SUPPLEMENTAL APPENDIX

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APPENDIX A

Richard D. Engler
Attorney at Law
593 Fourth Avenue
Yuma, Arizona 85364
(602)782-6507

Az. Bar No.: 0005323

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA Plaintiff, vs. **THEODORE WASHINGTON,** Defendant.	) No.: C-14064)) **AMENDED PETITION FOR POST CONVICTION RELIEF**))))))	

RICHARD D. ENGLER
ATTORNEY AT LAW
593 FOURTH AVENUE
YUMA, ARIZONA 85364
(602) 782-6507

I.

REVIEW OF EVIDENCE AND PROCEDURAL HISTORY OF THIS CASE

The petitioner, along with co-defendant Fred Robinson and Jimmy Mathers, was convicted of first degree murder and other noncapital crimes and sentenced to death after a trial at which the state presented evidence that Sterleen Hill was killed and her husband, Ralph Hill, Sr., badly injured during the course of a burglary and robbery. The petitioner, Robinson, and the Hills are black. Mathers is white.

Ralph Hill's daughter, Susan Hill, was Fred Robinson's common-law wife. The Arizona Supreme Court aptly described the association between Robinson and Hill as "a long, stormy relationship" in which Robinson physically and verbally abused Hill. Robinson and Hill separated numerous times during their relationship. At trial the state presented evidence that on those occasions when Susan Hill left Robinson, he would travel to wherever

RICHARD D. ENGLER
ATTORNEY AT LAW
593 FOURTH AVENUE
YUMA ARIZONA 85364
(602) 782-6507

and extremely suspicious of her, he became very hostile. Not surprisingly, he received a very adverse presentence report. (Id.)

The petitioner's defense counsel failed to consult with him regarding the aggravation/mitigation hearing until about twenty minutes before the actual hearing itself. At this time defense counsel informed the petitioner that this hearing would not change the sentencing. The petitioner was never informed of his right of allocution and appears that there was no serious discussion of the possible benefits that might be obtained by his testimony at this hearing -- which defense counsel apparently viewed only as only a formality in any event. (Id.)

It is highly unlikely that defense counsel's performance with regard to the sentencing phase of this case can be found to be reasonable under the circumstances. Moreover, it is submitted that the imposition of the death penalty as to the petitioner was a close question. Had defense counsel interviewed the petitioner, additional significant mitigating evidence could have been presented to this court. There can be no justification for the failure to develop and present this evidence and the resulting prejudice to the petitioner is apparent. Finally, the failure to advise the petitioner that a presentence report would be prepared, that he would be interviewed as part of that process and that it was in his best interest to fully cooperate with the adult probation department in the preparation of this report, is simply inexplicable. The prejudice arising from this failure is also apparent.

3. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE APPEAL PHASE

Lastly, there is the failure of petitioner's defense counsel to urge on appeal the insufficiency of evidence to support the conviction of the petitioner. The petitioner desired that this issue be raised, defense counsel agreed that this was a appealable issue, but unaccountably, failed to follow through. (Id.) Given the patent weakness of the state's case

RICHARD D. ENGLER
ATTORNEY AT LAW
593 FOURTH AVENUE
YUMA ARIZONA 85364
(602) 782-6507

against the petitioner -- a case no stronger against him than the state's case against Mathers -- defense counsel's failure to raise this as an issue on appeal is patently unreasonable. Had this issue been briefed and argued with regard to the petitioner, there is good reason to suppose that the Arizona Supreme Court might have set aside the petitioner's conviction and sentence as well. This is hardly hindsight, but rather an estimate of a substantial probability that should have been apparent to defense counsel at the briefing stage of the petitioner's appeal. The failure to argue insufficiency of evidence was prejudicial to the petitioner and the prospect of this prejudice was obvious at the time that the failure occurred.

4. SUMMARY

Defense counsel's performance fell below an objective standard of reasonableness at the stage of pre-trial preparation, preparation and investigation at the penalty phase of the case, and in presenting the petitioner's appeal. It is reasonably probable that but for these deficiencies in performance the petitioner would not now be awaiting execution. A reasonable probability is but "a probability sufficient to undermine confidence in the outcome," Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 674 (1984), and considering all of the circumstances of this case, it is difficult if not impossible to conclude that the petitioner today would remain under the sentence of death even had defense counsel provided effective representation.

III.

CONCLUSION

This is an extraordinary case, most especially in light of the Mathers decision. The petitioner now awaits execution because of a conviction and penalty arising from "evidence" that is insufficient when tested against the standards of rationality and reasonable doubt. It is respectfully submitted that the petitioner is entitled to either judgment of

acquittal or a new trial. Failing that he is entitled to a resentencing.

Dated this 24th day of February, 1992.

Richard D. Engler
Attorney at Law

By: Richard D. Engler

COPIES OF THE FOREGOING
MAILED THIS 24th DAY
of February, 1992;
TO:
Barbara Jarrett
Assistant Attorney General
1275 W. Washington
Phoenix, Az 85007

MAILED BY:

RICHARD D. ENGLER
ATTORNEY AT LAW
593 FOURTH AVENUE
YUMA, ARIZONA 85364
(602) 782 6507

STATE OF ARIZONA)
)SS.
County of Yuma)

THEODORE WASHINGTON first being duly sworn upon his oath deposes and says:

1. My defense counsel, Robert Clarke and I discussed insufficiency of evidence as a ground for appeal. He and I agreed that the state's evidence was extremely weak, I told him that I want him to raise this as an issue on appeal. He assured me that he would. He did not do so.

2. Mr. Clarke never discussed the penalty phase of my trial with me until about twenty (20) minutes before the mitigation/aggravation hearing.

3. Mr. Clarke never informed me that a pre-sentence report would be done. He never counseled me how critical that report could be with regard to sentencing. When the probation officer arrived for my interview, I was totally surprised and had no idea why she was there. I was still angry about my conviction believing that it was unfair and unjustified. Not knowing who she was, or what she wanted, I was very suspicious of her. Accordingly, I refused to cooperate with her. As a result I received a very unfavorable pre-sentencing report.

4. When I arrived in Court for the aggravation/mitigation hearing, Mr. Clarke informed me that this hearing would not change the sentencing. All of his actions were based on that belief, which I now know to be false.

5. Prior to that time, Mr. Clarke never asked me any questions whatsoever regarding my personal background for the purpose of developing mitigating evidence. Because of his lack of interest, several factors which I now understand could have been offered in mitigation were not developed and presented to the court for its

EXHIBIT C

4. In addition to failing to develop any real background information upon me, Mr. Clarke did not discuss the possibility of having me psychologically evaluated to document mitigating evidence of a non-violent disposition. I believe that such an evaluation would have greatly benefitted me because my life history demonstrated I am not a person who hurts other people. A psychological evaluation would have confirmed this and have been far more credible to the court then the testimony of family and friends.

5. Truly, Mr. Clark never seriously discussed the possibility of my testifying at the mitigation/aggravation hearing and he never explained my right of allocution and its importance. He simply told me that we were going to have a hearing and he was going to put on some character witnesses to tell the court "what kind of person I am."

FURTHER AFFIANT SAYTH NOT.

Theodore Washington
THEODORE WASHINGTON

SUBSCRIBED AND SWORN to before me this 20 day of February, 1992; by Theodore Washington.

