

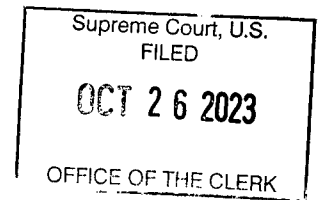
No. _____

23-6464

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

MICHAEL EDUARDO AGUILAR PETITIONER
(Your Name)



vs.

DAVID SHULD ET AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL AGUILAR
(Your Name)

P.O. Box 951
(Address)

Tucson, Arizona 85702
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

IN THIS CHALLENGE TO THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS, THE NINTH CIRCUIT REFUSED TO ISSUE MR. AGUILAR A CERTIFICATE OF APPEALABILITY FOR FAILING TO SHOW THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING, DESPITE THE FACT THE APPELLATE COURT'S HAVING PREVIOUSLY ISSUED A CERTIFICATE OF APPEALABILITY AND GRANTED RELIEF IN AN ANALOGOUS MATTER TO THAT OF PETITIONER'S, WHERE THE NINTH CIRCUIT HELD COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO IMPROACH THE GOVERNMENT'S KEY WITNESS WITH CELL PHONE EVIDENCE. YORK V. DUNCAN, 736 F.3d 1111 (9th Cir. 2018). IN DENYING MR. AGUILAR'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, THE NINTH CIRCUIT PROVIDED ONLY "LIPSERVICE" TO A NOVEL CLAIM YET TO BE ADDRESSED BY THIS COURT, POSSESSING THE ELEMENTS OF TRIAL COUNSEL: (1) TAKING CUSTODY OF PETITIONER'S CELL PHONE FROM POLICE THROUGH COURT-ORDER; (2) REPEATEDLY CHARACTERIZING INFORMATION READ FROM THE

PHONE IN A VIDEO AS "HELPFUL"; (3) SUPPRESSING THE CELL PHONE RATHER THAN IMPEACHING THE GOVERNMENT'S KEY WITNESS WITH THE PHONE - WHOSE TESTIMONY THE ARIZONA COURT OF APPEALS RELIED UPON TO DEEM AS HARMLESS ERROR THE ADMISSION INTO EVIDENCE OF A GUN THROUGH HEARSAY TESTIMONY; (4) BECOMING RESPONSIBLE FOR THE SPOILIATION OF MR. AGUILAR'S CELL PHONE POST-TRIAL AFTER FAILING TO RETURN THE PHONE TO POLICE; AND (5) PROVIDING PERJURED TESTIMONY MATERIAL TO THE SPOILIATED PHONE EVIDENCE IN A COLLATERAL REVIEW TRIAL COURT PROCEEDING.

THE NOVEL QUESTION PRESENTED IN THIS CASE IS WHETHER IN IGNORING TRIAL COUNSEL'S SERIOUS ERRORS AND SUBSEQUENT COVER-UP, THE NINTH CIRCUIT, IN DENYING PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, EGREGIOUSLY UNDERMINED THE PRINCIPLE THAT "[I]F ALL THE RIGHTS THAT AN ACCUSED PERSON HAS, THE RIGHT TO BE REPRESENTED BY [ETHICAL] COUNSEL IS BY FAR THE MOST PERVASIVE FOR IT AFFECTS HIS ABILITY TO ASSERT ANY OTHER RIGHTS HE MAY HAVE", *UNITED STATES V. CRALIC*, 466 U.S. 648, 654 (1984), AND LEFT OPEN A PANDORA-BOX FULL OF ASSISTANCE-OF-COUNSEL COMPROMISES.

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

PETITIONER: MICHAEL EDUARDO AGUILAR

RESPONDENTS: DAVID SHINN
KRISTIN K. HAYES
J.D. NIELSEN
AMY M. THORSON

RELATED CASES

AGUILAR v. SHINN, No. 4:19-cv-00359, U.S. District Court for the District of Arizona. Judgment entered Aug. 30, 2022.

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APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JUNE 15, 2023.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). HORN V. UNITED STATES, 524 U.S. 236 (1998) (THE SUPREME COURT HAD JURISDICTION TO REVIEW DENIALS OF CERTIFICATES OF APPEALABILITY BECAUSE THOSE DENIALS WERE JUDICIAL IN NATURE.)

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION READS: CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION READS: 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 ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

SECTION ONE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION READS: 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 LAW.

