

No. _____

9th Cir. No. 21-16174
D.C. No. 4:18-cv-00046-DCB

IN THE
Supreme Court of the United States

MICKY WAHL

Petitioner,

v.

CHARLES L. RYAN, Respondent; and ATTORNEY GENERAL FOR
THE STATE OF ARIZONA; DAVID SHINN, Director,

Respondents.

On Petition For Writ of Certiorari
From The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether Mr. Wahl Was Denied His Right To Effective Assistance Of Counsel In Violation Of The Guarantees Of The Sixth & Fourteenth Amendments?
- II. Whether The Ninth Circuit Erred In Denying Mr. Wahl A Certificate Of Appealability On His Uncertified Issues?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	2
LIST OF PARTIES.....	3
TABLE OF CONTENTS.....	4
INDEX TO APPENDICES.....	5
TABLE OF AUTHORITIES CITED.....	6
OPINIONS BELOW.....	9
JURISDICTION.....	9
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	9
STATEMENT OF THE CASE.....	10
REASONS FOR GRANTING THE WRIT.....	16
 CLAIM I: Mr. Wahl Was Denied His Sixth Amendment Right To The Effective Assistance Of Counsel.....	 16
 CLAIM II: The 9 th Circuit Erred In Denying Mr. Wahl A Certificate Of Appealability On His Uncertified Issues.....	 27
 CONCLUSION.....	 36

INDEX TO APPENDICES

APPENDIX A - MEMORANDUM DISPOSITION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 21-16174, filed March 15, 2023.

APPENDIX B - JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Case No. CV-18-00046-TUC-DCB, Filed June 14, 2021.

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DENYING PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254, Case No. CV-18-00046-TUC-DCB, Filed June 14, 2021.

APPENDIX D - REPORT AND RECOMMENDATION, Case No. CV-18-00046-TUC-DCB, Filed January 19, 2021.

APPENDIX E - MEMORANDUM DECISION OF THE ARIZONA COURT OF APPEALS, DIVISION TWO, Case No. 2CA-CR2017-0136-PR, Filed July 28, 2017.

APPENDIX F - ORDER OF THE COCHISE COUNTY SUPERIOR COURT OF THE STATE OF ARIZONA DENYING PETITION FOR POST-CONVICTION RELIEF, Case No. CR201200609, Filed March 27, 2017.

APPENDIX G - MEMORANDUM DECISION OF THE ARIZONA COURT OF APPEALS, DIVISION TWO, Case No. 2CA-CR2014-0138, Filed October 30, 2015.

APPENDIX H - SENTENCE OF IMPRISONMENT OF THE COCHISE COUNTY SUPERIOR COURT OF THE STATE OF ARIZONA, Case No. CR201200609, Filed April 3, 2014.

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<i>Argesinger v. Hamlin</i> , 407 U.S. 25, 31, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).....	21
<i>Avery v. Alabama</i> , 308 U.S. 444, 446, 60 S.Ct. 321 (1940).....	22
<i>Bullcoming v. N.M.</i> , 131 S.Ct. 2705 (2011).....	29
<i>California v. Trombetta</i> , 467 U.S. 479, 485 (1984).....	22
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 343, 100 S.Ct. 1708, 1715 (1980).....	22
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986).....	33
<i>Davila v. Davis</i> , 137 S.Ct. 2058 (2017).....	24
<i>Dietrich v. Ryan</i> , 740 F.3d 1237, 1246-47 (9th Cir. 2003).....	23
<i>Donnelly v. DeChristofono</i> , 416 U.S. 637 (1974).....	33
<i>Hurles v. Ryan</i> , 752 F.3d 768, 781 (9th Cir. 2014).....	24
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	34
<i>Martinez v. Ryan</i> , 132 S.Ct. 1309 (2012).....	16, 17, 20, 24, 27, 28, 29, 30
<i>Melendez-Diaz v. Moss</i> , 129 S.Ct. 2527 (2009).....	29
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935).....	30
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959).....	30
<i>Nguyen v. Curry</i> , 736 F.3d 1287 (9th Cir. 2013).....	24
<i>Rodney v. Filson</i> , 916 F.3d 1254 (9th Cir. 2019).....	24
<i>State v. Almeida</i> , 238 Ariz. 77, ¶9 (Ariz. Ct. App. 2015).....	20
<i>State v. DeLuna</i> , 110 Ariz. 497, 520 P.2d 1121 (1974).....	21

<i>State v. Donald</i> , 198 Ariz. 406, 414 (Ariz. Ct. App. 2000).....	19, 29, 30
<i>State v. Fish</i> , 222 Ariz. 109, 213 P.3d 258 (Ariz. Ct. App. 2009).....	23, 24
<i>State v. Hussain</i> , 189 Ariz. 336, 337 (Ariz. Ct. App. 1997).....	20
<i>State v. Krum</i> , 182 Ariz. 108, 893 P.2d 759 (Ariz. Ct. App. 1995).....	21
<i>State v. Lee</i> , 143 Ariz. 210, 214, 689 P.2d 153, 157 (1984).....	21
<i>State v. Lujan</i> , 136 Ariz. 103, 104 (1983).....	20
<i>State v. Nash</i> , 143 Ariz. 392, 397, 694 P.2d 222, 2227 (1985).....	21
<i>State v. Rogers</i> , 545 P.2d 930, 933, 113 Ariz. 6, 9 (Ariz. 1976).....	22
<i>State v. Rosas</i> , 183 Ariz. 421, 422 (Ariz. Ct. App. 1995).....	19
<i>State v. Salazar</i> , 173 Ariz. 299, 414, 844 P.2d 566, 581 (1992).....	21
<i>State v. Spreitz</i> , 202 Ariz. 1, 3 (2002).....	28
<i>State v. Suarez</i> , 23 Ariz. App. 45, 530 P.2d 402 (1975).....	22
<i>State v. Torres</i> , 208 Ariz. 340, 342 ¶ 6, 93 P.3d 1056, 1058 (2004).....	21
<i>State v. Wahl</i> , No. 2 CA-CR 2014-0138 (Ariz. Ct. App. Oct. 30, 2015)...	15
<i>State v. Wahl</i> , No. 2 CA-CR 2017-0136-PR (Ariz. Ct. App. Jul. 28, 2017).....	15
<i>State v. Walton</i> , 159 Ariz. 571, 592, 769 P.2d 1017, 1038 (1989).....	22
<i>State v. Watton</i> , 164 Ariz. 323 (1990).....	19
<i>State v. Willits</i> , 96 Ariz. 184 (1964) (en banc).....	29
<i>State v. Wilson</i> , 2 CA-CR 2021-0003 (Ariz. Ct. App. 2002).....	20
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	16, 20, 21, 22, 23, 27, 29, 30, 35
<i>United States v. Blueford</i> , 312 F.3d 962 (9th Cir. 2002).....	30