Notary Public

My Commission Expires:

10 June 1993

APPENDIX B

Fredric F. Kay
Federal Public Defender
Denise I Young (State Bar No. 007146)
Dale A. Baich (Ohio Bar No. 0025070)
222 North Central Avenue, Suite 810
Phoenix, Arizona 85004
602.379.3670

and

John Trebon (State Bar No. 005375)
Trebon & Fine
308 N. Agassiz
Flagstaff, Arizona 86001
520.779.1713

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THEODORE WASHINGTON, Petitioner,	)	
vs.	)	CIV-95-2460-PHX-RGS
TERRY STEWART, et al., Respondents.	)	

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

I. Jurisdictional and factual background.

1) Petitioner, Theodore Washington ("Washington"), has been sentenced to death for a crime he did not commit. At best, the evidence offered against Washington at trial, "supports an

Fifth claim for relief.

Insufficient evidence existed to sustain Washington's convictions and sentences. In light of the judgment of acquittal entered by the Supreme Court of Arizona in State v. Mathers, Washington's conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution

68) Insufficient evidence existed to sustain Washington's convictions and/or sentence of death.

69) The following evidence, as well as the prior bad acts of Mathers and Robinson described in the third claim for relief, were offered against Washington and was found sufficient to sustain his conviction:

> . . . Robinson and Mathers left the residence [in Banning] travelling (sic) toward Washington's house. Washington, Robinson, and Mathers were last seen around 6:00 p.m. embarking on their trip in Robinson's tan Chevette.
>
> . . . About 11:45 p.m., someone knocked on the door. When LeSean opened the door, a man with a deep voice identified himself as James and told LeSean that he had some money for Ralph Hill. When LeSean opened the door to accept the money, the man attempted to grab LeSean.[60] LeSean pulled away, ran through the house past his parents' bedroom, and escaped through another door. Ralph and Sterleen Hill emerged from the bedroom as a result of the commotion and heard voices shout, "We're narcotics agents. We want the dope and the money." Ralph Hill could see shadows of two people but could not identify their voices. The two intruders forced Ralph and Sterleen to return to the bedroom and lie face down on the floor. Someone kept saying, "We know you got the money and the

[60]Le Sean was subsequently unable to identify the man at the door. In fact, Le Sean could not identify Washington, Robinson or Mathers as being the person at the door. Indeed, Le Sean was unable to discern even the race of the person at the door. Le Sean testified that "James" "sounded black" but that he "could have been white." TR Dec. 2, 1987 at 31, 55.

> dope." During this time a black man with a red bandana[61] and a moustache[62] "screwed" a handgun into Ralph's ear, then ransacked the drawers and closet. A second person stood over Ralph and Sterleen. Someone said, "We better get the kid."
>
> * * *
>
> At approximately 2:00 a.m. on June 9, 1987, Washington placed a telephone call to his girlfriend, Barbara Bryant. He gave her a Yuma telephone number at which he could be reached. Later, Washington called a second time and gave her a second Yuma telephone number. Bryant phoned Washington a total of three times at Yuma telephone numbers. During one of these conversations, Washington told her that he was stranded in Arizona. One phone number at which Bryant contacted Washington was assigned to the Yuma bus station. Washington returned to Banning by bus.[63]

70) This same evidence, as well as the prior bad acts of Mathers and Robinson described in the third claim for relief, was offered against Mathers and was found insufficient to sustain his conviction.[64]

71) Despite the fact that there was more evidence against Mathers, the Arizona Supreme Court reversed his conviction and entered a judgment of acquittal.[65] The court found:

> [T]he state presented evidence that appellant Mathers, and co-defendants Robinson and Washington left

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[61]When Robinson was stopped by the police moments after the Hills were shot, a red bandana was found in his car on the driver's side dashboard. TR Dec. 3, 1987 at 195; State v. Robinson, 165 Ariz at 55, 796 P.2d at 854.

[62]Fred Robinson had facial hair. *See* Defendants' Trial Exhibit W-E. Robinson is located in position number 2.

[63]State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

[64]State v. Mathers, 165 Ariz. at 71, 796 P.2d at 873.

[65]Although the supreme court determined the "state . . . failed to marshal evidence sufficient to withstand Mathers' Rule 20 motion[,]" the court also conducted an independent review of the entire record as Mathers' motion challenged the sufficiency of the evidence. State v. Mathers, 165 Ariz. at 69, 796 P.2d at 871.

> Banning, California, and drove to Yuma, Arizona, on the afternoon of June 8, 1987. Appellant Mathers told Andre Robinson before they left that they were going to Arizona to take care of some business. Obviously the "business" appellant Mathers referred to required the use of weapons, as a shotgun, two pistols, and ammunition were loaded into the car.

Brief for State at 21.

We agree the evidence would support a finding that Mathers said they were going to "Arizona [not Yuma] to take care of business," that Mathers was seen helping load a duffle bag and some guns into Robinson's car, and that Mathers was seen in the car apparently leaving Banning with Robinson and Washington. We find no evidence to support the state's assertion that "obviously" the "business" referred to required the use of weapons.

The second portion of the state's argument relating to Mathers is the assertion that: "On one of those trips, appellant Mathers drove with codefendant Robinson to Philadelphia to get Susan." Brief for State at 21. We have carefully examined the record concerning the Philadelphia trip. It shows that in January 1987, Mathers travelled (sic) to Philadelphia with Robinson, Robinson's cousin Louis Charles, and Robinson's children, Andre and Truman. Truman testified that they went to Philadelphia to look for his mother; Andre testified that Robinson told him they were going to Philadelphia to see his mother. There was no testimony whatsoever indicating Mathers' motive, intent or knowledge in accompanying Robinson to Philadelphia. In Philadelphia, Susan was lured to a train station by a call from her daughter Misha that she, Misha, was in trouble. There is no evidence Mathers knew of or participated in this deception. At the train station, Robinson, according to Susan, forced Susan into the car. The group drove to a motel for the night. The next day, the group took Susan to her aunt and uncle's house to gather some clothing. On the way back to California, Robinson and Mathers argued. Robinson left Mathers in Oklahoma. We fail to see how Robinson's abduction of Susan in Philadelphia can be used against Mathers, absent any evidence of Mathers' complicity in it.

The third and last reference to Mathers in the state's argument is: "Appellant Mathers was arrested in Coachella the next day after being confronted by Susan and some of her relatives. Appellant Mathers told them that codefendant Robinson was in Yuma and admitted that he [Mathers] had also been in Arizona." Brief for State at 23.

> This argument is partially supported by the record. Mathers was not arrested in Coachella but was, instead, arrested in Yuma after he agreed to accompany two officers there. Susan and two carloads of Hill family members and friends confronted Mathers near Coachella the day following the murder. After Mathers had been questioned by the group, he fled to a nearby store. The evidence is conflicting about whether one of the group pulled a gun on Mathers. There is evidence to support the state's assertion that Mathers "admitted" that he had been in Arizona, and stated that Robinson was in Yuma. At best, this evidence supports an inference that Mathers went to Yuma with Robinson and Washington, reached Yuma, was present in Yuma, and returned from Yuma to California. *It does not, however, establish that Mathers went to the Hills' home, was at the Hills' home, was in the Hills' home, or participated in the murder and other crimes.*[66]

72) Applying the same analysis and test from Mathers to Washington, there is less evidence against Washington than there was against Mathers. The state court, on post-conviction review of Washington's conviction stated: "[q]uite truthfully, this court has a great deal of difficulty finding a basis to hold this defendant culpable which does not apply, at least equally or in a greater manner, to James Mathers. If Mathers, who was present at all times before the entry into the Hill residence, was not guilty of conspiring to rob and kill, no greater evidence seems to place this defendant at the scene."[67] However, feeling constrained by the decision of the supreme court on direct review, the post-conviction court left the conviction undisturbed. "It is true that this court, at sentencing, viewed Mathers as the triggerman. It is also true that he is now free while the two defendants who probably did not, physically, kill anyone are on death row. This does not mean that this court can 'forgive' them or reexamine their sentences which have been affirmed by the Supreme

[66]State v. Mathers, 165 Ariz. at 68-69, 796 P.2d at 869-70 (emphasis supplied).

