

23-5785

ORIGINAL

---

**SUPREME COURT OF THE UNITED STATES**

---

JOSHUA ASTON,  
PETITIONER  
VS.  
STATE OF ARIZONA,  
RESPONDENT.

---

FILED

SEP 12 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

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

---

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Joshua Aston  
Petitioner  
5501. North La Palma dr.  
Eloy, Arizona, 85131.

---

RECEIVED

OCT 11 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

I. **Questions Presented:**

1

Where a defendant wasn't afforded the opportunity to testify, did the trial court or defense counsel violate a defendant's right to testify and present a comprehensive defense as protected by the 6th Amendment by neglecting to address and document a defendant's right to testify during the defense phase and subsequently after the State's case was reopened in an irregular manner?

2

Does instructing a jury to vote unanimously, effectively eliminating the possibility of a hung jury?

3

Does the untimeliness of an appeal outweigh clear injustices, and is there a standard in which courts should abide in determining when to ignore a claim and continue to allow justice to be denied, particularly in cases involving newly discovered evidence, actual innocence, and claims with constitutional magnitude?

## II. Related Cases

State of Arizona vs. Joshua Aston, No CR 22-0314-PR, Arizona Supreme Court. judgment entered on 8-3-23.

State of Arizona vs. Joshua Aston, No 1 CA-CR 22-00143 PRPC, Court of Appeals, Div. 1. Judgement entered on 12-8-22.

State of Arizona vs. Joshua Aston, No CR 2004-006474-001, Maricopa County Superior Court. Judgement entered on 3-25-22.

## III. Table of Contents

I.	Questions Presented.....	1
II.	Related Cases .....	2
III.	Table of Contents.....	2
IV.	Table of Authorities.....	3
V.	Petition for Writ of Certiorari.....	5
VI.	Opinions Below.....	5
VII.	Jurisdiction.....	5
VIII.	Constitutional Provisions Involved.....	5
IX.	Statement of the Case.....	6
	A. Exhibit #92 and Irregularity in Reopening the State's Case: Ideal Time for Colloquy.....	7
	B. Violation of the Right to an Impartial Jury.....	8
	C. An Overview of Denial of Claims and Rights Violated in PCR Proceedings.....	9
X.	Reasons For Granting the Writ.....	12
	A. To avoid erroneous deprivation of the right to testify on one's behalf, this court should mandate that the trial court conducts a colloquy to address and document the defendant's right to testify during the defense phase and any subsequent reopening of the State's case for introduction of additional evidence or witnesses.....	12
	B. To avoid erroneous deprivation of a defendant's right to an impartial jury, this court should require the trial court to provide clear and fair instructions to the jury, informing them they have a right to express uncertainty or disagree with others. Also the concept of a hung jury should be explained, allowing the jurors to understand that it is a valid outcome if they are unable to reach a unanimous decision.....	13
	C. To avoid erroneous deprivations to the right to introduce colorable claims in PCR proceedings, the right to fair and impartial review of claims presented in PCR, the right to have the court of appeals consider questions of law and facts as well as the merits of the PCR claims, the rights under Rule 32.1(e) & (h) that should have been exempt from preclusion as well as the right to have the court rule on	

claims presented under these rules, the right to an evidentiary hearing and opportunity to present newly discovered evidence ; this court should require the trial court to ensure a petitioners rights are not violated or denied throughout the PCR proceedings and that a proper review is conducted based on the relevant laws and facts of the case .....	14
XI. In Conclusion.....	16
XII. Index to Appendices.....	3
XIII. Appendix.....	

