehearing and filed an amended opinion denying relief. Pet. App. 1a–44a.

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Washington has presented no such reason. In particular, Washington has not established that the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Rather, Washington "assert[s] error consist[ing] of erroneous factual findings," for which this Court "rarely grant[s]" certiorari review. Sup. Ct. R. 10. Because this Court lacks jurisdiction to consider the merits of Washington's appeal, and Washington merely seeks correction of the Ninth Circuit's perceived error in denying his sufficiency of the evidence claim, this Court should deny the petition.

I. THE NINTH CIRCUIT LACKED JURISDICTION OVER WASHINGTON'S APPEAL.

Federal Rule of Appellate Procedure 4(a)(1)(A) requires that a notice of appeal in a civil case be filed within 30 days of the entry of judgment. This deadline, which is also provided in 28 U.S.C. § 2107(a), is jurisdictional and therefore failure to comply with it deprives a court of appeals of jurisdiction. *See Bowles*, 551 U.S. at 214. No court "has … authority to create equitable exceptions to jurisdictional requirements." *Id.* Here, Washington failed to file his notice of appeal within FRAP 4(a)'s time limits. *Washington I*, 789 F.3d at 1045. And he failed to take advantage of the procedures in Rule 4(a)(5)(A) to remedy the late appeal. *Id.* Under FRAP 4(a) and this Court's jurisprudence, the Ninth Circuit lacked jurisdiction over the appeal.

In an attempt to render his appeal timely, Washington sought relief in district court under Federal Rule of Civil Procedure 60(b)(1). *Id.* Washington asked the district

court to vacate and reenter judgment "*nunc pro tunc* as of June 9, 2005," so that his notice of appeal would be rendered timely. *Id.* The district court denied relief, and a 3-judge panel affirmed and determined that it lacked jurisdiction over Washington's appeal. *See Washington I*, 789 F.3d at 1048. An en banc panel of the Ninth Circuit reversed and ordered the district court to "vacate and reenter its judgment denying Washington's petition for writ of habeas corpus, *nunc pro tunc*, June 9, 2005" for the sole purpose of rendering Washington's appeal timely, *Washington II*, 833 F.3d at 1102.

The Ninth Circuit's attempt to render Washington's notice of appeal timely by granting equitable Rule 60(b) relief was ineffective to confer jurisdiction over Washington's appeal. *Bowles* teaches that equitable considerations have no place in the enforcement of jurisdictional time limits, even when court error causes the untimely appeal (as the en banc panel found here). In *Bowles*, the district court extended the time for a petitioner to file a notice of appeal by 17 days—3 days longer than FRAP 4(a)(6) allowed. Bowles filed his notice of appeal within the time allowed by the district court, but outside the time allowed by FRAP 4(a)(6). 551 U.S. at 207. This Court held that equitable relief was unavailable to remedy the late appeal. *Id.* at 213–14.

"The lesson to be drawn from *Bowles* is that when Congress provides timely filing requirements, courts are meant to stick to them, even where the resulting consequences are harsh, as they admittedly are here." *Washington II*, 833 F.3d at 1106 (Bybee, J., dissenting, joined by Judges Callahan, Bea, Ikuta, and Watford). Thus, the

Ninth Circuit's use of equitable relief to avoid FRAP 4(a)'s jurisdictional requirements was at the time, and still is, ineffective to grant jurisdiction over Washington's appeal.

This Court likewise lacks jurisdiction over this matter, except to "correct[] the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95 (quotation marks omitted). But because the Ninth Circuit ultimately affirmed the district court's denial of habeas relief, this Court need not grant the writ to correct the Ninth Circuit's error. Any "correction" will leave Washington in the same position in which he comes to this Court. Accordingly, this Court should deny review.