<i>United States v. Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039 (1984).....	22
<i>United States v. Twomey</i> , 510 F.2d 634, 640 (1975).....	22
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	35

STATUTES

28 U.S.C. § 2253.....	9
28 U.S.C. §2254.....	9, 16
A.R.S. §13-404(a).....	18
A.R.S. §13-405.....	18
A.R.S. §13-418.....	18
A.R.S. §13-1201(A).....	14, 18, 25
A.R.S. §13-1202(A)(1).....	14, 18, 25
A.R.S. §13-1203(A).....	14, 18, 26
A.R.S. §13-1204.....	14, 19, 26

CONSTITUTIONAL PROVISIONS

Ariz. Const. Art. 2 § 24.....	21
U.S. Const. Amend. V.....	9, 33, 34
U.S. Const. Amend. VI.....	9, 21, 27
U.S. Const. Amend. XIV.....	9, 19, 21, 22, 27, 33, 34

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Mickey Wahl (“Mr. Wahl”), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming the denial of Mr. Wahl’s petition for a writ of habeas corpus under 28 USC §2254 and declining to issue a certificate of appealability is annexed as Appendix A. A copy of the Order of the United States District Court denying Mr. Wahl’s petition for a writ of habeas corpus under 28 USC §2254 is annexed as Appendix B. A copy of the Sentence of Imprisonment of the Superior Court of Cochise County, Arizona, is annexed as Appendix H.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit decided this case was March 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2253
2. 28 U.S.C. § 2254
3. U.S. Const. Amend. V
4. U.S. Const. Amend. VI
5. U.S. Const. Amend. XIV

STATEMENT OF THE CASE

Mr. Wahl was charged by Indictment with one count of Manslaughter, a Class Two Felony and One Count of Negligent Homicide as a lesser included offense for the death of S.C. alleged to occur on December 13, 2011. 2-ER-75. The case proceeded to trial nearly two and a half years later on February 11, 2014, and the trial lasted approximately 10 trial days. *Id.* Initially, the Cochise County Sheriff, Larry Dever, declined to press charges on Wahl. *Id.* However, Sheriff Dever died on September 18, 2012. *Id.* Mr. Wahl was then indicted on November 1, 2012. *Id.*

The Fight at the Mescal Bar and Grill

On December 13, 2011, Dannie Lynn Bowling and Jenny Meza, significant other of Mr. Wahl at the time of the incident, drove to the Mescal Bar and Grill in Dannie Lynn's truck. 2-ER-111; 3-ER-322. Mr. Wahl followed, driving Jenny's Dodge Dually Truck. *Id.* Upon arrival, Mr. Wahl parked in a secluded area of the parking lot out of sight of the front of the bar and where Dannie Lynn parked. *Id.* Shortly after parking, Mr. Wahl heard Jenny yell his name. *Id.* It then changed to a blood-curdling scream, and then became muffled as if someone had covered her mouth. *Id.*

Mr. Wahl ran to the other side of the bar to the origin of the scream. *Id.* Mr. Wahl observed Shanda Woolf (ex-girlfriend of Mr. Wahl who was dating S.C.) pulling Jenny's hair. *Id.* Jenny was on her back on the ground, and S.C. (the named victim in the case) was straddling Jenny with his hands around her neck choking off her screams. *Id.* S.C.'s friend, Victor Pallane, was standing behind S.C. *Id.* There were others standing with pool cues raised. *Id.*

Mr. Wahl ran to Jenny. *Id.* When he reached her, he assisted Jenny, and Shanda and S.C. released Jenny. *Id.* Mr. Wahl put Jenny over his shoulder and ran back to Jenny's truck where he put her in the passenger seat. 2-ER-112. Mr. Wahl noticed Shanda and S.C. approaching the truck, and Shanda ran around the rear of the truck to the passenger door to get to Jenny and Mr. Wahl. *Id.* Mr. Wahl side-stepped her drunken running, and Shanda ran into the opened passenger door. *Id.* Mr. Wahl, still having Jenny over his shoulder, raced to Dannie Lynn's truck, and put Jenny inside with Dannie Lynn. *Id.*

S.C. stepped in front of Dannie Lynn's truck yelling at them, saying repeatedly "Do you know who I am?". *Id.* Mr. Wahl ran back to Jenny's truck to leave. *Id.* He noticed at least six people in the parking lot and at least one was wielding a pool cue. *Id.* Both S.C. and Victor were standing next to that man. *Id.* S.C. started yelling at Mr. Wahl that he was "dead" "10 fold" and "twelve men". *Id.* S.C. continuously yelled at Mr. Wahl that he was dead and a "pussy." *Id.*

Mr. Wahl jumped in the driver's side of Jenny's truck cab, started the truck, and rolled down the window a little so he could see in the mirror to back up. *Id.* He backed up and prepared to go forward to leave. *Id.* S.C. approached the truck from the rear, hitting the bed of the truck continuously harder and louder as he approached the driver door. *Id.* He kept yelling, "you're dead," "you're fucking dead", "I'm going to kill you, you pussy mother fucker". *Id.*

S.C. was angrier and more aggressive than Shanda had ever seen him and ran up to the truck and jumped onto the driver's side door. 3-ER-324. Yelling obscenities and

death threats the entire time, S.C. put his arm into the window, which was partially rolled down. *Id.* He began punching Mr. Wahl, as Mr. Wahl was retreating from the situation. *Id.*

Mr. Wahl did not know if S.C. had a weapon, and Mr. Wahl put the truck in first gear to leave. 2-ER-112. Later, it was found that S.C. had a 4" folding knife blade in his pocket. 2-ER-88. S.C. punched him twice through the open window which caused Mr. Wahl to jump sideways, and the truck lurched forward. 2-ER-113. Mr. Wahl was leaning heavily to the passenger side to ward off S.C.'s attacks. *Id.* Police found smudges on the driver's window of the truck, and a DPS criminalist found that there was human DNA on the swab, but nothing sufficient upon which to draw a conclusion. 3-ER-329.