#### IV. Table of Authorities

CASES	PAGE NUMBER
<u>State vs Sajna</u> , No CR12-0797 (Ariz. ct. App. May 15th 2015).....	6,13
<u>U.S. vs Teague</u> , 953 f.2d 1525, 1531 (11th cir 1992).....	6,12
<u>Tachibana vs State</u> , (79 Hawaii, 226, 900 p.2d 1293).....	6
<u>Hawaii vs Lewis</u> , 94 Hawaii 292 12 p3d 1233.....	6
<u>State vs Davis</u> ,206, Ariz 377, 390, 64, 79, p.3d 64, 77 (2003).....	8
<u>State vs Gulbranson</u> , 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995).....	8
<u>State vs Flowers</u> ,159, Ariz 469, 472, 468, p.2d, 201, 204 (1989).....	7,8
<u>Armstrong vs Manzo</u> , 380 U.S. 545, 552 (1965) .....	7
<u>Earp vs Ornoski</u> , 431 F.3d 1158 9th cir.....	7,11
<u>Marte vs Berkman</u> ,70 A.D.3d 493, 504, 895 N.Y.S.2d 376, 385(N.Y. Supreme Ct.App. Div. 2010).....	7
<u>Mims vs Leblanc</u> , 176 F3d 280, 282 (5th cir. 1999).....	7
<u>Henley vs FMC</u> ,189 F.R.D. 340 1999. U.S. dist lexis 15866.....	7
<u>State vs Bocharski</u> , 218 Ariz 476, 487, 189 P.3d 403, 414 (2008).....	8
<u>State vs Glassel</u> , 211 Ariz 33, 53, 116 P.3d 1193, 1213 (2005).....	9
<u>henderson</u> ,10 Ariz at 568, 25, 115 p.3d at 608.....	10,12
<u>Stewart vs Smith</u> , 536 U.S. 856, 859-61 (2002) .....	10
<u>Stewart vs Smith</u> , 202 Ariz. 446, 448-50, 117 11, 46 P.3d 1067, 1069-71 (2002).....	10
<u>State vs Moody</u> , 192 Ariz. 505, 22, 968 P.2d 578 (1998).....	11
<u>State vs Butrick</u> , 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976).....	11
<u>State vs Smith</u> , 197 Ariz. 333, 17, 4 P.3d 388(App. 1999), .....	11
<u>State vs Soliz</u> , 223 Ariz. 116, 120 n.4, 17, 219 P.3d 1045, 1049 n.4 (2009).....	11
<u>State vs Swoopes</u> , 216 Ariz. 390, 398-402, 26-39, 166 P.3d 945, 953-57 (App. 2007).....	11
<u>state vs Hansen</u> , 215 ariz, 287, 289 2007.....	11
<u>state vs Gutierrez</u> , 229 Ariz. 573,577,19 (2012).....	11
<u>state vs Poblete</u> ,227 Ariz 537, 538 1 (App. 2011).....	11

Apodaca vs Oregon (406 U.S. 404, 410).....13

<b>STATUTES AND RULES</b>	<b>PAGE NUMBER</b>
28 U.S.C. §1257.....	5
ARCRP Rule 32.1(e)(h).....	7,10,11,12,14,15
ARCRP Rule 32.2(b) .....	9,10
ARCRP Rule 32.4(b)(3).....	9
Rule 32.14.....	10
[Rule] 18.1(b)(1).....	11
ARIZONA STATUTES §13-4236(c).....	11

<b>OTHER</b>	<b>PAGE NUMBER</b>
John M. Burkoff's "Misapplication of Law and the Role of Appellate Courts,".....	14,15,16

### **Constitutional Provisions**

United States Constitution, Amendment 5.....	5,6
United States Constitution, Amendment 6.....	6,7,12
United States Constitution, Amendment 14.....	6,7

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

V. Petition for Writ of Certiorari

Joshua Aston, an inmate currently incarcerated at La Palma correctional center in Eloy, Arizona by and through himself as pro se respectfully petitions this court for a Writ of Certiorari to review the judgments of the Arizona Superior Court, Court of Appeals, and Supreme Court.

VI. Opinions Below

The decision by the Arizona Superior Court denying Mr. Aston's Post-Conviction Relief (PCR) is reported as State of Arizona vs. Joshua Aston, No CR 2004-006474-001, in Maricopa County Superior Court. 3-25-22.

The Court of Appeals denied Mr. Aston's Petition for Review on 12-8-22; State of Arizona vs. Joshua Aston, No 1 CA-CR 22-00143 PRPC, Court of Appeals, Div. 1.

The Arizona Supreme Court denied Mr. Aston's Petition for Review on 8-3-23; State of Arizona vs. Joshua Aston, No CR 22-0314-PR, Arizona Supreme court.

VII. Jurisdiction

Mr. Aston's Petition for Review to the Arizona Supreme Court was denied on August 3rd, 2023. Mr. Aston invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this petition for a writ of certiorari within ninety days of the Arizona Supreme Court decision.

VIII. Constitutional Provisions Involved

United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment 14:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**IX. Statement of the case**

The 5th, 6th, and 14th Amendments of the United States Constitution are essential in guaranteeing the protection of a defendant's rights during accusation and trial. These amendments ensure that individuals have the right to testify on their behalf and are afforded due process, which further safeguards their rights. The principle of due process ensures that everyone is treated fairly and that proper legal procedures are followed.