[67]State v. Washington, No. C-14064 (Yuma Cty. Super. Ct. Aug. 6, 1992) at 3.

Court."[68]

73) The findings that exculpate Mathers also exculpate Washington. For instance, Mathers was seen in Robinson's car apparently leaving Banning with Robinson and Washington. At best this evidence supports inference that Mathers went to Yuma with Robinson and Washington, and returned from Yuma to California. This evidence did not establish that Mathers went to the Hill's home, was at the Hill's home, was in the Hill's home or participated in murder and other crimes. The same could be said for Washington.

74) Evidence that tended to inculpate Mathers, but did not inculpate Washington, was ignored by the supreme court. For instance, evidence was introduced that Mathers said going to Arizona to take care of business; however no such evidence suggests that Washington said anything about the trip or its purpose. Mathers was seen helping load a duffel bag and some guns in Robinson's car; however, no evidence suggests that Washington assisted Mathers in loading the car. In fact the record suggests it was Robinson who assisted who assisted Mathers.

75) Police procedures in the house seem to have been lacking - should have processed everything, leaving nothing unturned. Police procedures in maintaining accountability of the evidence is definitely lacking. It appears that inventories and testing were not conducted as they should have been. For instance, the tan trench coat recovered near the scene of the crime was never tested. In addition, there are many unidentified, yet probably identifiable, latent prints obtained during this investigation that are not adequately addressed. Also, Viola Sandate, the scene technician, processed the drawers of the dresser and night stand in the bedroom for latent prints. She

[68] *Id.* at 4.

did not process the other rooms because Lt. Owen instructed her what to process and what not to process. The crime lab apparently did not examine these latent prints obtained at the scene by Sandate.[69]

76) Washington's rights as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution; the Right to Counsel Clause of the Sixth Amendment to the United States Constitution; the Eighth Amendment protections against cruel and unusual punishment; and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, were violated as a result of a conviction against the manifest weight of the evidence and/or based upon insufficient evidence.

Sixth claim for relief.

Washington's rights guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution were violated as a result of the ineffective assistance of counsel that he received at the trial phase of the capital proceedings.

77) The United State Supreme Court in ~~Strickland v. Washington,~~ 466 U.S. 688, set forth the test for ineffective assistance of counsel. The inquiry must focus on (1) whether Washington received reasonably effective assistance and, (2) if not, whether counsel's errors resulted in a reasonable probability that the outcome would have been different. *Id.*

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[69]Washington will move to include support for this statement in the record before this court pursuant to Rule 7 of the Rule Governing Section 2254 Proceedings in the District Courts. Washington's efforts to further support these allegations have been hampered in two ways. First, exhibits introduced at trial and evidence collected by the sheriff are missing. The Clerk of the Yuma County Superior Court is unable to account for missing items of evidence. Similarly, the sheriff has been unable to locate evidence and it appears that at least two boxes of evidence are still missing. Second, Washington has attempted to learn about the procedures employed by the Arizona Department of Public Safety ("DPS") Crime Lab concerning the handling of evidence and the processing of latent prints. These efforts have failed as the DPS has refused to meet with Washington's representatives. Instead, the DPS would only provide information pursuant to the discovery process.

did not meet the mandates of the United States Supreme Court.

133) Simply put, the state supreme court did not afford Washington a fair proportionality review that extends beyond mere "lip service." Washington will never know whether his death sentence is indeed proportionate or disproportionate to the penalty received by others committing similar crimes.

134) The denial of a right promised Washington under Arizona law operated as a violation of the guarantees afforded by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Thirteenth claim for relief.

Counsel was ineffective in his representation on direct appeal. This violated Washington's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

135) The United State Supreme Court in Strickland v. Washington, 466 U.S. 688, set forth the test for ineffective assistance of counsel. The inquiry must focus on (1) whether Washington received reasonably effective assistance and, (2) if not, whether counsel's errors resulted in a reasonable probability that the outcome would have been different. *Id.*

136) Appellate counsel failed to exercise the skill, judgment and diligence expected of reasonably competent criminal defense lawyers. There was no tactical or strategic reason for counsel's failure to review and prepare adequately for the appellate phase of the capital proceedings.

137) Appellate counsel was ineffective at the sentencing phase as he failed to raise and argue the insufficiency of the evidence to sustain the conviction. Had counsel not committed the error as described above, the results of the appeal would have been different. *See* Third, Fourth,

Fifth, Sixth and Twelfth Claims for Relief; State v. Mathers, 165 Ariz. 64, 796 P.2d at 866.

138) Washington's rights as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution; the Right to Counsel Clause of the Sixth Amendment to the United States Constitution; the Eighth Amendment protections against cruel and unusual punishment; and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, were violated as a result of the actions of counsel.

Fourteenth claim for relief.

The trial court failed to consider evidence of mitigation offered at trial and the supreme court failed to consider evidence of mitigation in its independent review. This violated Washington's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

139) At sentencing in this case, the trial court had before him the following evidence: Robinson exerted influence over Washington[99]; Washington was a follower and easily manipulated;[100] Washington was a minor participation; [101] Washington was fairly young and can be rehabilitated;[102] there was nothing in Washington's background but burglary conviction, he was a loving and caring father and individual and he was never involved in any violent or hostile acts;[103]

[99]TR Jan 8, 1988 at 170.

[100]TR Jan 8, 1988 at 172, 174.

[101]TR Jan 8, 1988 at 173.

[102]TR Jan 8, 1988 at 174.

[103]TR Jan 8, 1988 at 175.

habeas corpus to have Washington brought before it to the end that he may be relieved of his unconstitutional sentences;

8) Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

Respectfully submitted this 27th day of May, 1997.

Fredric F. Kay
Federal Public Defender
Denise I. Young
Dale A. Baich

and

Trebon & Fine

By _____
COUNSEL FOR PETITIONER

Copy of the foregoing
mailed this 27th day of
May, 1997 to:

Gregory A. McCarthy
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997

c:\washingt\habeas.pet\.5.27.97 g.

APPENDIX C

Fredric F. Kay
Federal Public Defender
Dale A. Baich (Ohio Bar No. 0025070)
Assistant Federal Public Defender
222 North Central Avenue, Suite 810
Phoenix, Arizona 85004
602.379.3670

John Trebon (State Bar No. 005375)
Trebon & Fine
308 N. Agassiz
Flagstaff, Arizona 86001
520.779.1713

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THEODORE WASHINGTON,

Petitioner,

vs.

TERRY STEWART, et al.,

Respondents.

No. CIV-95-2460-PHX-RGS

PETITIONER'S MEMORANDUM REGARDING MERIT CLAIMS

Petitioner Theodore Washington ("Washington"), pursuant to an order of the Court,[1] offers his memorandum addressing the merits of the claims as alleged in the First Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 by a Person in State Custody ("First Amended Petition") that are now pending before the Court.