S.C. was grabbing the wheel to pull himself further into the cab to continue striking Mr. Wahl and to attempt to force the truck off the road. 2-ER-113. Mr. Wahl believed Victor was behind S.C., and he was terrified that they were going to kill him. *Id.* While driving at less than 20 mph, Mr. Wahl stopped the truck quickly and accelerated again three times in about 3 seconds in an attempt to shake S.C. off the truck. *Id.* S.C. held on and continued to try to strike Mr. Wahl. *Id.*

S.C. was highly intoxicated (which could have accounted for his aggressive behavior). 2-ER-89. He had a .164 BAC and significant amounts of cocaine and marijuana in his blood. *Id.*

The third time Mr. Wahl quickly stopped; he was able to push S.C. away from the truck. 2-ER-113. S.C. fell away and Mr. Wahl released the clutch and took off. *Id.* He

continued for about a mile to his home. *Id.* He did not look back to see where S.C. had landed as it was too dark, nor did he feel any bumps or jolts of the truck when he left. *Id.*

When Mr. Wahl went home, he noticed the side-view mirror was hanging off by the control wires. 2-ER-291. Wahl's drive home from the Mescal is approximately two minutes. *Id.* Mr. Wahl poured himself a drink because he was upset by what had happened, and he believed S.C. was alive. *Id.* In fact, Mr. Wahl posted a Facebook post directed to S.C. *Id.*

Shortly thereafter, the police arrived at Mr. Wahl's house and took him into custody. 2-ER-113. They later informed him that S.C. was dead. *Id.* Before Mr. Wahl was told that S.C. was dead, he was very confused about why there was such a big deal being made about a bar fight. 2-ER-293.

The Trial

Mr. Wahl contended at trial that he acted in self-defense. He testified in detail about S.C. pursuing him, screaming at Mr. Wahl "you're dead, you're dead," hitting him through the open window, and trying to get into the vehicle while Mr. Wahl was attempting to retreat after rescuing Jenny. 3-ER-324-326.

At the trial, the State introduced voluminous text messages which Mr. Wahl sent to Shanda from around the time of their breakup until early December 2011. 3-ER-318. Shanda had purposely deleted her text messages that she sent to Mr. Wahl during this same period of time. *Id.* The deleted messages would have provided context to Mr. Wahl's messages since the texts from Mr. Wahl were demonstrating that Shanda was

initiating contact or responding to statements and demonstrating that she was instigating or escalating the conflict. *Id.*

At trial, one of the detectives speculated that S.C.'s arm was caught in the window and a mark resulted (this mark was non-existent at the time of the autopsy). 3-ER-328. Over Mr. Wahl's objection, the State conducted a demonstration in the parking lot outside the courthouse in which a detective, who was about the same size as S.C., put his arm through the partially closed window of the truck and stood on his tiptoes. 3-ER-328-29. The trial court instructed the parties not to adduce any testimony during this demonstration and the court reporter did not record any of the proceedings. 3-ER-329. Victor subsequently testified that the demonstration was "exactly" as he had seen S.C. holding onto the vehicle. *Id.* This is despite Victor stating that he did not know how S.C.'s arm got into the window because he was looking elsewhere. *Id.* Victor smelled strongly of alcohol at the time he was questioned by police, but no test was conducted on him to determine the state of his intoxication. 3-ER-330.

Outside the presence of the jury, jury instructions were discussed. 2-ER-113. Defense counsel failed to request that the court give the jury specific definitions to "unlawful physical force", as an element of the self-defense jury instructions. *Id.* The specific definitions NOT requested were: Endangerment (ARS §13-1201(A)), Threatening or intimidating (ARS §13-1202(A)(1), Assault (ARS §13-1203(A)(1)(2) and (3), and Aggravated Assault (ARS §13-1204). *Id.* Counsel did request basic self-defense instructions, but they did NOT include any definitions of the unlawful physical force that would justify Mr. Wahl's actions. 2-ER-114.

At conclusion of the trial, the jury found Mr. Wahl was found guilty of one count of manslaughter and sentenced to a term of 10.5 years. *See* Appendix “H”.

State Direct Appeal and Post-Conviction Proceedings

On April 25, 2015, Mr. Wahl filed a direct appeal on the following issues: (1) whether the court committed error in allowing introduction on prior bad acts, texts messages and Facebook posts, (2) prosecutorial misconduct, (3) whether the trial court committed error in denying a motion for a new trial, and (4) insufficient evidence to support a conviction. 3-ER-310. The Arizona Court of Appeals denied relief on October 30, 2015. *State v. Wahl*, No. 2 CA-CR 2014-0138 (Ariz. Ct. App. Oct. 30, 2015); Appendix “G”.

On December 1, 2016, Mr. Wahl filed a Rule 32 Petition for Post-Conviction Relief. 2-ER-279. The issues raised were “Ineffective assistance of counsel: failure to properly evaluate blood and DNA evidence.” *Id.* The Petition was summarily denied on March 27, 2017. *See* Appendix “F”. Mr. Wahl filed a Petition for Review with the Arizona Court of Appeals, Division Two, on April 13, 2017. 2-ER-268. The Arizona Court of Appeals granted review but denied relief. *State v. Wahl*, No. 2 CA-CR 2017-0136-PR (Ariz. Ct. App. Jul. 28, 2017); Appendix “E”.