In significant legal cases like State vs Sajna and U.S. vs Teague, the Supreme Court has recognized the right to testify as fundamental and constitutional. The court cannot assume a waiver of rights based on a silent record, as was evident in Teague's case where the right to testify was violated due to the absence of a colloquy.

In the Tachibana vs State case, the court established that the ideal time to conduct a colloquy is before the close of the defendant's case. Similarly, in Hawaii vs Lewis, the court mandated that defendants be informed of their right to testify prior to the trial's commencement and again at its conclusion.

The current case raises the question of whether a colloquy is necessary not only prior to the close of the defendant's case but also when the state's case is reopened, and if the judge requests an additional rest from both parties.

The protection of due process in trial proceedings and the right to a fair and impartial jury are ensured by the 6th and 14th Amendments of the United States Constitution.

An example that exemplifies the importance of these amendments is the case of State vs Davis, where it was demonstrated that denying a defendant the right to an unanimous jury verdict infringes upon their right to a fair and impartial jury. This case also suggests that a jury can reach a verdict even if they are divided in their opinions.

Similarly, in the case of State vs Flowers, it was held that denying the principle of impartiality not only violates the constitution but also denies an essential component of due process.

These cases raise the question of whether it is necessary to inform a jury about the possibility of a 'hung jury' in order to ensure that their decision-making is not limited.

Rights on appeal are protected under the 6th and 14th amendments of the US Constitution.

Over 50 years ago, the court suggested in Armstrong vs Manzo, that individuals must have the opportunity to be heard in a meaningful manner and at a meaningful time when seeking relief for claims involving constitutional rights, newly discovered evidence, and actual innocence. Similarly, in Earp vs Ornoski, it was established that if a petitioner presents a colorable claim for relief and has not been granted a hearing at the state or federal level, the case should be remanded to the district court for an evidentiary hearing. In other words, a hearing is necessary if the defendant has alleged facts that, if proven, would entitle them to habeas relief and if they did not have a fair chance to present those facts.

By denying an opportunity to raise such claims the lower courts deprive petitioners due process. As the New York Supreme Court appellate division has held, "if petitioners were incapable of making a contemporaneous objection, their due process right to make a recording was abrogated, and the belated ruling constitutes a mode of proceeding error that required no preservation for review. "Marte vs Berkman, 70 A.D.3d 493, 504, 895 N.Y.S.2d 376, 385(N.Y. Supreme Ct.App. Div. 2010). Indeed, the Fifth Circuit recognized, "Due process can be denied by any substantial retardation of the appellate process," even something as insubstantial as a delay in providing transcripts. Mims vs Leblanc, 176 F3d 280, 282 (5th cir. 1999).

Furthermore, in Henley vs FMC, judges have the authority to prevent miscarriages of justice. It is both their right and duty to order a new trial when it is in the interest of justice. This principle is also reflected in ARCP Rule 32.1(e)(h), which affirms the right to introduce credible claims on appeal.

These court cases and rules provide an opportunity to review matters involving fundamental errors and claims of constitutional significance that may be outside the time limitations. This raises the crucial question of whether post-conviction appeals addressing issues of significant importance should be denied review and hearings. Are there exceptions to the preclusion rule if discretionary decisions allow for appeals to be dismissed without review on constitutional claims or fail to consider reasons for not raising issues earlier, especially when valid reasons have been established? Should injustices be allowed to proceed based on inaccurate findings or discretionary rulings?

#### **A. Exhibit #92 and Irregularity in Reopening the State's Case: Ideal Time for Colloquy:**

On January 15, 2004, sixteen-year-old Joshua Aston faced charges of 1st degree murder and conspiracy to commit murder. The trial commenced in March 2007, resulting in Mr. Aston being found guilty on all counts.

Throughout the trial, Mr. Aston did not testify, and there is no evidence suggesting his awareness of his right to do so. After the State rested its case, the defense counsel immediately followed suit, without again determining whether Mr. Aston desired to testify on his own behalf.

The court failed to conduct a colloquy at any point. However, the day after the case was rested, the judge reopened the State's case upon a juror's request to view Exhibit #92. The judge informed the jury that they would not have access to this exhibit/transcripts but decided to present a redacted audio tape (previously transcribed as Exhibit #92) as a "witness" to the jury.

Following the audio tape's presentation, the judge once again requested both parties to rest their cases. However, there was no colloquy to establish whether Mr. Aston was aware of his right to testify at this stage either.