I. Introduction.

Theodore Washington is before this Court because the death penalty process in Arizona failed miserably. The system established in this state demands that a bifurcated trial be held on questions of guilt and sentencing; mandates that an appeal

[1]District Court Docket Entry No. ("Doc. No.") 64 at 35.

and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U.S. Const., Amdt. 6; Pointer v. Texas, 380 U.S. 400 (1965) (applying Sixth Amendment to the States). Central to the Confrontation Clause is the right to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845, (1990). The accused has a right to force a witness "'to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'" California v. Green, 399 U.S. 149, 158 (1970) (footnote and citation omitted). The Supreme Court has repeatedly rejected suggestions that the Confrontation Clause should be narrowly construed.

Here, Washington should have been permitted to cross-examine Barbara Bryant regarding the statements made by Washington in the telephone conversations. The state opened the door by asking the question of the witness on direct examination. Allowing cross-examination on this point would have ensured the reliability of the evidence against Washington, or alternatively would have demonstrated that the already weak, circumstantial case presented by the state was even thinner.

■ ■ ■

The refusal to permit cross-examination not only violated Washington's right to confrontation under the Sixth Amendment, but his rights to due process and a reliable sentencing hearing under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

C.

Insufficient evidence existed to sustain Washington's convictions and sentences. In light of the judgment of acquittal entered by the Supreme Court of Arizona in State v. Mathers, Washington alleges in his fifth claim for relief that his conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments

to the United States Constitution.

1. Relevant facts regarding Washington.

Insufficient evidence existed to sustain Washington's convictions and/or sentence of death. The following evidence, as well as the prior bad acts of Mathers and Robinson described at Part III(A) *supra*, was offered against Washington and found **SUFFICIENT** to uphold his conviction.[163]

a. Washington in a car in California.

> On June 8, 1987, Robinson and Mathers left the residence in Banning, California traveling toward Washington's house. Washington, Robinson, and Mathers were last seen around 6:00 p.m. embarking on their trip in Robinson's tan Chevette.[164]

b. Outside the Hill home.

i. One man knocks on the door.

> Later that day in Yuma, Arizona just before midnight, LeSean Hill opened the door of his parents house. A man with a deep voice identified himself as James and told LeSean that he had some money for Ralph Hill. When LeSean opened the door to accept the money, the man attempted to grab LeSean. LeSean pulled away, ran through the house past his parents' bedroom, and escaped through another door.[165]

ii. Washington is not identified as the man.

> Le Sean was unable to identify the man at the door. In fact, Le Sean could not identify Washington, Robinson or Mathers as being the person at the door. Indeed, Le Sean was unable to discern even the race of the person at the door. Le Sean testified that "James" "sounded black" but that he "could have been white."[166]

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[163] *See* State v. Mathers, 165 Ariz. at 71, 796 P.2d at 873.

[164] TR Dec. 4, 1987 at 133-137.

[165] State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

[166] TR Dec. 2, 1987 at 31, 55.

c. Inside the Hill home.

i. Events in the home.

Ralph and Sterleen Hill emerged from the bedroom as a result of the commotion and heard voices shout, "We're narcotics agents. We want the dope and the money." Ralph Hill could see shadows of two people but could not identify their voices. The two intruders forced Ralph and Sterleen to return to the bedroom and lie face down on the floor. Someone kept saying, "We know you got the money and the dope." During this time a black man with a red bandana and a moustache "screwed" a handgun into Ralph's ear, then ransacked the drawers and closet. A second person stood over Ralph and Sterleen. Someone said, "We better get the kid."[167]

ii. Who was in the home?

Washington was not identified by Ralph Hill as being in the home. Mr. Hill said a "black man" was in the home. Washington is African-American. Fred Robinson is African-American too. Fred Robinson had facial hair.[168] When Robinson was stopped by the police moments after the Hills were shot, a red bandana was found in his car on the driver's side dashboard.[169] Mathers' hair was found in the red bandana.[170]

d. Washington in Yuma.

At approximately 2:00 a.m. on June 9, 1987, Washington placed a telephone call to his girlfriend, Barbara Bryant. He gave her a Yuma telephone number at which he could be reached. Later, Washington called a second time and gave her a second Yuma telephone number. Bryant phoned Washington a total of three times at Yuma telephone numbers. During one of these conversations, Washington told her that he was stranded in Arizona. One phone number at which Bryant contacted Washington was assigned to the Yuma bus station.

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[167]State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

[168]*See* Defendants' Trial Exhibit W-E. Robinson is located in position number 2.

[169]TR Dec. 3, 1987 at 195; State v. Robinson, 165 Ariz at 55, 796 P.2d at 854.

[170]TR Nov. 30, 1987 at 19.

Washington returned to Banning by bus.[171]

Washington was in Yuma, Arizona on the day of the crime.

2. Relevant facts regarding Mathers.

The following evidence, as well as the prior bad acts of Mathers and Robinson described at Part III(A) *supra*, was offered against Mathers and found **INSUFFICIENT** to sustain his conviction.[172]

a. Mathers in a car in California.

> [T]he state presented evidence that appellant Mathers, and co-defendants Robinson and Washington left Banning, California, and drove to Yuma, Arizona, on the afternoon of June 8, 1987. Appellant Mathers told Andre Robinson before they left that they were going to Arizona to take care of some business. Obviously the "business" appellant Mathers referred to required the use of weapons, as a shotgun, two pistols, and ammunition were loaded into the car. Brief for State at 21.
>
> We agree the evidence would support a finding that Mathers said they were going to "Arizona [not Yuma] to take care of business," that Mathers was seen helping load a duffle bag and some guns into Robinson's car, and that Mathers was seen in the car apparently leaving Banning with Robinson and Washington. We find no evidence to support the state's assertion that "obviously" the "business" referred to required the use of weapons.[173]

b. Outside the Hill home.

i. One man knocks on the door.

> Later that day in Yuma, Arizona just before midnight, LeSean Hill opened the door of his parents house. A man with a deep voice identified himself as James and told LeSean that he had some money for Ralph Hill. When LeSean opened the door to accept the money, the man attempted to grab LeSean. LeSean pulled away, ran through the house past his parents' bedroom, and

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[171] State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

[172] *See* State v. Mathers, 165 Ariz. at 71, 796 P.2d at 873.

[173] State v. Mathers, 165 Ariz. at 68, 796 P.2d at 869.

escaped through another door.[174]

ii. Who knocked on the door?

Le Sean was unable to identify the man at the door. In fact, Le Sean could not identify Washington, Robinson or Mathers as being the person at the door. Indeed, Le Sean was unable to discern even the race of the person at the door. Le Sean testified that "James" "sounded black" but that he "could have been white."[175] Mathers was not identified as being outside the Hill home. However, Mathers' first name was "James," and although he was white, he was often described as "acting black."[176]

c. Inside the Hill home.

i. Events in the home?

Ralph and Sterleen Hill emerged from the bedroom as a result of the commotion and heard voices shout, "We're narcotics agents. We want the dope and the money." Ralph Hill could see shadows of two people but could not identify their voices. The two intruders forced Ralph and Sterleen to return to the bedroom and lie face down on the floor. Someone kept saying, "We know you got the money and the dope." During this time a black man with a red bandana and a moustache "screwed" a handgun into Ralph's ear, then ransacked the drawers and closet. A second person stood over Ralph and Sterleen. Someone said, "We better get the kid."[177]

ii. Who was in the home?

Mr. Hill said a "black man" was in the home. The African-American man had a pistol, wore a red bandana and had a moustache.

Fred Robinson is African-American. Fred Robinson had facial hair.[178] When Robinson was stopped by the police moments after the Hills were shot, a red bandana

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[174]State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

[175]TR Dec. 2, 1987 at 31, 55.