Mr. Wahl filed a Petition for Writ of Habeas Corpus which was denied by the District Court. 2-ER-99; 1-ER-2. Mr. Wahl raised ten grounds of ineffective assistance of counsel and also raised claims that were presented in the direct appeal. *Id.* On June 14, 2021, the District Court denied the Petition for Writ of Habeas Corpus but issued a Certificate of Appealability as to Ground 2 of the Petition. *See* Appendix “C” & “D”.

Mr. Wahl timely filed notices of appeal on July 9th & 12th, 2021. 3-ER-365, 368. On September 22, 2022, the Ninth Circuit affirmed Jim's conviction and sentence. On March 15, 2023, the Ninth Circuit affirmed the District Court's denial of Mr. Wahl's Petition for Writ of Habeas Corpus.

REASONS FOR GRANTING THE WRIT

I. Mr. Wahl Was Denied His Sixth Amendment Right To The Effective Assistance Of Counsel.

Mr. Wahl has suffered ineffectiveness on top of ineffectiveness. His trial counsel failed to request an adequate self-defense jury instruction, which the trial court would have been required to give. Then, Mr. Wahl's post-conviction counsel was ineffective in causing a procedural default in an initial review of a Rule 32 petition when he failed to raise trial counsel's failure to request an adequate self-defense jury instruction. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Strickland v. Washington*, 466 U.S. 668 (1984).

Federal habeas relief is warranted when a state court adjudication results in a decision that is contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States or a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d)(1), (2). Mr. Wahl's habeas petition arises from his claim that his post-conviction counsel was deficient in failing to raise the issue of ineffective assistance of trial counsel for failure to provide an important and necessary jury instruction on self-defense. In denying the habeas petition, the District Court certified a sole issue for appeal: whether Mr. Wahl's PCR

counsel was ineffective by not raising a claim of trial counsel ineffectiveness, thus excusing the procedural default of that claim under *Martinez v. Ryan*, 566 U.S. 1 (2012). The Ninth Circuit ultimately found that it was unlikely trial counsel asking for the definitional jury instruction would have changed the outcome of the trial, and thus equally unlikely that PCR counsel having raised the trial IAC claim would have changed the outcome of the post-conviction proceedings. Therefore, the Ninth Circuit concluded Mr. Wahl had not demonstrated cause to excuse PCR counsel's procedural default of his trial IAC claim.

"The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings." *Martinez*, 132 S.Ct. at 1313. Under those circumstances, "a procedural default [during the initial collateral review] will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding ... counsel in that proceeding was ineffective." *Id.* at 1320.

Mr. Wahl presented evidence at trial that he acted in self-defense. Witnesses testified that Mr. Wahl ran to his truck to get away from the fight, but S.C. followed and grabbed onto the truck. 3-ER-325. S.C. was seen swinging his arm inside of the truck, screaming threats, and punching Mr. Wahl. *Id.* S.C. was trying to pull Mr. Wahl out of the truck. *Id.*

Mr. Wahl testified that S.C. was coming after him as he was trying to leave after he had gotten Jenny into another vehicle. *Id.* S.C. was screaming at Mr. Wahl stating,

“you’re dead, you’re dead” and was trying to get into the vehicle. *Id.* Mr. Wahl had rolled down the window because it was a rainy night, and he could not see through the side view mirror. *Id.* S.C. then put his right arm into the driver side window after Mr. Wahl had rolled it down. *Id.* S.C. grabbed onto the side view mirror and sucker punched Mr. Wahl in the face with his right hand. *Id.* Mr. Wahl had his left hand on the steering wheel and was using his right hand to shift gears on the truck. *Id.* Eventually, S.C. fell off the side of the vehicle. *Id.* The entire time S.C. was threatening to kill Mr. Wahl. 3-ER-326. Other individuals were also approaching the truck, and one was carrying a pool cue in an aggressive manner. *Id.*

Mr. Wahl did not know that S.C. had been run over. Mr. Wahl was only trying to get away from S.C. and the rest of the crowd because he felt that he was in danger. *Id.* After Mr. Wahl had returned home, he posted on Facebook that he was trying to get S.C. further down the road so that he could beat him up without Victor being around to intervene. 3-ER-327. Mr. Wahl expected S.C. to read the post not knowing that S.C. was dead. *Id.* Shortly thereafter, the police arrived at Mr. Wahl’s house, took him into custody, and informed him that S.C. was dead. 2-ER-113.

At trial, defense counsel presented a defense of self-defense pursuant to A.R.S. §§13-404(a), 13-405 and 13-418. Although he requested an instruction of self-defense involving the term “unlawful physical force”, counsel failed to request that the jury be instructed on the specific definitions of unlawful force that were appropriate under the facts of this case: Endangerment (ARS §13-1201(A)), Threatening or intimidating (ARS §13-1202(A)(1), Assault (ARS §13-1203(A)(1)(2) and (3), and Aggravated Assault (ARS

§13-1204). 2-ER-113. Counsel did request basic self-defense instructions that did NOT include any definitions of the unlawful physical force that would justify Mr. Wahl's actions. 2-ER-114.

The failure to include the definitions in the jury instructions was prejudicial because it allowed the jury to speculate about whether S.C.'s conduct was illegal, it allowed the jury to completely disregard all self-defense evidence, it denied Mr. Wahl due process pursuant to the 14th Amendment, and it allowed an illegal conviction and sentence of 10.5 years. 2-ER-115. Including the definitions in the jury instructions could have changed the outcome at the trial level. *State v. Watton*, 164 Ariz. 323 (1990); *State v. Rosas*, 183 Ariz. 421, 422 (Ariz. Ct. App. 1995). Also, if this issue had been properly presented in the petition for post-conviction relief, Mr. Wahl could have received a new trial with the correct jury instructions. A petitioner need not provide detailed evidence in the claim, but must provide specific factual allegations, that if true, would entitle him to relief. *State v. Donald*, 198 Ariz. 406, 414 (Ariz. Ct. App. 2000).