II. WASHINGTON HAS WAIVED ANY ARGUMENT THAT THE FEDERAL COURTS FAILED TO DEFER TO THE STATE COURTS' FACTUAL FINDINGS.

Washington asserts that the district court and Ninth Circuit "failed to presume the correctness of and defer to the state court's clear factual findings regarding the lack of evidence tying Washington" to the home invasion and murder. Pet. at 12. In his opening brief in the Ninth Circuit, however, Washington argued that the district court erred by finding the *same* facts found by the state courts. *See* Ninth Cir. Dkt. 223, at 66 ("The decisions of the state and district courts denying Washington relief rely on two pieces of physical evidence to link him to the crime scene: a red bandana and a tan trench coat."). In his petition for rehearing after the Ninth Circuit rejected his claim, Washington asserted that "the panel, like the Arizona Supreme Court, erroneously assumes that Washington was present when Robinson and Mathers formulated the plan to go to Yuma." *See* Ninth Cir. Dkt. 267-1, at 19; *see also id.* at 20 ("[T]he panel, like the Arizona Supreme Court, assumes that Ralph Hill's description of a black man

with a red bandana matched Washington's appearance that night."); *id.* at 21 ("[T]he panel, like the Arizona Supreme Court, assumed that Washington carried a gun into the house."). This Court should not consider Washington's new argument that the federal courts failed to defer to the state courts' factual findings.

III. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT SUFFICIENT EVIDENCE SUPPORTS WASHINGTON'S CONVICTION.

"[I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 … the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). "[T]his inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but only "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318–19 (quotation marks omitted).

In habeas, federal courts must review the "last reasoned state-court opinion" on the claim at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991). In a pre-AEDPA case such as this one, federal courts must apply a "presumption of correctness" to the state court's factual findings. *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011). Legal questions and mixed questions of law and fact, however, are reviewed under a *de novo* standard. *Hovey v. Ayers*, 458 F.3d 892, 900 (9th Cir. 2006). "A sufficiency-of-the-evidence challenge in a habeas petition presents a mixed question of fact and law." *Hooks v. Workman*, 689 F.3d 1148, 1165 (10th Cir. 2012).

A. The post-conviction ruling is not the last reasoned state court decision on the merits of Washington's sufficiency of the evidence claim.

Washington asserts that the post-conviction court's comparison of the evidence against Mathers and Washington constitutes the last reasoned decision of the state courts on the merits of his claim of insufficient evidence. *See* Pet. at 16. But the post-conviction court did not consider the merits of the sufficiency of the evidence claim; instead it found the claim precluded. Pet. App. 197a. Moreover, two years after the post-conviction court issued the ruling on which Washington now relies, that court held (after an evidentiary hearing on Washington's ineffectiveness claims) that the Arizona Supreme Court had decided "the issue of the sufficiency of the evidence to support the conviction." Resp. App. A-5; *see Robinson I*, 796 P.2d at 864. It also explained that "[h]owever one may view the reversal of Mathers' conviction, it does not follow, either legally or logically, that Washington is entitled to the same treatment as his co-defendant James Mathers." Resp. App. A-3 ("[T]he highest court in the state has spoken to those exact issues and they are resolved for all time and purposes as to this court."). Washington ignores this ruling.

Thus, the Arizona Supreme Court's finding that the evidence is sufficient to establish Washington's culpability for the murder is the last reasoned decision on the merits of the sufficiency of the evidence claim. Any presumption of correctness would apply to the facts supporting this ruling, and not to the comments by the post-conviction court.

B. The Ninth Circuit's factual findings do not conflict with those of the state courts.

The Ninth Circuit found that the following evidence supported Washington's conviction:

> [T]he evidence shows that Robinson, Mathers, and Washington discussed going to Yuma on the day of the crimes. The evidence further shows that Washington was seen in Robinson's car with Mathers and Robinson leaving Banning on the night of the crime wearing a red bandana and a tan trench coat. Moreover, Ralph Hill's description of one of his attackers as a young black man wearing a red bandana with a moustache and long sideburns matched Washington's appearance that night. Ralph knew Robinson, who is also black, and testified the man he saw was not Robinson. The jury could reasonably conclude that Washington was one of the culpable intruders. Also, the shotgun used to shoot the Hills and a tan trench coat containing a slip of paper with Eric Robinson's name on it were found in a nearby field. A few hours after the murder, Washington called his girlfriend from Yuma, telling her he was stranded. From all this evidence, a rational trier of fact could have found beyond a reasonable doubt that Washington participated in the crime.