[176]Declaration by Dana Huseth ("Huseth Declaration") at ¶ 3, attached as Exhibit L to First Rule 7 Motion.

[177]State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

[178]*See* Defendants' Trial Exhibit W-E. Robinson is located in position number 2.

was found in his car on the driver's side dashboard.[179] Mathers' hair was found in the red bandana.[180]

d. Mathers in Yuma.

> Mathers was arrested in . . . Yuma after he agreed to accompany two officers there. Susan and two carloads of Hill family members and friends confronted Mathers near Coachella the day following the murder. After Mathers had been questioned by the group, he fled to a nearby store. The evidence is conflicting about whether one of the group pulled a gun on Mathers. There is evidence to support the state's assertion that Mathers "admitted" that he had been in Arizona, and stated that Robinson was in Yuma. At best, this evidence supports an inference that Mathers went to Yuma with Robinson and Washington, reached Yuma, was present in Yuma, and returned from Yuma to California. *It does not, however, establish that Mathers went to the Hills' home, was at the Hills' home, was in the Hills' home, or participated in the murder and other crimes.*[181]

Mathers was in Yuma, Arizona on the day of the crime.

3. Washington versus Mathers.

Another way to look at the evidence against Washington and the evidence against Mathers is to read the two direct appeal decisions side-by-side.

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[179]TR Dec. 3, 1987 at 195; State v. Robinson, 165 Ariz at 55, 796 P.2d at 854.

[180]TR Nov. 30, 1987 at 19.

[181]State v. Mathers, 165 Ariz. at 68-69, 796 P.2d at 869-70 (emphasis supplied).

Washington

. . . Robinson and Mathers left the residence [in Banning] travelling (sic) toward Washington's house. Washington, Robinson, and Mathers were last seen around 6:00 p.m. embarking on their trip in Robinson's tan Chevette.

. . . About 11:45 p.m., someone knocked on the door. When LeSean opened the door, a man with a deep voice identified himself as James and told LeSean that he had some money for Ralph Hill. When LeSean opened the door to accept the money, the man attempted to grab LeSean. LeSean pulled away, ran through the house past his parents' bedroom, and escaped through another door. Ralph and Sterleen Hill emerged from the bedroom as a result of the commotion and heard voices shout, "We're narcotics agents. We want the dope and the money." Ralph Hill could see shadows of two people but could not identify their voices. The two intruders forced Ralph and Sterleen to return to the bedroom and lie face down on the floor. Someone kept saying, "We know you got the money and the dope." During this time a black man with a red bandana and a moustache "screwed" a handgun into Ralph's ear, then ransacked the drawers and closet. A second person stood over Ralph and Sterleen. Someone said, "We better get the kid."

* * *

At approximately 2:00 a.m. on June 9, 1987, Washington placed a telephone call to his girlfriend, Barbara Bryant. He gave her a Yuma telephone number at which he could be reached. Later, Washington called a second time and gave her a second Yuma telephone number. Bryant phoned Washington a total of three times at Yuma telephone numbers. During one of these conversations, Washington told her that he was stranded in Arizona. One phone number at which Bryant contacted Washington was assigned to the Yuma bus station. Washington returned to Banning by bus.

State v. Robinson, 165 Ariz. at 55-56, 796 P.2d at 857-58.

Mathers

We agree the evidence would support a finding that Mathers said they were going to "Arizona [not Yuma] to take care of business," that Mathers was seen helping load a duffle bag and some guns into Robinson's car, and that Mathers was seen in the car apparently leaving Banning with Robinson and Washington. . . .

* * *

. . . Mathers was not arrested in Coachella but was, instead, arrested in Yuma after he agreed to accompany two officers there. Susan and two carloads of Hill family members and friends confronted Mathers near Coachella the day following the murder. After Mathers had been questioned by the group, he fled to a nearby store. The evidence is conflicting about whether one of the group pulled a gun on Mathers. There is evidence to support the state's assertion that Mathers "admitted" that he had been in Arizona, and stated that Robinson was in Yuma. At best, this evidence supports an inference that Mathers went to Yuma with Robinson and Washington, reached Yuma, was present in Yuma, and returned from Yuma to California. *It does not, however, establish that Mathers went to the Hills' home, was at the Hills' home, was in the Hills' home, or participated in the murder and other crimes.*

State v. Mathers, 165 Ariz. at 68-69, 796 P.2d at 869-70 (emphasis supplied).

The supreme court concluded Washington was in Yuma on the night in question and that was sufficient to uphold his conviction. The supreme court also concluded that Mathers was in Yuma on the night in question but this evidence was insufficient to sustain his conviction.

4. The trial judge questioned the sufficiency of the evidence.

The state of Arizona has in place a post-conviction process, defined in Ariz. R. Crim. P. 32. Proceedings under Rule 32 are designed to provide convicted prisoners with an adequate opportunity to obtain relief from improper or unjust convictions under the state constitution or statutes, or the federal Constitution. Rule 32 proceedings collapsed five former avenues of post-conviction relief into one, which is initiated before the original trial judge as part of the original criminal proceeding.[182]

In disposing the claims, the superior court was obviously troubled by the fact that Mathers had been acquitted by the Arizona Supreme Court on direct review while Washington's conviction was upheld and he remained under sentence of death. The court found:

> Quite truthfully, this court has a great deal of difficulty finding a basis to hold this defendant culpable which does not apply, at least equally or in a greater manner, to James Mathers. If Mathers, who was present at all times before the entry into the Hill residence, was not guilty of conspiring to rob and kill, no greater evidence seems to place this defendant at the scene.

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[182]Rule 32.1 enumerates the grounds upon which relief may be granted. Among those grounds is Rule 32.1(e) which allows relief on the basis of newly-discovered material facts. If newly-discovered material facts exist, Rule 32.1(e)(1) mandates that the court consider the probability that such facts would have changed the verdict or sentence. The court is directed by Rule 32.6 to hold a hearing after it determines that the petitioner has raised an issue of material fact or law which would entitle him to relief. Finally, Rule 32.8 says that a petitioner "shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses in his behalf."

James Mathers' conviction was reversed as a mitigating factor. It is true that this court, at sentencing, viewed Mathers as the triggerman. It is also true that he is now free while the two defendants who probably did not, physically, kill anyone are on death row. This does not mean that this court can "forgive" them or reexamine their sentences which have been affirmed by the supreme court.

The record is silent, insofar as this court can tell, as to the supreme court considering the reversal of Mathers' case with regard to Petitioner's case. This court has a difficult task in finding any evidence linking Washington to the crime.

The findings in State v. Mathers, 165 Ariz. 64, at 68-70, which might apply to Washington, were:

1. ". . . the evidence would support a finding that Mathers said they were going to Arizona (not Yuma) to take care of business . . ."

No evidence suggests that Washington said anything about the trip or its purpose.

2. ". . . that Mathers was seen helping load a duffel bag and some guns into Robinson's car . . ."

No evidence suggests that Washington assisted Mathers in doing the loading. In fact the record suggests it was Robinson who assisted.

3. " . . . that Mathers was seen in the [Robinson's] car apparently leaving Banning with Robinson and Washington."

4. "At best the evidence supports an inference that Mathers went to Yuma with Robinson and Washington, and returned from Yuma to California. It does not, however, establish that Mathers went to the Hill's home, was at the Hill's home, was in the Hill's home, or participated in the murder and other crimes."