TITLE 28, UNITED STATES CODE SERVICE SECTION 2253 READS: IN A HABEAS CORPUS PROCEEDING OR A PROCEEDING UNDER SECTION 2255 BEFORE A DISTRICT JUDGE, THE FINAL ORDER SHALL BE SUBJECT TO REVIEW, ON APPEAL, BY THE COURT OF APPEALS FOR THE CIRCUIT IN WHICH THE PROCEEDING IS HELD. THERE SHALL BE NO RIGHT OF APPEAL FROM A FINAL ORDER IN A PROCEEDING TO TEST THE VALIDITY OF A WARRANT TO REMOVE TO ANOTHER DISTRICT OR PLACE FOR COMMITMENT OR TRIAL A PERSON CHARGED WITH A CRIMINAL OFFENSE AGAINST THE UNITED STATES, OR TO TEST THE VALIDITY OF SUCH PERSON'S DETENTION PENDING REMOVAL PROCEEDINGS.

(1) UNLESS A CIRCUIT JUSTICE OR JUDGE ISSUES A CERTIFICATE OF APPEALABILITY, AN APPEAL MAY NOT BE TAKEN TO THE COURT OF APPEALS FROM THE FINAL ORDER IN A HABEAS CORPUS PROCEEDING IN WHICH THE DETENTION

COMPLAINED OF ARISES OUT OF PROCESS ISSUED BY A STATE COURT; OR THE FINAL ORDER IN A PROCEEDING UNDER SECTION 2255.

(2) A CERTIFICATE OF APPEALABILITY MAY ISSUE UNDER PARAGRAPH (1) ONLY IF THE APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

(3) THE CERTIFICATE OF APPEALABILITY UNDER PARAGRAPH (1) SHALL INDICATE WHICH SPECIFIC ISSUE OR ISSUES SATISFY THE SHOWING REQUIRED BY PARAGRAPH (2).

TITLE 28 UNITED STATES CODE SERVICE SECTION 2254 READS: THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT ONLY ON THE GROUNDS THAT HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAW OR TREATY OF THE UNITED STATES.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

On November 11, 2011, PETITIONER BECAME ROMANTICALLY INVOLVED WITH JAMIE HUSCH (J.M.), WHOM HE HAD MET WHILE DRIVING TAXI FOR FREEDOM CAB IN TUCSON, ARIZONA. APP. C AT 16:1-3. J.M., A STRIPPER, LIVED WITH HER BOYFRIEND, SHANE BRADY (S.B.), A DRUG DEALER. Id. AT 3:5-6. MR. AGUILAR ALSO BECAME INVOLVED WITH J.M.'S FRIEND AND CO-WORKER, SARAH, IN DECEMBER 2011. Id. AT 10:1-17.

On MARCH 29, 2012, RELATIVE TO A THIRD DANCER, THE TUCSON POLICE DEPARTMENT FABRICATED MULTIPLE FELONY CHARGES AGAINST PETITIONER, INCLUDING FLEEING FROM A LAW-ENFORCEMENT VEHICLE. Id. AT 22:26-28.¹ THE OVERRARCHING FACT IS A MANIFEST DISCARRIAGE OF JUSTICE RESULTED INTO MR. AGUILAR SENDING A DECADE IN PRISON AS A WRONGFULLY CONVICTED INNOCENT MAN. Id. AT 9:10-11:9; APP. B AT 5:7-10.

¹ FOR A DETAILED ACCOUNT OF WHY PETITIONER BECAME A TARGET OF THE TUCSON POLICE, SEE MICHAEL EDWARD AGUILAR V. UNITED STATES DISTRICT COURT, TUCSON, NO. 22-70207, DOCKET ENTRY NO. 1 (9TH CIR. SEP. 16, 2022); FOR RECORD EVIDENCE OF FABRICATED, FORGED, ALTERED AND PLANTED EVIDENCE BY THE GOVERNMENT, SEE AGUILAR V. RYAN, NO. 4:15-cv-00296, DOC. 1 AT EXHIBITS (D. ARIZ. JUL. 6, 2015).

AFTER BECOMING AWARE OF THE FACT HE HAD BECOME A TARGET OF POLICE, ON THE EVENING OF MARCH 29, 2012, PETITIONER HAD J.M. RENT A ROOM IN HER NAME AT THE REID PARK HOTEL, WHERE THEY TOGETHER SPENT THE NIGHT AND HATCHED OUT A PLAN FOR MR. AGUILAR TO RETURN TO PHOENIX, ARIZONA, AFTER COLLECTING MONEY OWED TO HIM BY J.M. ON THE FOLLOWING EVENING, WHEN HE WOULD GO TO THE HOME OF S.B. AT 202 WEST MOUNTAIN VIEW AND TAKE J.M. TO WORK. APP. C AT 2:1-4. WHILE PETITIONER WAS AWAY, IT WAS SARAH WHOM WOULD STAY AT HIS HOME. Id. AT 10:13-14.