A trial court need not inquire on the record whether a defendant has waived his right to testify. State vs. Gulbranson, however "in an appropriate case... it may be prudent for a trial court" to do so. reopening of the state's case should grant such an opportunity for a record to be made, as well as it is uncertain for a person to know their rights unless it is addressed. It's important to note that Mr. Aston was a child with a learning disability, so it is unlikely that anyone could expect him to understand the judicial process without explanation.

## **B. Violation of the Right to an Impartial Jury:**

On March 20th 2007 the judge told the jury "All 12 of you must agree on any verdict you reach. All 12 of you must agree whether the verdict is guilty or not guilty."

The U.S. Constitution guarantees a criminal defendant the right to a fair and impartial jury, with the judge ensuring a fair presentation of information and giving clear and fair instructions to the jury.

In this specific instance, during the jury instructions, the judge told the jury that "all 12 of you must agree" the same, thereby limiting the jury's decision-making process and denying the possibility of any other outcome.

The instruction to vote the same eliminates the ability for a juror to express uncertainty or disagree with other jurors, ultimately suppressing their individual analysis of the case and compromising their duty to the court.

The concept of a hung jury, wherein jurors are unable to reach a unanimous decision, was not presented as a possible outcome, further limiting the jurors' understanding of their role and choices.

The denial of the right to a fair trial and impartial jury, as evidenced by the court's instruction, is a fundamental error that infringes upon the defendant's constitutional rights under the Sixth and Fourteenth Amendments.

Precedents such as State vs. Davis (206 Ariz 377, 390, 64 P.3d 64, 77 (2003)) and State vs. Flowers (159 Ariz 469, 472, 468 P.2d 201, 204 (1989)) support the argument that denying the right to an unanimous jury verdict suggests the possibility of a divided jury decision.

It is not required that all jurors vote the same, and the judge had an obligation to inform the jury that their individual votes did not have to align with everyone else's. By failing to do so, the judge potentially coerced a guilty verdict.

The denial of jurors' ability to be impartial in this critical instance violates the constitution and denies a key component of due process, as stated in State vs. Bochariski (218 Ariz 476,

487, 189 P.3d 403, 414 (2008)) and State vs. Glassel (211 Ariz 33, 53, 116 P.3d 1193, 1213 (2005)).

The defendant did not waive their right to a trial by jury, making the judge's instruction of "agreeing" rather than "deciding" an unfair, inappropriate, and biased term to use.

### **C. An Overview of Denial of Claims and Rights Violated in PCR Proceedings:**

Petitioner seeks a writ of certiorari to review the decisions of the Superior Court in denying the petitioner's claims in the post-conviction relief (PCR) proceeding and on those decisions of the court of appeals stemming from the PCR as well.

#### Synopsis of the Supreme Court filing and decision

A Petition for Review was filed 12-29-22.

The Petitioner filed a Motion Requesting the Court Accept a Delayed Petition for Review Due to Extraordinary Circumstances on 1-12-23.

The court granted a delayed Petition for Review on 1-13-23.

The court denied the matter without review on 8-3-23.

#### Synopsis of the Court of Appeals filings and decision

A Petition for Review was filed on 4-2-22. No response was provided by the opposing party. The Court of Appeals on 11-15-22 dismissed due to a claim of a failure to establish abuse of discretion or error in law. The Petitioner filed a Motion for Reconsideration on 11-27-22 and was denied on 12-8-22 without explanation.

#### Synopsis of the Superior Court filings and decision

The Petitioner was found guilty of two counts: 1st degree murder; and conspiracy to commit 1st degree murder. a trial court issued a prison sentence of [juvenile] life without parole and [juvenile] life with parole.

On 7-30-21 the Superior Court dismissed a successive PCR(Notice), filed on 7-20-21, on a summary review for hybrid representation; without a hearing. The Petitioner filed a Motion for Reconsideration on 8-7-21 for a review on the claims which were never decided; along with an Amended PCR(Notice). On 8-16-21, the Court ordered the State to respond to the Motion for Reconsideration. the Court on 10-7-21 granted the Motion for Reconsideration, granted the Motion Requesting Permission to File an Amended Notice Requesting PCR, and dismissed the Amended Notice Requesting PCR; the Court found, in a summarily decision, Mr Aston failed to provide a valid reason for failing to raise claims in a timely manner under ARCRP Rule 32.2(b)(see also: Rule 32.4(b)(3). On 10-14-21 Petitioner filed a Reply to the State's Response to the Defendants Motion for Reconsideration [the Court made its decision before Mr Aston had a chance to timely reply]. Petitioner filed an additional Motion for Reconsideration on 10-18-21;

which presented the issue of the "sufficient" standard under ARCRP Rule 32.2(b); and if the Court overstepped in its ruling based upon Rule 32.14; also Mr Aston addressed the issue as to why he wasn't given chance to reply before the court made its decision to dismiss. and finally the Court on 11-5-21 denies the Petition for Reconsideration for no good cause. Mr. Aston proceeds to request multiple extensions of time to file a Petition for Review to the Court of Appeals.