Pet. App. 90a–91a.

These facts are consistent with the state court's finding that "Robinson's son Andre was present when Robinson, Mathers, and Theodore Washington discussed going to Yuma. Washington was wearing a red bandana [and] Washington, Robinson, and Mathers were last seen around 6:00 p.m. embarking on their trip in Robinson's tan Chevette." *Robinson I*, 796 P.2d at 857; *see also id.* at 858 (supreme court noting that Washington called his girlfriend from Yuma later that night). And the Arizona Supreme Court explained in *Mathers* that Washington matched Ralph Hill's description of one of the men who invaded his home: "Hill stated that he was accosted by two men, one of whom he identified as a black man with a mustache and bandana.

Washington, a black male with a mustache, was seen leaving Banning wearing a bandana." 796 P.2d at 872.

Washington identifies two facts found by the Ninth Circuit that he believes conflict with the facts found by the state courts. First, he asserts that the Ninth Circuit erred by finding that the three men "discussed going to Yuma on the day of the crimes." Pet. at 13 (quoting Pet. App. 90a). As just explained, however, the Arizona Supreme Court found that "Robinson, Mathers, and Theodore Washington discussed going to Yuma." *Robinson I*, 796 P.2d at 857. Washington does not assert that the record fails to support this finding, but insists that it is inconsistent with the post-conviction court's statement that "no evidence suggests that Washington said anything about the trip or its purpose." Pet. at 13 (quoting Pet. App. 198a; alteration omitted). But the Ninth Circuit did not find that Washington was heard to *say* anything during the discussion about going to Arizona. And neither the state nor federal court found that the three men discussed the purpose of the trip. In any event, to the extent the Ninth Circuit's finding conflicts with the post-conviction court's comment, the record supports the Ninth Circuit's (and the supreme court's) conclusion that Washington was present for the discussion about going to Arizona.

Second, Washington claims that the post-conviction court "found that Robinson, when arrested, had a red bandana in his car with hairs that did not match Washington,"[2] and that the Ninth Circuit "cited the same red bandana as evidence supporting Washington's conviction." Pet. at 14 (emphasis omitted). The Ninth Circuit,

[2] The hairs were determined to be consistent with Mathers' hair. *See Mathers*, 796 P.2d at 872.

however, did not "cite[]" to or discuss the bandana found in Robinson's car. *See* Pet. App. 90a–91a. The court explained that "Washington was seen in Robinson's car with Mathers and Robinson leaving Banning on the night of the crime wearing a red bandana and a tan trench coat," and that "Ralph Hill's description of one of his attackers as a young black man wearing a red bandana with a moustache and long sideburns matched Washington's appearance that night." Pet. App. 90a. The Ninth Circuit said nothing about the bandana found in Robinson's car, let alone suggest that it was the same bandana Washington wore that night. Given that Washington was wearing the bandana during the home invasion and fled the house on foot, it is logical to conclude that the bandana found in Robinson's car shortly after the murder was not the same bandana Washington wore.[3]

The federal courts were required to "view[] the evidence in the light most favorable to the prosecution," in determining whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Both the Ninth Circuit and the district court complied with this Court's direction and found, as did the state courts, that the evidence was sufficient to support Washington's conviction. Washington has not established that any of the Ninth Circuit's factual findings conflict with those found by the state courts or are unsupported by the record.

[3] The district court observed that "there was no evidence that either [Washington] or Mathers was in Robinson's car after the Hills were attacked." Pet. App. 161a, n.10. Thus, evidence that Mathers' hair was on the bandana found in Robinson's car "could support the theory that both [Washington] and Mathers had red bandanas, but that Mathers removed his and left it in Robinson's car before entering the Hills' home." *Id.*

C. The post-conviction court's opinions of the evidence against Washington and Mathers are not entitled to a presumption of correctness.