The District Court found that the IAC claim on Ground 2 may have some merit because it would not have hurt Mr. Wahl's case to ask for a jury instruction to define "unlawful physical force" as including "endangerment, threatening, intimidation assault, and aggravated assault." 1-ER-6. However, the District Court was incorrect in assessing that PCR counsel was not ineffective by failing to raise trial counsel's failure to request this instruction under *Strickland*. The self-defense instruction actually given and the facts in the case allowed the jury to speculate about S.C.'s behavior and disregard the self-defense evidence. The jury was instructed that if it was determined

that S.C. was in the process of unlawfully or forcefully entering an occupied vehicle, then the defendant had no duty to retreat before threatening or using physical force or deadly physical force. 1-ER-7. The given instruction was not enough.

In Arizona, “[g]enerally, a defendant is entitled to an instruction on any theory of the case reasonably supported by the evidence.” *State v. Lujan*, 136 Ariz. 103, 104 (1983). The “slightest evidence” of justification is sufficient to entitle the defendant to an instruction, *State v. Almeida*, 238 Ariz. 77, ¶9 (Ariz. Ct. App. 2015), but if the instruction does not fit the facts of a particular case, the trial court does not err by refusing to give it. *State v. Hussain*, 189 Ariz. 336, 337 (Ariz. Ct. App. 1997). *See also, State v. Wilson*, 2 CA-CR 2021-0003 (Ariz. Ct. App. 2002) (case reversed and remanded for failure to provide instruction; evidence not overwhelming). In this case, Mr. Wahl had a strong defense and the evidence was not overwhelming.

Strickland, as applied by *Martinez*, required Mr. Wahl to demonstrate that post-conviction counsel was ineffective because (1) post-conviction counsel’s performance was deficient AND (2) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different. *Ramirez*, 937 F.3d 1230, 1241 (9th Cir. 2019). When the District Court considers *Martinez*’s prejudice prong, it must be careful not to “collapse what should [be] a two-step process: first decide, whether the procedural default is excused, and if so, then address the claim squarely, after allowing a chance for any necessary record or evidentiary development.” *Ramirez*, 937 F.3d at 1242 n.7.

The failure regarding the jury instruction was ineffective assistance of counsel, and the trial court judge reversibly erred during post-conviction relief proceedings in failing to grant an evidentiary hearing on a colorable claim or grant relief and reverse Mr. Wahl's conviction. The United States Constitution guarantees the right to effective assistance of counsel in criminal cases. U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."); Ariz. Const. Art. 2 § 24 ("In criminal prosecutions, the accused shall have the right to appear and defendant in person, and by counsel...."). This Court has held that the Sixth Amendment, as applied to the states by the Fourteenth Amendment, includes the effective assistance of counsel. *Strickland*; see *Argesinger v. Hamlin*, 407 U.S. 25, 31, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *State v. Torres*, 208 Ariz. 340, 342 ¶ 6, 93 P.3d 1056, 1058 (2004); *State v. DeLuna*, 110 Ariz. 497, 500-01, 520 P.2d 11221, 1124-25 (1974) (defendant is entitled to competent counsel).

A two-pronged test is applied to determine whether a conviction should be reversed on grounds of ineffective assistance of counsel. A defendant must affirmatively show that (1) counsel's performance fell below an objective standard of reasonableness, as defined by prevailing professional norms, and (2) the deficient performance resulted in prejudice to the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *State v. Salazar*, 173 Ariz. 299, 414, 844 P.2d 566, 581 (1992); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 2227 (1985); *State v. Lee*, 143 Ariz. 210, 214, 689 P.2d 153, 157 (1984); *State v. Krum*, 182 Ariz. 108, 112, 893 P.2d 759, 763 (Ariz. Ct. App. 1995). Where the allegation of incompetency of counsel is made, the defendant must proffer

allegations that, if taken as true, demonstrate actual incompetency of counsel as reflected in the manner of carrying out his duties as trial counsel, and substantial prejudice resulting therefrom without which the outcome would probably have been different. *State v. Rogers*, 545 P.2d 930, 933, 113 Ariz. 6, 9 (Ariz. 1976); *State v. Suarez*, 23 Ariz. App. 45, 530 P.2d 402 (1975). The court will find prejudice if defendant establishes a reasonable probability that the verdict in this case might have been affected by the alleged error of counsel. *See State v. Walton*, 159 Ariz. 571, 592, 769 P.2d 1017, 1038 (1989).

Defense counsel must aggressively protect the client's rights as a "fundamental component of our justice system." *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984). "Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715 (1980), *see also Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321 (1940) ("The Constitutional guarantee of assistance cannot be satisfied by mere formal appointment."); *United States v. Twomey*, 510 F.2d 634, 640 (1975). The Due Process Clause of the Fourteenth Amendment ensures a defendant a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). There was no strategic basis for failing to present a jury instruction that would support Mr. Wahl's self-defense. It was an utter failure to defend. Consequently, it was also error for the post-conviction counsel to not raise this issue. *See Strickland*, 466 U.S. at 687-88 (to establish prejudice, defendant must show a "reasonable probability that, but for

counsel's unprofessional errors, the results of the proceeding would have been different").

The results would have been different if the post-conviction counsel asserted the IAC, Ground 2, against trial counsel for failing to seek the jury instruction. The trial court must give the aforementioned definitions under self-defense when requested because the absence of these instructions allows the jury to speculate about S.C.'s behaviors and would allow the jury to completely disregard all the self-defense evidence. It is reversible, prejudicial error to not give the instructions. *State v. Fish*, 222. Ariz. 109, 213 P.3d 258 (Ariz. Ct. App. 2009). Defense counsel's failure to request jury instructions to define elements of the defense that were being presented to the jury is a colorable claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). No reasonable attorney would fail to define what conduct was unlawful. Defense counsel's failure to submit the complete jury instructions was highly prejudicial to Mr. Wahl and deprived the jury of the information they needed to find that Mr. Wahl acted in self-defense. The failure to request the definitions directly lead to Mr. Wahl's conviction. Trial counsel also failed to ask for a defense of others jury instruction. 2-ER-80.