These two areas of evidence show first, clearly, that all three of the defendants rode together from Banning to Yuma and the record supports the fact that only Mathers, apparently, was able to return to California.

But what other evidence was there of the activities of this petitioner which separates him from Mathers? From the facts found in State v. Robinson, 165 Ariz. 51, at 54-56, we know that only Robinson was seen leaving the area in his auto; that Robinson was stopped and had the red bandana (with hairs which did not match Washington) and

Mathers' duffel bag.

> We know that Washington was in Yuma as he called Ms. Bryant from here. He told the officers what Robinson said about the purpose of the trip, but never said he was at or in the house.[183] No one else placed him in the house either. The only reference was to an unidentified, black male who had a mustache.
>
> However, the supreme court has accepted as true that the evidence showed that Washington entered the Hill residence while armed with a .38 caliber pistol and, though present with knowledge of the possibility or probability of killing, did nothing to stop the same. This court must accept that as true and does.
>
> To this court's view this may present a colorable claim for relief at some point in time, it seems most appropriate to allow counsel to make a record so it could be examined in the event that another court wishes to accept review.[184]

Clearly, the court felt that in light of the acquittal of Mathers, the evidence was not sufficient to sustain Washington's conviction. However, the court felt constrained by the ruling by the Arizona Supreme Court in Washington's appeal in declining to hold an evidentiary hearing on this claim or to give it full consideration on the merits, the trial court instead stated: "[t]o this court's view [the sufficiency of the evidence issue and Mathers' acquittal] may present a colorable claim for relief at some point in time, it seems most appropriate to allow counsel to make a record so it could be examined in the event that another court wishes to accept review."[185]

5. Argument.

The findings by the state supreme court that exculpate Mathers also exculpate Washington.

Sentencing guidelines have long been used in state and federal court to increase

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[183]It was not proper for the court to consider statements by Washington. *See* Part II (L) and (M) *supra*.

[184]Td. at 192, pp. 3-5.

[185]Td. at 192, 193.

the degree of uniformity of sentencing for those who commit similar crimes and display similar degrees of culpability. In capital sentencing, establishing the degree of culpability serves an even greater role because of the severity of the punishment. Therefore, the culpability of co-defendants in relation to the defendant has is taken into account in several ways.

a.

Appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman v. Georgia, 408 U.S. 238 (1972). The teaching of Furman was that a state may not leave the decision of whether a defendant lives or dies to unfettered discretion because such a scheme inevitably results in death sentences that are "wantonly and . . . freakishly imposed" and "are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Id.* at 309-310. (Stewart, J., concurring).

In response to Furman, many states added proportionality reviews to their capital statutes. These statutes insured that sentencers will be "given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision." Gregg, 428 U.S. at 192 (plurality opinion of Stewart, Powell, and Stevens, JJ.). The Gregg Court in particular underscored the useful function of proportionality review and characterized it as assuring that "'no death sentence is affirmed unless in similar cases throughout the State the death penalty has been imposed generally. . . .'" Gregg, 428 U.S. at 205 *quoting* Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975).

b.

The sentencing scheme in federal death penalty cases "allows consideration of evidence of a co-defendant's sentence at the punishment phase of the trial" when the two defendants are equally culpable. *See* Cordova v. Johnson, 993 F.Supp. 473, 503 (1998). In addition, "when there is substantial disparity in sentences imposed upon

different individuals engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation." *See* United States v. Capriola, 537 F.2d 319, 321 (9th Cir.1976).

Although these considerations are generally made at the original sentencing, or during proportionality review on appeal, the same issues have emerged in the present court. In order to uphold the "appearance of judicial integrity and impartiality" that these cases refer to, the court must conclude that Washington and his co-defendant, who was acquitted, must be viewed in the same light.

■ ■ ■

A review of this case from trial, to appeal and through state collateral proceedings demonstrates that there is no evidence to suggest that Washington was transported to or that he was at the Hill home. There is no physical evidence to place him in the home, and despite the fact that there were two eyewitnesses who viewed a photo array and live line-up, Washington was not identified as being one of the invaders. Finally, there was no link between Washington and the abandoned property found near the scene. All that the state could show was that Washington was in Yuma, Arizona on the day of the crime. It is fundamentally unfair for one defendant in a criminal matter to walk free while another suffers the penalty of death when the evidence against each is equal. The application of the facts by the state supreme court as to Washington was unreasonable.

Washington's rights as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution; the Right to Counsel Clause of the Sixth Amendment to the United States Constitution; the Eighth Amendment protections against cruel and unusual punishment; and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, were violated as a result of a conviction against the manifest weight of the evidence and/or based upon insufficient evidence.

a life sentence. Had counsel not committed the errors as described above, the results of the sentencing hearing would have been different.

3. Appellate counsel.

Appellate counsel was ineffective at the sentencing phase as he failed to raise and argue the insufficiency of the evidence to sustain the conviction.

Robert Clarke, Washington's trial attorney, also represented Washington on direct appeal. At the trial and at its conclusion, Clarke forcefully argued that the state's evidence against Washington was insufficient to sustain a conviction, and moved for an acquittal and a new trial..[207] However, Clarke began the sentencing hearing by again moving for an acquittal and a new trial.[208] Clarke did not raise this issue on appeal.[209] Counsel for co-appellant James Mathers did.

Mathers argued Rule 20 on direct appal. Washington did not. Although the state courts made a finding as to Washington, albeit erroneous, as to the sufficiency of the evidence, *see* State v. Mathers, 165 Ariz. at 71, 796 P.2d at 873; Td. 244, 245 at 4, that does not necessarily resolve the issue.

The United State Supreme Court in Strickland v. Washington, 466 U.S. at 688, set forth the test for ineffective assistance of counsel. The inquiry must focus on (1) whether Washington received reasonably effective assistance and, (2) if not, whether counsel's errors resulted in a reasonable probability that the outcome would have been

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[207]TR Dec. 23, 1987 at 5-7.

[208]TR Jan. 8, 1988 at 32.

[209]Clarke's reason for not raising this issue was that he believed that he did not have to present it to the Arizona Supreme Court. "I do recall the provision that -- the statutory provision which required the supreme court to research the entire record for error. So I do believe that I was under the impression that the supreme court would -- was not necessarily limited to only those issues raised in the brief in determining whether or not error had occurred. I believed -- I think I believed that, then, and I still believe that today." TR Sept. 9, 1993 at 9-10.

different. *Id.*

The role of the attorney on direct appeal is clear. The Sixth Amendment right to counsel applies not only at trial, but also during the course of the direct appeal, and therefore, there are certain obligations that the attorney has to his client that must be fulfilled during this appeal. Douglas v. People of the State of California, 372 U.S. 353, 355 (1963). Counsel is not required to advance every possible argument, but the attorney must be able to assist in preparing and submitting a brief to the appellate court. *See* Swenson v. Bosler, 386 U.S. 258, 259 (1967). Appellate counsel is required to include any issue which has a reasonable probability of success on appeal. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client," as opposed to a friend of the court making a detached evaluation of the appellant's claim. *See* Anders v. California, 386 U.S. 738, 744 (1967); *see also* Entsminger v. Iowa, 386 U.S. 748, 751 (1967).