In any event, the post-conviction court's comments that it "has a great deal of difficulty finding a basis to hold [Washington] culpable which does not apply, at least equally or in a greater manner, to James Mathers"; that "no greater evidence seems to place [Washington] at the scene"; and that it "has a difficult task in finding any evidence linking Washington to the crime," are not "facts" to which deference is owed. Pet. App. 197a–98a. Washington even *agrees* that these are not factual findings when he asserts that the post-conviction court "*analyzed* the evidence to support [its] *conclusion* that no greater evidence seems to place Washington at the scene," and that "the district court and the Ninth Circuit owed deference to the *opinion* of [the post-conviction court] as to the quantum of evidence against Washington." *Id.* at 16 (emphasis added; quotation marks omitted). Under pre-AEDPA law, the federal courts owed no deference to the state court's *opinions* about the evidence.[4] Nor were they required to review the evidence against Mathers before concluding that the evidence was sufficient to support Washington's conviction.

Washington is simply incorrect in asserting that the post-conviction court made "clear factual findings regarding the lack of evidence tying Washington to the crime." Pet. at 12. Instead, the court's comments that the evidence against Washington was no greater than that against Mathers may be interpreted as a criticism of Mathers'

[4] Washington suggests that a federal court would "flout deference" if it disagreed with a state court's finding that sufficient evidence supported a conviction. Pet. at 18. Under pre-AEDPA law, however, such a finding would be permitted. In any event, here the federal courts *agreed* with the state courts that sufficient evidence supported Washington's conviction.

acquittal, and not a conclusion that the evidence against Washington was lacking. *See* Pet. App. 197a ("[T]his court has a great deal of difficulty finding a basis to hold [Washington] culpable which does not apply, at least equally or in a greater manner, to James Mathers."). And even if the court found it "difficult" to find evidence linking Washington to the crime, this does not mean that no evidence existed. Pet. App. 198a. As the post-conviction court later found, Washington was not entitled to the same relief Mathers received. See Resp. App. A-3.

Washington further asserts that the post-conviction court's "factual findings are owed deference because the weight of the evidence is a question of fact." Pet. at 12 (citing *Tibbs v. Florida*, 457 U.S. 31, 37–38 (1982)). Even if Washington is correct, however, the post-conviction court did not assess the weight of any evidence. Instead, it compared the evidence against Washington to that against Mathers, concluding that the evidence against each was similar. Moreover, Washington does not explain how the state court "weighed" any evidence differently than did the federal courts. Given that the trial court and the supreme court found sufficient evidence to support Washington's convictions, no prejudice resulted to the extent the Ninth Circuit failed to defer to the court's "weighing" of the evidence.

In any event, the state supreme court, and not the post-conviction court, issued the last reasoned decision on Washington's sufficiency of the evidence claim. Accordingly, to the extent the Ninth Circuit did not defer to the post-conviction court's opinions comparing the evidence against Washington and Mathers, it was not required to do so.

D. The fact that Washington was sentenced to death does not entitle him to relief.

Washington asserts, without support or argument, that "[s]ummary reversal also may be appropriate here because Washington faces death." Pet. at 19. But the fact that a death sentence has been imposed does not entitle a petitioner to habeas relief where no constitutional violation has occurred. Nor does the fact that this Court has "granted summary reversals to numerous capital defendants in recent years" mean that Washington is also entitled to a summary reversal absent constitutional error in his conviction. *Id.* at 20.

Washington further asserts that summary reversal "provides an efficient means to clarify the contours of federal habeas law." *Id.* But given that Washington's petition is governed by pre-AEDPA standards, he does not explain how it would be "efficient" to clarify those standards more than 20 years after AEDPA changed the habeas landscape.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

Order re: Petition for post-conviction relief, August 12, 1994 (Yuma County Superior Court No. C-14064).

FILED

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CLERK OF SUPERIOR COURT
YUMA COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA,

Plaintiff,

v.

THEODORE WASHINGTON,

Defendant.

No. C-14064

ORDER RE: PETITION FOR POST CONVICTION RELIEF

The matter of Theodore Washington's petition for post conviction has now been heard, briefed, and all matters have been submitted for decision.

1. The disposition of the case against the codefendant, James Mathers, does not present a claim for relief which is colorable.