Petitioner argued in a Motion for Reconsideration to the Superior Court, and a Petition for Review to the Court of Appeals and Arizona Supreme Court, that he was hadn't been allowed to introduce colorable claims under Rule 32.1(e) and (h), which explicitly grants the right to do so. Claims were denied based on a standard that allowed discretion to be used by the court; hybrid representation, the sufficient reason standard and untimeliness. later claims were dismissed for failure to adhere to the rules outlined in rule 32. The Court also used legal authority Dixon vs State to deny self-representation as a matter of law, not discretion. The Court claimed untimeliness under Rule 32.2(b); that Mr Aston failed to declare a sufficient reason for why he was late to filing claims in an appeal. the court improperly shifted the burden of proof for claims that deal with personal right of waiver and fundamental error. The Petitioner did provide reasons that would have satisfied the 'sufficient' standard under this rule. The court failed to provide a hearing to determine further if the claims were out weighed by any untimeliness regardless of any reason provided.

The Petitioner further argued that the Court committed judicial bias, as it contradicted itself and rendered conflicting decisions without considering due process. The decisions were based on discretion and went beyond the scope of law and facts. (see Motions for Reconsideration to the Superior Court and the Court of Appeals, and a petition for review to the court of appeals and az supreme court) the Courts misapplied discretionary rules and citations to deny review of claims of constitutional magnitude.

The Court granted the State to respond to the Motion for Reconsideration; which stole the opportunity to address claims in the Notice Requesting to file PCR, not the issues of the Motion for Reconsideration as ordered by the Court. Also the judge denied the Petitioner's Reply by making a decision on the matter which formed a decision based on nothing presented by the State's Response. This decision was reaffirming the decision of untimeliness, however no summary decision with untimeliness existed and therefore couldn't be affirmed. The Court allowed the state to also file its response untimely which was raised as an issue wishing the Petitioners Reply. The Petitioner filed an Additional Motion for Reconsideration; which presented the question to the "sufficient" standard under ARCRP Rule 32.2(b) and argued that the Court had the burden of reviewing claims under Henderson, 10 Ariz at 568, 25, 115 p.3d at 608. the court improperly shifted the burden of proof.

In Stewart vs Smith, 536 U.S. 856, 859-61 (2002) (per curiam), the US. Supreme Court adopted the holding of Stewart vs Smith, 202 Ariz. 446, 448-50, 117 11, 46 P.3d 1067, 1069-71 (2002), that the question of waiver under Rule 32.2 alleged to have been violated. A personal waiver only is required for a narrow category of claims, those involving a right of "sufficient

constitutional magnitude" to require a knowing, voluntary and intelligent waiver. As examples of such rights, the court cited State vs Moody, 192 Ariz. 505, 22, 968 P.2d 578 (1998) (waiver of right to counsel "must be knowing, intelligent, and voluntary"); State vs Butrick, 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976) (when defendant waives right to jury trial, "the court must always address the defendant personally, pursuant to [Rule] 18.1(b)(1) to ascertain that the waiver is knowing, voluntary and intelligent"); and State vs Smith, 197 Ariz. 333, 17, 4 P.3d 388 (App. 1999), abrogated on other grounds by State vs Soliz, 223 Ariz. 116, 120 n.4, 17, 219 P.3d 1045, 1049 n.4 (2009) ("[A] defendant's right to a twelve-person jury under the Arizona Constitution is a right so inherently personal that it cannot be waived by defense counsel; only the defendant can waive it."). For all other rights, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding. For further discussion of whether personal waiver of a particular right is required before preclusion can apply, see State vs Swoopes, 216 Ariz. 390, 398-402, 26-39, 166 P.3d 945, 953-57 (App. 2007).

The Petitioner sought a fair review of the claims presented in the PCR by appealing to the Court of Appeals. However, the Court of Appeals disregarded the Petitioner's Petition for review and applied irrelevant legal authorities without finding an established abuse of discretion within its decision. The Court of Appeals ignored questions of facts and law, as well as the merits of the PCR claims.