This is a colorable claim, and an evidentiary hearing in the post-conviction proceedings was required. If an evidentiary hearing was held by the Superior Court, the end result would have been to reverse the conviction and order a new trial. See *Dietrich v. Ryan*, 740 F.3d 1237, 1246-47 (9th Cir. 2003) (en banc). The additional jury instruction was critical because the State argued that Mr. Wahl had an "evil plan" to hurt S.C.

However, Mr. Wahl and his girlfriend (Jenny) did not know that Shanda or S.C. would be at the bar. S.C. has heavily intoxicated. He ran after Mr. Wahl as Mr. Wahl was retreating from any confrontation between the women. S.C. tried to punch Mr. Wahl and pull him out of a moving vehicle. S.C. also had a knife on him and yelled “you’re fucking dead” multiple times at Mr. Wahl. 2-ER-95-96.

This claim was raised for the first time in the habeas proceedings because post-conviction counsel failed to raise the issue (thus being ineffective). This is not a bar to the claim. *Martinez v. Ryan, supra.*, allows for new claims of ineffectiveness to be asserted for the first time in federal habeas, even if post-conviction counsel properly raised other claims of trial counsel ineffectiveness. *Rodney v. Filson*, 916 F.3d 1254 (9th Cir. 2019); *Hurles v. Ryan*, 752 F.3d 768, 781 (9th Cir. 2014) (overturned on other grounds by *Davila v. Davis*, 137 S.Ct. 2058 (2017); *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013) (same).

Mr. Wahl’s post-conviction counsel failed to raise the claim regarding ineffective assistance of trial counsel for failure to request adequate self-defense jury instructions. Accordingly, the claim was defaulted. This was prejudicial because had post-conviction counsel raised the claim, it was reasonably probable that the Superior Court would have reversed the conviction. *State v. Fish*, 222. Ariz. 109, 213 P.3d 258 (Ariz. Ct. App. 2009); 2- ER-115.

Without the benefit of any reference to statute or case law, fact-finders would likely differ in their opinion of whether the facts in Mr. Wahl’s case constitute self-defense. That is, whether under Arizona law S.C.’s actions in the parking lot were

“unlawful physical force” that Mr. Wahl was defending himself from. Yet the jury in this case was expected to conjure an answer to that question out of thin air, without instruction on the four relevant Arizona statutes: endangerment, threatening or intimidating, assault, and aggravated assault.

In Arizona, S.C. was committing the crime of endangerment if he was “recklessly endangering another person with a substantial risk of imminent death or physical injury” as he tried to haul Mr. Wahl from the window of a moving truck. A.R.S. § 13-1201(A). The jury was never told about that statute, and the only reason they didn’t know the legal definition of “endangerment” is because Mr. Wahl’s trial lawyer did not ask them to be instructed on it. Likewise, Mr. Wahl’s post-conviction attorney failed to bring that error to the attention of the courts.

Similarly, if the jury believed that S.C. had been “threaten[ing] or intimidat[ing] by word or conduct ... [t]o cause physical injury to another person or serious damage to the property of another” then they would have concluded under Arizona law that S.C. was committing the crime of threatening and intimidating. A.R.S. §13-1202(A)(1). Yet, again, the jury deliberated Mr. Wahl’s fate without being instructed on that type of unlawful physical force due to the failure of Mr. Wahl’s trial counsel. Again, Mr. Wahl’s post-conviction attorney failed to bring that error to the attention of the courts.

If the jury believed that S.C. had “intentionally, knowingly or recklessly caus[ed] any physical injury to another person; or ... [i]ntentionally plac[ed] another person in reasonable apprehension of imminent physical injury; or ... [k]nowingly touch[ed] another person with the intent to injure, insult or provoke such person,” then S.C. was

in the act of unlawfully committing assault when he punched or tried to pull Mr. Wahl out of the window. A.R.S. §13-1203(A)(1)(2) and (3). Yet the jury never heard about that type of unlawfully force, either.

And finally, if the jury believed that S.C.'s assault against Mr. Wahl "cause[d] serious physical injury to" him, or had caused "temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part" then S.C. has been in the process of committing the crime of aggravated assault under A.R.S. §13-1204. The jury never heard that legal definition, either.

The jury in Mr. Wahl's case was instructed to deliberate without the benefit of *any* of the above definitions. There are myriad ways in which S.C.'s actions in December 2011 would have caused a reasonable person in Mr. Wahl's shoes to believe that he was being subjected to unlawful physical force. But the jury members were never given the benefit of those four statutory definitions necessary to find that Mr. Wahl acted in self defense.

In the briefing before the Ninth Circuit, the State of Arizona agreed with Mr. Wahl there was evidence presented at trial that he was—at the time of the brawl at the Mescal Bar and Grill—the victim of unlawful force. The State of Arizona also agreed that Mr. Wahl's trial attorney did not request any instruction that would have clarified whether that ongoing attack was unlawful. Finally, the State of Arizona agreed that Mr. Wahl's first post-conviction attorney did not raise the trial attorney's lapse as a basis for post-conviction relief. Since the trial evidence established S.C.'s aggressive conduct

toward and physical contact with Mr. Wahl, including the victim's punching Mr. Wahl through the open driver's window of the pick-up truck, that evidence required the jury be instructed on how to apply those facts to the law. When the facts of a case fit a missing legal instruction, it makes that instruction more important, not less so. Therefore, this Court should grant certiorari and rectify the errors that have resulted in Mr. Wahl's wrongful conviction.

II. The Ninth Circuit Erred When It Denied Mr. Wahl A Certificate Of Appealability On His Uncertified Issues.

The Ninth Circuit declined to issue Mr. Wahl a certificate of appealability on his uncertified issues "because he failed to make a substantial showing of the denial of constitutional rights that reasonable jurists would find debatable." The Ninth Circuit committed error because Mr. Wahl's Opening Brief made a substantial showing of the denial of his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. As a result, Mr. Wahl asks this Court to grant certiorari on the following issues.