There was a conversation held at a fast food restaurant involving the three, then defendants. That conversation, which this court used against this defendant (viewing this as a communication between conspirators made during, in furtherance of, and in the course of a conspiracy), was that the group was going to take out some drug dealers. That the real ends of the "conspiracy" were otherwise makes no difference as this defendant voluntarily joined his co-defendant in the commission of a felony which ultimately caused the shot gun death of Sterleen Hill

and the massive wounds to Ralph Hill.

Whether petitioner now argues he received a fundamentally unfair and excessive penalty because Mathers was the actual killer and was set free. Or whether he argues that considering Mathers' acquittal his punishment violates constitutional protections concerning punishment. Or whether he argues the penalty for murder is cruel or unusual. Or that no greater evidence was available to support his conviction than that of Mathers, the highest court in the state has spoken to those exact issues and they are resolved for all time and purposes as to this court.

However one may view the reversal of Mathers' conviction, it does not follow, either legally or logically, that this petitioner is entitled to the same treatment as his co-defendant, James Mathers. It most certainly does not mandate a change in his sentence.

2. Competency of Counsel, is presented on many bases but must be examined in the light of case law on the subject.

To establish ineffective assistance of counsel, the defendant must prove that, (1) his attorney lacked minimal competence, determined by application of prevailing professional norms, *State v. Nash*, 143 Ariz. 392, 694 P.2d 222, cert. den. 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706; and that (2) counsel's deficient performance prejudiced his defense. *State v. Lee*, 142 Ariz. 210, 689 P.2d 153. See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The order in which the elements are examined is not important for if the proof of either prong is lacking, the defense is lacking. *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382; *State v. Salazar*, 146 Ariz. 540, 707 P.2d 944.

Simply suggesting that a capital case is "extraordinarily complex" does not make it so. As is commonly the case, counsel here is compared to the perfect example of counsel. We do not require him to be perfect, only that he be

competent as defined by case law.

a. Venue and Grand Jury: There was no challenge to the grand jury's verdict and the petit jury's verdicts moot such a contest. No request for change of venue was necessary because the jurors, to a person, either knew little about the facts and agreed to set aside their supposed knowledge in favor of the true facts they would hear during the trial. Certainly there was pretrial publicity but it was not such that it tainted the jury or the jury selection process.

b. Sentencing Phase: Counsel is rebuffed for not calling witnesses to present evidence of a mental impairment, poor upbringing or defendant's good behavior while in custody, at the sentencing phase.

Mr. Washington has been examined and found to have an organic mental disorder but no evidence of mental disease per Dr. McCullars. Nothing in the record supports a suggestion that this defendant was unaware of the activities at the Hill home on the evening of the crime and the court now rejects, and would have, at sentencing hearings, rejected a suggestion of Borderline Personality Disorder.

This court accepts as true that Mr. Washington has an antisocial personality disorder and is poorly adjusted to living in society, but there is nothing in his makeup now, nor in the opinion of the experts was there anything at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions with the law.

Defendant's lawyer saw nothing in his personality makeup or his actions which made him suspect a mental examination would bear fruit then any more than it has in the present tense of the case.

There may have been no mental examination at the time of sentencing, but the recent examination does not support any suggestion that one would have altered the sentence imposed.

It is also true that the court was aware of certain matters in mitigation at the time of sentencing. It was aware that the defendant had been a good, even a model prisoner while in Yuma and it appears that he has had a minimum of trouble while at the Department of Corrections.

This court has nothing except the indications of the defendant that he was either drug or alcohol dependent; that he was so dependent at the time of the crimes, or that either of those dependencies affected his ability to conform his actions to the demands of society. Neither of these, taken separately or with any other mitigating circumstance or circumstances would have mitigated against the sentence he has received.

c: Appeal Phase: This court finds that the issue of sufficiency of evidence to support the conviction included in the decision of the Supreme Court. Counsel for both defendants assault this point, but a reading of the opinion shows that the issue of the sufficiency of the evidence to support the conviction was examined.

CONCLUSION: As to the issues presented the court finds that the defendant has raised no factual or legal claim for relief which should be granted.

IT IS ORDERED that the petition for post conviction relief is overruled.

Done in Open Court August 12, 1994.

Judge of Superior Court

C14064.30W