Cases Gutierrez and Poblete were provided as references in the Court's decision. These cases were argued in a Motion for Reconsideration for having no bearing on the Petitioner's case. The case in Gutierrez does show that relief is granted but it's unclear how the Court of Appeals in this instance applied it considering in this case claims of newly discovered evidence were raised. Gutierrez states that the precluded provision in rule 32.1(e) does not apply to claims on newly discovered evidence or actual innocence.

Gutierrez also serves to address De novo issues. And in which case it ignored State vs Hansen, 215 ariz, 287, 289 2007. The court makes no mention of de novo. Through §13-4236(c) the Petitioner showed a hearing is required for such claims.

In Poblete the case revolved around significant changes in law and retroactive/applicability in that instant. The Petitioner claims raised on PCR do deal with changes in law, however the Superior Court never made any decision on these grounds, since they dismissed the PCR in its entirety. In short, Retroactivity wasn't a factor.

The Petitioner argued that both the Superior Court and the Court of Appeals misapplied the law to important issues, thereby undermining the entire appeal process. The Petitioner specifically points out that the courts failed to address the question of whether the trial court is required to record a waiver of testimony and whether the right to testify is a voluntary unwaivable right. The petitioner asserts that there is no controlling Arizona decision on these questions and that they warrant review and decision. The courts also overlooked relevant legal authority, such as EARP v ORNOSKI, which the Petitioner argues is applicable to affording a hearing when colorable claims are raised.

The Petitioner also contended that the courts failed to properly review the issues presented and denied relief without sufficient reason or explanation. The courts ignored

colorable claims and overlooked the Petitioner's rights under Rule 32.1(e) and (h) that should have been exempt from preclusion. The Petitioner argued that the superior court dismissed the PCR in its entirety without ruling on the claims under Rule 32.1(e) and (h). The Court of Appeals erroneously relied on previous decisions that were not applicable to the Petitioner's case. Courts disregarded Henderson, 10 ariz 247 246 82 p.2d 1289 (1992).wherein the burden of proof layed with the courts for grounds presented under rule 32.1(e) &(h).

In addition, the Petitioner asserted that an evidentiary hearing is required and that the Courts failed to review the issues presented in the light of newly discovered evidence. The Petitioner argued that the Courts violated his due process rights by denying him the opportunity to present his claims, and failed to address the grounds raised under Rule 32.1(e) and (h).

## **X. Reasons for granting the Writ**

- A. To avoid erroneous deprivation of the right to testify on one's behalf, this court should mandate that the trial court conducts a colloquy to address and document the defendant's right to testify during the defense phase and any subsequent reopening of the State's case for introduction of additional evidence or witnesses.**

In the case of United States v. Teague, the Ninth Circuit held that the defendant's right to testify was violated because there was no colloquy or on-the-record inquiry to ensure his waiver of that right was knowing and voluntary. This decision supports the argument that the trial court or defense counsel in the present case violated the defendant's right to testify and present a comprehensive defense as protected by the 6th Amendment.

The United States v. Teague case supports the argument that the trial court or defense counsel violated the defendant's right to testify, as protected by the 6th Amendment. The defense counsel failed to address and document the defendant's desire to testify, which infringes upon the defendant's personal right to testify, as emphasized in United States v. Teague. Moreover, in this instance, the irregular reopening of the State's case, where a redacted audio tape was presented as a "witness" after the case had been rested, further undermines the defendant's right to present a comprehensive defense. Additionally, the lack of evidence suggesting the defendant's awareness of his right to testify throughout the trial raises doubts about whether he was truly given the opportunity to exercise this fundamental right.

In the present case, the defense counsel neglected to address and document the defendant's desire to testify during the defense phase. This failure to inquire about the defendant's wishes regarding testifying violates the defendant's personal right to testify, as emphasized by the court in United States v. Teague.

Additionally, the reopening of the State's case in an irregular manner further strengthens the argument of a violation of the defendant's right to testify. The judge's decision to present a redacted audio tape as a "witness" to the jury after the case had been rested raises concerns

about the fairness of the trial. Without a colloquy to establish whether Mr. Aston was aware of his right to testify at this stage, his right to present a comprehensive defense was undermined.

Furthermore, the lack of evidence suggesting Mr. Aston's awareness of his right to testify throughout the trial raises doubts about whether he was truly given the opportunity to exercise this fundamental right. It is the responsibility of the trial court and defense counsel to ensure that defendants are aware of their rights and to provide them with the opportunity to testify if they so desire.