This right is fundamental, and therefore, the state supreme court's decision to address an issue that was not specifically raised by Washington does not negate the counsel's duty to raise this claim in the first place. Although the issue was addressed, it was reviewed without a zealous advocate presenting and arguing the facts and merits of the insufficiency of the evidence and the acquittal issue. "Lawyers are "necessities, not luxuries" in our adversarial system of criminal justice. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

Appellate counsel's failure to raise the issue of insufficient evidence and the failure of the trial court to enter a judgment of acquittal was not harmless. Here, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," thus establishing ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. at 694. The issue in Washington's case was a "dead-bang winner." *See* Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995). A "dead-bang winner" is "an issue which was obvious from

the trial record,[210] and one which would have resulted in a reversal on appeal." United States v. Cook, 45 F.3d at 395. How does Washington know that the issue was a "dead-bang winner?" He read State v. Mathers, 165 Ariz. 64, 796 P.2d 866. So did the judge in the state collateral proceedings and he reached the same conclusion.

Appellate counsel failed to exercise the skill, judgment and diligence expected of reasonably competent appellate lawyers. There was no tactical or strategic reason for counsel's failure to review and prepare adequately for the appellate phase of the capital proceedings. Had counsel not committed the error as described above, the results of the appeal would have been different. *See* State v. Mathers, 165 Ariz. 64, 796 P.2d 866.

■ ■ ■

Washington's rights as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution; the Right to Counsel Clause of the Sixth Amendment to the United States Constitution; the Eighth Amendment protections against cruel and unusual punishment; and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, were violated as a result of the actions of counsel at sentencing and appeal.

G.

The Court divided claims fourteen and fifteen into two parts. *See* Memorandum and Order, Aug. 9, 1999, at 25-29. It characterized claim 14-B as follows, "[i]n Claim 14-B, Petitioner contends the Arizona Supreme Court failed to consider and separately weigh all of the mitigating evidence supported by the record in its independent review of his sentence." *Id.* at 27. The Court construed claim 15-B as,

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[210]At trial, Robert Clarke aggressively argued that the evidence was not sufficient to sustain a conviction and that a judgment of acquittal should have been entered. TR Dec. 23, 1987 at 5-7; TR Jan. 8, 1988 at 32.

mitigators clearly outweigh the aggravators. Consequently, Washington should have been sentenced to a life term rather than death.

IV. Conclusion.

For these reasons, the Court should issue a writ of habeas corpus. In the alternative, the Court should issue an order permitting Washington to conduct discovery and schedule this matter for an evidentiary hearing[254], or consider argument from counsel on the issues presented.

Respectfully submitted this 18th day of January, 2000.

Fredric F. Kay
Federal Public Defender
Dale A. Baich

John Trebon
Trebon & Fine

By Jason D. Hall for
COUNSEL FOR PETITIONER

Copy of the foregoing mailed this
18th day of January, 2000 to:

J.D. Nielson
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997

Jennifer Smith
c:\data\washingt\habeas\merit.hab

[254]Washington intends to seek discovery and an evidentiary hearing as to a number of claims presented to the Court.

APPENDIX D

No. 05-99009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON,

Petitioner-Appellant,

v.

CHARLES L. RYAN,

Respondent-Appellee.

Appeal from the United States District Court for the District of Arizona, Case No. CV-95-02460-JAT, Judge James A. Teilborg

REPLACEMENT OPENING BRIEF OF PETITIONER-APPELLANT THEODORE WASHINGTON

Gilbert H. Levy
THE LAW OFFICES OF
GILBERT H. LEVY
2125 Western Ave., Suite 330
Seattle, WA 98121
206-443-0670

Mark E. Haddad
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Nathaniel C. Love
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Attorneys for Petitioner-Appellant Theodore Washington

STATEMENT OF ISSUES

Certified Issues

1. Whether Washington was deprived of his constitutional rights, including his rights to a fair trial and due process, where after the trial court denied his motion for a separate trial, the State presented extensive, prejudicial testimony concerning violent prior acts by co-defendant Robinson that could not be cured by any limiting instruction, and in any event the instruction the trial court gave was clearly inadequate. (Claim 3.)

2. Whether in violation of Washington's rights under the Eighth Amendment the trial court erroneously applied a "cruel, heinous, and depraved" aggravating factor in sentencing Washington to death where no evidence supports findings that Washington had a plan intended or reasonably certain to cause suffering, or that any aspect of the killing was within Washington's knowledge or control. (Claim 8-B.)

3. Whether Washington's trial counsel was unconstitutionally ineffective during the sentencing phase of Washington's case, for failing to perform a reasonable investigation that would have uncovered significant mitigating evidence concerning his upbringing and

background that was likely to change Washington's sentence. (Claim 11.)

Uncertified Issues

4. Whether the evidence is insufficient to support Washington's conviction, where even the original trial judge recognized the evidence against Washington was no stronger than that against Mathers, whose conviction the Arizona Supreme Court vacated for insufficient evidence. (Claim 5 and related claims 13 and 14.)

5. Whether the trial court violated Washington's rights under the Eighth Amendment in sentencing him to death, including by erroneously applying a "pecuniary gain" aggravating factor, where no evidence supports a finding that Washington's alleged search for valuables motivated, caused, or was the impetus for the shooting. (Claim 8-C.)

6. Whether the state court's imposition of a death sentence is unconstitutional under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), where no evidence supports a finding that Washington was a major participant who exhibited reckless indifference to human life. (Claim 10.)

C. Washington's Conviction Cannot Be Sustained Where the Evidence Was Insufficient to Convict Mathers.

Especially when laid beside the evidence against Mathers (which the Arizona Supreme Court found insufficient to support the verdict and ordered an acquittal) the evidence against Washington cannot constitutionally sustain his conviction. Both Mathers and Washington were seen leaving Banning with Robinson, but Mathers helped load guns in the car and discussed plans for going to Yuma. The Arizona Supreme Court concluded:

> At best, this evidence supports an inference that Mathers went to Yuma with Robinson and Washington, was present in Yuma, and returned from Yuma to California. It does not, however, establish that Mathers went to the Hills' home, was at the Hills' home, was in the Hills' home, or participated in the murder or other crimes.

Mathers, 796 P.2d at 869-70.

That reasoning applies even more strongly to Washington.[18] The evidence establishes that Washington left Banning and ended up in Yuma. Washington did not load guns into the car, and did not discuss any plans for going to Yuma. Viewed in light of the inferences the

[18] One juror called Washington "the least involved," and had "doubts in her mind regarding the verdict for [Washington]." ER592.

prosecution asked the jury to make, the red bandana[19] in Robinson's car and trench coat discarded nearby suggest Mathers' presence at the crime scene, not Washington's.

After the Supreme Court ordered Mathers' acquittal, the original trial judge conducted Washington's post-conviction review. He found the disparate treatment of Washington and Mathers troubling:

> Quite truthfully, this court has a great deal of difficulty finding a basis to hold this defendant culpable which does not apply, at least equally or in a greater manner, to James Mathers. If Mathers, who was present at all times before the entry into the Hill residence, was not guilty of conspiring to rob and kill, no greater evidence seems to place this defendant at the scene.

---

[19] Ralph Hill said he glimpsed a "black man" wearing a red bandana. But in pressing its case against Mathers, the state argued that the intruder who said, "my name is James" was Mathers:

> LeSean Hill says the man sounded like he was black…. Mathers' first name happens to be Jimmie, and the formal name for Jimmie is James, and he happens to sound like he is black. He is a member of a black motorcycle club. And he sounds and talks black.

ER515. Susan Hill described Mathers in similar terms. *See* ER347. LeSean admitted that the man may have been white. ER223. If in the dimly-lit home LeSean misidentified Mathers as black, it is more than possible that Ralph also misidentified Mathers, in a red bandana, as black.