Ground 1: Ineffective Assistance of Counsel: Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial review when Rule 32 counsel failed to raise ineffective assistance of trial counsel for failure to object to prosecutorial misconduct or move for a mistrial due to the misconduct. These inactions were a violation of Petitioner's right to counsel as guaranteed by the 6th and 14th Amendments. *See also, Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsel was ineffective for only objecting on relevancy regarding the testing of swabs (DNA or blood) on the truck tires. Counsel did not object to the fact that the jury was misled or prosecutorial misconduct. Counsel did not move for a mistrial because there was no forensic evidence that Mr. Wahl ran over S.C. Petition for Habeas Corpus, pages 6-A-6-E, 2-ER-105-09. This was prejudicial because the jury was left with the impression that it was a fact that Mr. Wahl ran over S.C., and there was blood and DNA on the swabs taken from the tire of Mr. Wahl's truck. (That was never proven.). *State v. Spreitz*, 202 Ariz. 1, 3 (2002) (ineffective assistance of counsel claims must be presented in an initial Rule 32 petition).

On August 30, 2016, after Mr. Wahl's conviction, post-conviction counsel had three swabs tested by NMS labs who generated a Forensic Biological Laboratory Report. All three were negative for blood and DNA. There was no direct blood or DNA evidence suggesting that Mr. Wahl had run over the decedent's skull. 2-ER-83. The lack of blood and DNA on the tires directly contradicted the State's eye-witnesses testimony. There was another suspect, Griffin, who was intoxicated and drove in front of S.C. as he lay in the road. 2-ER-84.

Ground 3: Ineffective Assistance of Counsel: Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial Rule 32 proceeding when post-conviction counsel failed to raise ineffective assistance of counsel related to the failure to request a *Willits* instruction that was required as a prerequisite for further collateral review. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012);

Strickland v. Washington, 466 U.S. 668 (1984). Mr. Wahl was entitled to a *Willits* jury instruction regarding destroyed evidence regarding other vehicles at the scene (Griffin and Shanda particularly). *State v. Willits*, 96 Ariz. 184 (1964) (en banc). The instruction would have let the jury know that there was evidence that S.C. was hit by another vehicle which was in the State's possession, but did not hold onto it. 2-ER-118-26.

Post-conviction counsel's performance fell below professional norms by not raising this claim and that failure prejudiced Mr. Wahl as it was not presented or persevered. At trial, defense counsel could not present evidence that another vehicle struck S.C. Mr. Wahl need not provide detailed evidence in the claim, but has provided specific factual allegations, that if true, entitles him to relief. *State v. Donald*, 198 Ariz. 406, 414 (Ariz. Ct. App. 2000).

Grounds 4 & 5: Ineffective Assistance of Counsel: Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial Rule 32 proceeding when post-conviction counsel failed to raise ineffective assistance of counsel related by failing to object to confrontation clause violation that was required as a prerequisite for further collateral review. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Strickland v. Washington*, 466 U.S. 668 (1984); *Bullcoming v. N.M.*, 131 S.Ct. 2705 (2011); *Melendez-Diaz v. Moss*, 129 S.Ct. 2527 (2009).

Trial counsel did not object to criminalist Bernarz testifying regarding the results of the testing by retired criminalist Holden. 2-ER-128-30. Post-conviction counsel did

not mention this issue in the Rule 32 petition. Similarly, forensic pathologist Hess testified regarding the autopsy performed by forensic pathologist Gupta. 2-ER-132-34.

Had this objection been made at trial, prejudicial testimony would not have been presented to the jury. Mr. Wahl was denied the right to confront Holden and Gupta on the testimony because Holden and Gupta did not testify at trial. Mr. Wahl need not provide detailed evidence in the claim, but has provided specific factual allegations, that if true, entitles him to relief. *State v. Donald*, 198 Ariz. 406, 414 (Ariz. Ct. App. 2000).

Grounds 6 & 7: Ineffective Assistance of Counsel: Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial Rule 32 proceeding when post-conviction counsel failed to raise ineffective assistance of counsel related by trial counsel failing to object to prosecutorial misconduct. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Strickland v. Washington*, 466 U.S. 668 (1984). The prosecutor elicited testimony from Cynthia Boykin that Mr. Wahl hit S.C., S.C. flew over the truck, and then Mr. Wahl hit S.C. a second time. 2-ER-136-39. Trial counsel failed to object, request a curative instruction, ask for the testimony to be struck, or move for a mistrial.

Shanda Woolf requested and received written statements from Mary Lou Scott and Bruce Woolf that Mr. Wahl was "86'd" from the bar. This was knowingly false information. 2-ER-141-44. It is improper for a prosecutor to propound an inference that it knows to be false or has a strong reason to doubt. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959); *US v. Blueford*, 312 F.3d 962 (9th Cir. 2002). Not only was this evidence, but it was more prejudicial than probative. The prosecutor

entered the evidence, and the trial counsel did not object. Post-conviction counsel did not raise this as an issue. This fell below the professional norms and that failure prevented the trial counsel from reviewing this issue.

Ground 8: Ineffective Assistance of Counsel: Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial Rule 32 proceeding when post-conviction counsel failed to raise ineffective assistance of counsel related to trial counsel not obtaining a necessary expert witness. Witnesses for the State testified to the alleged incident of S.C. being run over by Mr. Wahl. Trial counsel did not request an accident reconstruction expert, even though the court authorized that an expert could be appointed and the County would pay for the expert. 2-ER-146-50.

Mr. Wahl hired an accident reconstruction expert, Paul Gruen, who issued a report on December 26, 2017. Mr. Gruen stated that State witness Victor Pallanes could not have witnessed Mr. Wahl running over S.C.. Further, S.C.'s injuries were consistent with falling and hitting his head on the road. Additionally, the Dodge Dually driven by Mr. Wahl was 5,513 pounds and a skull will be completely crushed (more damage than S.C. had) at 520 pounds of pressure. S.C.'s skull was not crushed. *Id.*

This issue was not raised in the Rule 32 petition. If this claim was raised, it was reasonably probable that the trial court would have agreed that there was no adequate investigation or preparation by trial counsel and the failure to obtain an expert could not have been a strategic decision.

Ground 9: Ineffective Assistance of Counsel: Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial Rule 32 proceeding when post-conviction counsel failed to raise ineffective assistance of counsel related to the prosecutor asking witnesses to vouch for each other or asking if certain witnesses were lying. Trial counsel did not object.