There is no clarity in the courts to determine whether a record to establish a waiver to the right to testify is required. A silent record is not a waiver. no law exists to support a person's right to testify, yet it is a well established right and process of trial. The 9th Cir court, in Sajna, supports the right to testify, but didn't publish its recognition to require a record.

**B. To avoid erroneous deprivation of a defendant's right to an impartial jury, this court should require the trial court to provide clear and fair instructions to the jury, informing them they have a right to express uncertainty or disagree with others. Also the concept of a hung jury should be explained, allowing the jurors to understand that it is a valid outcome if they are unable to reach a unanimous decision.**

The judge's instruction severely limits the jury's ability to independently and objectively evaluate the evidence presented. By explicitly stating that all jurors must agree on a verdict, the judge pressures jurors to conform to the majority opinion, disregarding the possibility of dissenting or differing views.

This violation is particularly concerning in a criminal trial, where the stakes are high and the defendant's liberty is at risk. A fair and impartial jury is crucial to ensure that the defendant receives a fair trial and that justice is served.

Additionally, the judge's failure to inform the jury about the possibility of a hung jury further undermines the fairness and impartiality of the trial. By omitting this crucial information, the judge skews the jurors' understanding of their options and potentially coerces them into reaching a verdict quickly, rather than engaging in thorough deliberation.

The U.S. Supreme Court has consistently held that a defendant's right to an impartial jury includes the right to have each juror vote their conscience and make an independent determination of guilt or innocence. In Apodaca v. Oregon, (406 U.S. 404, 410), the Court held that a defendant's right to an impartial jury is violated when the jury is required to reach a unanimous verdict. This case supports the argument that the judge's instruction in this case violates the defendant's rights.

The judge's instruction severely limits the jury's ability to independently evaluate the evidence presented. By explicitly requiring all jurors to agree on a verdict, the judge pressures

jurors to conform to the majority opinion, disregarding dissenting views. This violation is particularly concerning in a criminal trial, where a fair and impartial jury is crucial to ensure the defendant receives a fair trial and justice is served. The judge's failure to inform the jury about the possibility of a hung jury further undermines the fairness and impartiality of the trial, potentially coercing them into reaching a quick verdict instead of engaging in thorough deliberation.

There is no existing law that requires a jury to be informed on knowing if a hung jury is a possibility. Judges may arbitrarily decide with bias to leave this information out with the sole intent of ensuring there is no need to conduct another trial due to time restraints with schedules or otherwise. however this affects a defendant's right to a fair jury and due process.

**C. To avoid erroneous deprivations to the right to introduce colorable claims in PCR proceedings, the right to fair and impartial review of claims presented in PCR, the right to have the court of appeals consider questions of law and facts as well as the merits of the PCR claims, the rights under Rule 32.1(e) & (h) that should have been exempt from preclusion as well as the right to have the court rule on claims presented under these rules, the right to an evidentiary hearing and opportunity to present newly discovered evidence ; this court should require the trial court to ensure a petitioners rights are not violated or denied throughout the PCR proceedings and that a proper review is conducted based on the relevant laws and facts of the case**

The Petitioner argues that the Court of Appeals disregarded their Petition for Review and failed to properly review the issues presented, including claims of newly discovered evidence, actual innocence, and claims with constitutional magnitude. The Petitioner contends that the courts' dismissal of their claims without sufficient reason or explanation and the failure to grant an evidentiary hearing violated their due process rights and denied them the opportunity to present their claims. They argue that the Court's actions in ignoring their claims and continuing to deny relief, despite clear injustices, raise questions about the standard courts should abide by in such cases.

In analyzing the grounds for appeal outlined in John M. Burkoff's "Misapplication of Law and the Role of Appellate Courts." it is evident that the Petitioner in this case has a strong argument for seeking a Writ of Certiorari to Review the decisions made during his Post-Conviction Relief (PCR) proceedings.

Firstly, the Petitioner asserts that his claims were denied based on a standard that allowed discretion to be used by the Court. This misapplication of the law contradicts Rule 32.1(e) and (h), which explicitly grant the petitioner the right to introduce colorable claims. By denying him this right, the courts violated the Petitioner's rights and deprived him of the opportunity to present claims of constitutional magnitude.

Furthermore, the Petitioner argues that the Court's denial of self-representation violates his right to present colorable claims. This decision goes against legal authority and undermines the petitioner's ability to effectively argue his case.