ER75. Although the trial judge believed himself powerless to address this problem, he stated, "To this court's view this may present a colorable claim for relief at some point in time, it seems more appropriate to allow counsel to make a record so it could be examined *in the event that another court wishes to accept review*." ER77 (emphasis added).

This is that proceeding. Washington's conviction by the trial court based on insufficient evidence violated his Washington's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendment, entitling him to acquittal or, at a minimum, a new trial.

D. The Lack of Evidence Against Washington Compels Relief Under Claims 13 and 14.

The insufficiency of evidence against Washington provides the grounds for relief under two additional uncertified claims.

Claim 13. Washington was unconstitutionally deprived of effective assistance of counsel on appeal because his appellate counsel (also Robert Clarke) failed to raise the sufficiency of evidence on direct appeal. *See Douglas v. California*, 372 U.S. 353, 355 (1963). Clarke's conduct fell below an objective standard of reasonableness because the evidence against Washington was so weak. Counsel for Mathers raised

the issue on appeal and prevailed; the trial judge recognized the evidence against Washington was no stronger. Clarke's failure prejudiced Washington because (as argued for Claim 6) the evidence is so weak that Washington, like Mathers, should have been acquitted on appeal.

Claim 14. In post-conviction proceedings, Washington argued for resentencing in light of Mathers' acquittal, and the trial court believed the evidence against Washington was no stronger. However, the court erroneously believed it could not consider the reversal in *Mathers* in resentencing Washington, based on the Arizona Supreme Court's statements in *Mathers* and in Washington's direct appeal concerning Washington's presence at the scene. ER70; ER77. But Washington was not a party to *Mathers*, and his appellate counsel failed to raise the sufficiency of the evidence. The PCR court thus erred, by failing to consider relevant mitigating evidence, *see Eddings*, 455 U.S. at 114, and by ignoring a significant, unexplained disparity in the sentencing among the defendants, *see State v. Dickens*, 926 P.2d 468, 493 (1996).

CONCLUSION

The denial of Washington's petition should be reversed and the case remanded to the district court with instructions to grant the writ.

DATED: October 16, 2017.

By: s/ Nathaniel C. Love

Gilbert H. Levy
THE LAW OFFICES OF
GILBERT H. LEVY
2125 Western Ave., Suite 330
Seattle, WA 98121
206-443-0670

Nathaniel C. Love
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Mark E. Haddad
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

APPENDIX E

No. 05-99009
Argument Date: Week of September 24, 2018
(Judges Gould, Callahan, and N.R. Smith)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON,

Petitioner-Appellant,

v.

CHARLES L. RYAN,

Respondent-Appellee.

Appeal from the United States District Court for the District of Arizona,
Case No. CV-95-02460-JAT, Judge James A. Teilborg

SUPPLEMENTAL REPLY BRIEF OF PETITIONER-APPELLANT THEODORE WASHINGTON

Gilbert H. Levy
THE LAW OFFICES OF
GILBERT H. LEVY
2125 Western Ave., Suite 330
Seattle, WA 98121
206-443-0670

Mark E. Haddad
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Nathaniel C. Love
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Attorneys for Petitioner-Appellant Theodore Washington

record does not support any conclusion that Washington was the person who went through the drawers of the Hills' bedroom. Moreover, there is no evidence in the record suggesting that person—whoever it was—was still in the bedroom when the Hills were shot.

C. Washington's Conviction Cannot Be Sustained Where the Evidence Was Insufficient to Convict Mathers.

The State's contention that "the evidence against Washington was stronger than the evidence against Mathers" (Supp. Resp. 10) does not withstand scrutiny. The State tries to suggest that the record equally supports findings that Mathers *and* Washington loaded guns in Robinson's car and discussed plans for going to Yuma. (*Id.* at 10-11.) That is incorrect. Both Truman and Andre Robinson testified clearly—without uncertainty or need for refreshed recollections—that Mathers was present and personally loaded guns into Robinson's car. ER304-305 (Mathers and Robinson "brought out some more guns"); ER307-308 (Mathers loaded "pistols" in the back of the car); ER331-332 ("My father and J.B. [Mathers]" were "loading up the car with some guns"). Andre heard Mathers say they were going to Yuma "to take care of some business." ER340-341. The record thus contains specific testimony that Mathers armed himself for a trip to Yuma.

There is no such testimony as to Washington. Contrary to the State's claim, Truman did not testify "that all three men loaded the car." (Supp. Resp. 10-11.) Truman first confirmed that Washington "wasn't present … during any of the period of time that the car was being loaded." SER709. Then, under repeated questioning by the State, Truman conceded only that it was "possible" that Washington was there. *Id.* No witness affirmatively testified that Washington helped load the car with anything, and no witness testified that Washington so much as touched a gun on June 8. Andre repeatedly testified that Washington was not present when Robinson and Mathers loaded the car. ER331-332; ER344-345. The State ignores Andre's testimony.

Truman testified unequivocally that Washington was not present when Robinson and Mathers talked about going to Arizona. ER311. Andre similarly testified that Washington was not at the house that afternoon. ER332. So the State instead points to Andre's later, "refreshed" testimony that all three men were "talking about going to Arizona." (Supp. Resp. 11, citing SER751-752). But that reflects nothing about *why* the men were going to Arizona, and is consistent

with Major Ogden's testimony that Washington thought they were going to Arizona for a party. *See* ER553.

The State falls back on Ralph Hill's testimony concerning "a man matching Washington's appearance in the house." (Supp. Resp. 11.) But as noted repeatedly, Ralph Hill failed to identify Washington in multiple lineups, and the red bandana matched Mathers' hair, not Washington's.

Finally, the original trial judge (on post-conviction review) had "a great deal of difficulty finding" any basis to hold Washington more culpable than Mathers (who had since been acquitted), and concluded that "no greater evidence" placed Washington at the scene. ER75. The judge had "a difficult task in finding any evidence linking Washington to the crime," and believed Washington had presented "a colorable claim for relief." ER76-77.

The State dismisses the trial judge's conclusion as "irrelevant and incorrect." (Supp. Resp. 11.) It is neither. Notably, the State urges that a *different* determination in the same PCR decision is entitled to a "presumption of correctness." (*See* Resp. 54-55, citing ER71.) But for the State, that presumption seems to disappear when the judge

accurately assessed (only pages later in the same decision) the substantially weak case against Washington.

The trial judge believed himself powerless to address this problem, but ensured that Washington's counsel could "make a record so it could be examined *in the event that another court wishes to accept review*." ER77 (emphasis added). This Court should accept that invitation and find that Washington's conviction was based on such insufficient evidence as to violate his Constitutional rights. (*See* Br. 65.)

D. The Lack of Evidence Against Washington Compels Relief Under Claims 13 and 14.

The State contends that "Washington did not identify these claims [13 and 14] as uncertified claims for this Court's review." (Supp. Resp. 12.) That is incorrect. Washington's Replacement Brief presented these uncertified claims for review, along with related Claim 5, consistent with Cir. R. 22-1(e) and FRAP 28(a)(5). (*See* Br. 6 (Issue #4), 65-66.)

As to Claim 13 (ineffective assistance of appellate counsel for failure to raise the sufficiency of evidence on direct appeal), the State's only response is that the evidence is sufficient to support Washington's

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By: s/ Nathaniel C. Love

Nathaniel C. Love
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Mark E. Haddad
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Gilbert H. Levy
THE LAW OFFICES OF
GILBERT H. LEVY
2125 Western Ave., Suite 330
Seattle, WA 98121
206-443-0670