On February 20, 2014, Deputy County attorney, Lori Zucco, asked Dannie Lynn Bowling on cross-examination if Jenny was lying. 2-ER-152-54. On February 21, 2014, Deputy County Attorney Zucco, asked Mr. Wahl if his defense witness Mr. Borland was mistaken about his account of what transpired. *Id.* On February 21, 2014, Deputy County Zucco asked Mr. Wahl if the trial witnesses, including Mr. Stiles lied during testimony. *Id.* Trial counsel would not object.

This issue was not raised in the Rule 32 petition. If this claim was raised, it was reasonably probable that the trial court would have agreed that there was no reason for trial counsel to not object to these lines of questioning.

Ground 10: Ineffective Assistance of Counsel - Rule 32 Counsel on Initial Review

Mr. Wahl's counsel was ineffective in causing a procedural default in an initial Rule 32 proceeding when post-conviction counsel failed to raise ineffective assistance of counsel related to the prosecutor referring to "evidence" that was not in the record.

On February 20, 2014, Deputy County attorney, Lori Zucco, asked Dannie Lynn Bowling regarding statements on a recording that was not in evidence. 2-ER-156-58. Trial counsel did not object to this clear prosecutorial misconduct.

This issue was not raised in the Rule 32 petition. If this claim was raised, it was reasonably probable that the trial court would have agreed that there was no reason for trial counsel to not object to this line of questioning.

Ground 11: Prosecutorial Misconduct

Mr. Wahl's conviction was obtained as a result of prosecutor's misconduct in violation of Due Process rights to a fair trial pursuant to 5th and 14th Amendments of the U.S. Constitution. *See, Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristofono*, 416 U.S. 637 (1974). The prosecutor would improperly lead witnesses during direct examination, vouching for credibility of witnesses, making improper statements regarding evidence, disregarding court orders regarding defense objections, engaging in speaking objections, presenting a rebuttal witness who had contact with other witnesses in the trial, and making statements or eliciting testimony that had no relevance, but was used to garner sympathy and emotional response. 2-ER-160-69.

This issue was raised with the Court of Appeals. On October 30, 2015, the Arizona Court of Appeals denied relief, holding the instructions cured the misconduct regarding the prosecutorial comments, and that while it was improper to introduce facts or opinions that were not in evidence, they were not relevant and did not amount to fundamental error. 1-ER-56-57. The Court of Appeals also that held that because the field trip was allowed, Mr. Wahl was not prejudiced by the prosecutor violating the spirit of the court order. Even though it was improper to request the demonstration because a witness testified to S.C. having his arm caught in the window, there was no prejudice. 1-ER-57. The prosecutor told a personal story about her Father being upset

while watching the trial and being upset about S.C. The Arizona Court of Appeals ultimately found that the errors did not amount to cumulative error. However, the errors permeated the trial and infected it with unfairness in violation of the 5th and 14th Amendments of the US Constitution.

Because the prosecutorial misconduct was persuasive throughout the trial, this resulted in a constitutional error. Mr. Wahl was denied the right to a fair trial. The jury could not concentrate on the actual evidence due to the prosecutor inserting herself into the facts of the case and making improper statements throughout.

Ground 12: Insufficiency of Evidence

Mr. Wahl's conviction was obtained as a result of evidence that was insufficient to persuade a properly instructed, reasonable jury of his guilt beyond a reasonable doubt in violation of Constitutional Due Process rights pursuant to the 5th and 14th Amendments of the U.S. Constitution. No reasonable jury could have found Mr. Wahl guilty (absent the errors) and due process and fundamental fairness was violated. *See also, Jackson v. Virginia*, 443 U.S. 307 (1979).

Throughout every moment of this case, Mr. Wahl has maintained his innocence. Although unfortunate, S.C.'s death was caused by S.C.'s attack of Mr. Wahl. 2-ER-171-72. Mr. Wahl was sentenced on April 3, 2014, to the presumptive term of 10.5 years. On October 30, 2015, the Arizona Court of Appeals denied relief, holding that there was sufficient evidence to support a guilty verdict. The Court partially held that the evidence demonstrated that Mr. Wahl had run over S.C. and based on previous

disagreements and comments reasonable jurors could find Mr. Wahl intentionally or recklessly caused the death of S.C.

Mr. Wahl has been wrongfully convicted, and he will never be able to reclaim the last 10.5 years of his life. Mr. Wahl is set for release in January 2023, and Mr. Wahl deserves for his conviction to be reversed.

Ground 13: Ineffective Assistance of Counsel – Trial Counsel

Mr. Wahl's trial counsel was ineffective for failing to properly investigate and properly evaluate blood and DNA evidence alleged to have been on the tire of Mr. Wahl's truck. Mr. Wahl was denied effective counsel as guaranteed by the U.S. Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). Trial counsel failed to have the swabs from the tire(s) tested. The prosecutor did not have tests performed as well. Trial counsel should have been aware of how critical testing of the swabs were for blood and DNA. 2-ER-188-92. The absence of blood and DNA would have been exculpatory to Mr. Wahl and would have discredited Victor Pallane's alleged eyewitness testimony.

On July 28, 2017, the Arizona Court of Appeals held that the Superior Court did not abuse its discretion in denying relief in Mr. Wahl's initial review Rule 32 Petition because counsel could conclude the jury would not find it remarkable that there was no blood on the tires of Mr. Wahl's truck. However, the court overlooked the fact that trial counsel wanted the results of the swabs for trial, but was relying on the State to provide the evidence at trial.

CONCLUSION

This case involves questions of exceptional importance involving the violation of Mr. Wahl's constitutional right to the effective assistance of counsel. Such violations deprived Mr. Wahl of a fair trial that resulted in a wrongful conviction. Therefore, Mr. Wahl respectfully requests this Court grant certiorari of his case.

RESPECTFULLY SUBMITTED this 4th day of April 2023.

LAW OFFICE OF FLORENCE M. BRUEMMER, P.C.

/s/ Florence M. Bruemmer

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