Another ground for appeal is the alleged judicial bias exhibited by the court, as it rendered conflicting decisions without considering due process. This inconsistency, coupled with the fact that the Court's decisions were based on discretion rather than law and facts, raises concerns about the overall fairness of the proceedings.

The Petitioner also claims that the court of appeals failed to properly review his claims and applied irrelevant legal authorities without finding an established abuse of discretion. This disregard for the Petitioner's arguments and failure to address the merits of the PCR claims is a clear misapplication of the law.

Moreover, the Courts' failure to address crucial questions of law, such as the recording of a waiver of testimony and the voluntary nature of the right to testify, reveals a misapplication of the law to important issues. This oversight, coupled with the courts' ignorance of relevant legal authority, undermines the overall integrity of the appeal process.

Additionally, the Courts' dismissal of the PCR claims without ruling on them under Rule 32.1(e) and (h) indicates a failure to properly review the issues presented. This dismissal, combined with the Court of Appeals' reliance on irrelevant published decisions, further strengthens the Petitioner's argument for misapplication of the law.

Lastly, the Petitioner argues that an evidentiary hearing is required in order to address the issues presented and that the courts' failure to do so violates his due process rights. This failure to consider newly discovered evidence and address the grounds raised under Rule 32.1(e) and (h) further supports the Petitioner's claim for misapplication of the law.

Based on the Petitioner's arguments and supporting attachments, it is clear that the Superior Court and the Court of Appeals misapplied the law, thereby undermining the integrity of the appeal process. The Petitioner has presented strong grounds for appeal, including misapplication of law, judicial bias, failure to properly review issues, and denial of due process rights. Therefore, it is justified for the petitioner to seek review and relief through a Writ of Certiorari.

The Petitioner argues that the Court of Appeals disregarded the Petition for Review, failed to properly review the issues presented, and denied them the opportunity to present their claims. The denial of their claims without sufficient reason or explanation and the failure to grant an evidentiary hearing violated their due process rights. This raises questions about the standard courts should abide by in such cases, as outlined in John M. Burkoff's "Misapplication of Law and the Role of Appellate Courts."

The grounds for appeal outlined in Burkoff's article suggest that the Petitioner's Post-Conviction Relief proceedings were a misapplication of the law, and violated the

Petitioner's right to present claims of constitutional magnitude; it also denied self-representation, exhibited judicial bias, and failed to properly review and address the Petitioner's claims. The Court's misapplication of the law, disregard for the Petitioner's arguments, and failure to address important issues undermine the integrity of the appeal process.

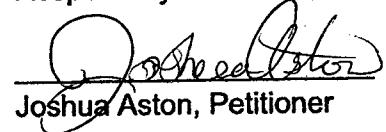
In summary, the lower courts committed errors in the present case that violated the Petitioner's rights, misapplied the law, and denied the Petitioner's claims without sufficient reason or explanation. The national importance of this case lies in protecting constitutional rights and addressing conflicts with decisions of other appellate courts. Given the violations of the Petitioner's rights, the misapplication of the law, and the importance of the case to the Petitioner and others in similar situations, it is justified for the U.S. Supreme Court to grant the Petition for a Writ of Certiorari and review the decisions made in this case.

#### XI. In Conclusion

In conclusion, the Petitioner has presented strong arguments regarding the violations of a defendant's right to testify, the right to an impartial jury, and the denial of claims and rights in PCR proceedings. The Petitioner seeks a Writ of Certiorari to review the decisions made by the lower courts, which demonstrate errors in the application of the law, judicial bias, and denial of due process rights. It is therefore warranted for the Court to grant the writ of certiorari and review the case.

DATED this 12<sup>th</sup> day of SEPTEMBER, 2023.

Respectfully submitted,

  
Joshua Aston, Petitioner

#### XII. Index to Appendices

APPENDIX A - Superior Court: Minute Entry; filed 11-5-21

APPENDIX B - Superior Court: PCR Dismissed; filed 10-7-21

APPENDIX C - Superior Court: response time set; filed 8-16-21

APPENDIX D - Superior Court: PCR dismissed; filed 7-30-21

APPENDIX E - Court of Appeals: Order reinstating Petition for review; filed 1-3-23

APPENDIX F - Court of Appeals: Mandate; filed 12-30-22

APPENDIX G - Court of Appeals: order denying motion for reconsideration; filed 12-8-22

APPENDIX H - Court of Appeals: memorandum decision; filed 11-15-22

APPENDIX I - Supreme Court: order; filed 1-13-23

APPENDIX J - Supreme Court decision; filed 8-3-23