IT WAS ROUTINE FOR J.M. TO WAIT FOR MR. AGUILAR OUTSIDE OF THE HOME OF S.B. Id. AT 16:1-2. HOWEVER, ON THE NIGHT OF MARCH 30, 2012, BECAUSE J.M. WAS NOT OUTSIDE AND (1) DID NOT ANSWER PETITIONER'S REPEATED KNOCKS ON S.B.'S FRONT DOOR, AND (2) REFUSED TO ANSWER HER PHONE, MR. AGUILAR PARKED IN THE DRIVEWAY AND LAYED ON HIS VEHICLE'S HORN. Id. AT 2:1-2. CONTRARY TO THE RECORD, IT WAS J.M. AND NOT PETITIONER WHO SCREAMED, "I DON'T OWE YOU ANY MONEY!" AFTER COMING OUTSIDE WHEN MR. AGUILAR "WAS IN A CAR." Id. AT 2-4. SHORTLY THEREAFTER, S.B. CAME OUTSIDE AND "ASKED AGUILAR 'WHAT THE PROBLEM WAS,' AND AGUILAR REPLIED THAT J.M. OWED HIM MONEY."

Id. at 5-6. "When S.B. told Aguilar that he didn't have any money, Aguilar" stepped out of his vehicle with his cell phone in his right hand, and with his left index finger in S.B.'s face, "Aguilar stated, 'I'm not leaving until I get my money.'" Id. at 5-7. After a brief conversation between J.M. and S.B., "J.M. retreated into the house [under the ruse of getting money] and called 9-1-1." Id. at 9. Mr. Aguilar, aware J.M. had called police, backed out of the driveway and inexplicably was unable to maneuver his vehicle out of the neighborhood, parked on an adjacent street, hid in a shed, and it took 79 minutes to "locate Aguilar hiding" at 108 North Avenida Carolina. Id. at 10-11. And with 28 police personnel in search of a handgun, it took 82 minutes after J.M.'s 9-1-1 call for a police sergeant to find a BB gun "in the middle of the roadway in front of 207 North Arcadia." Id. at 12:17-18. Sergeant Kadous failed to (1) file a report, (2) be interviewed, (3) receive a trial subpoena, and (4) testify at trial. Id. at 23-25.

It is important to point out that the District Court incorrectly rendered the operative facts of the case as follows:

[T]HE COURT OF APPEALS REVIEWED THE EVIDENCE PRESENTED AS TO THE BB GUN AND DETERMINED THAT, EVEN WITHOUT THE ERRONEOUSLY ADMITTED TESTIMONY, THE OFFICER'S OTHER TESTIMONY ESTABLISHED THAT THE GUN WAS PRESENT AT THE SCENE OF THE INCIDENT: THE OFFICER TESTIFIED THAT HE COLLECTED THE GUN AT THE LOCATION AND VICTIM S.B. IDENTIFIED THE WEAPON THAT WAS COLLECTED AS THE WEAPON USED IN THE ROBBERY.

APP. B AT 8:5-9. OMITTED BY ALL BUT PETITIONER ARE THE FACTS (1) "THE SCENE OF THE INCIDENT" WAS AT 202 NORTH MOUNTAIN VIEW, (2) MR. AGUILAR WAS TAKEN INTO CUSTODY AT 108 NORTH AVENUE CAROLINA, AND (3) TWO BLOCKS FROM THE SCENE OF THE ALLEGED INCIDENT, "SERGEANT K [ADOLK] INITIALLY LOCATED THE GUN AT 207 NORTH ARCADIA," WITHOUT ESTABLISHING HOW AND WHEN PETITIONER PLACED THE BB GUN AT 207 NORTH ARCADIA. APP. C AT 13:5-8.

AFTER HE WAS PLACED UNDER ARREST, MR. AGUILAR SPOKE WITH A DETECTIVE AND ADAMANTLY URGED THE DETECTIVE TO LOOK INTO PETITIONER'S CELL PHONE FOR EVIDENCE OF S.B. AND J.H. HAVING REPEATEDLY LIED TO POLICE; AND THOUGHT THE DETECTIVE DID NOT VIEW THE INFORMATION

IN FRONT OF MR. AGUILAR, THE DETECTIVE DID PLACE THE CELL PHONE IN POLICE EVIDENCE. APP. C AT 10:21-23.

AFTER PETITIONER WAS BOOKED INTO THE PINA COUNTY ADULT DETENTION COMPLEX AT THE MORNING OF MARCH 31, 2012, IT WAS NOT UNTIL JULY 25, 2013, THAT TRIAL COUNSEL VANESSA C. MOSS MET WITH MR. AGUILAR AFTER HAVING BEEN APPOINTED TO ASSIST PETITIONER BY THE STATE COURT, AND SUBSEQUENTLY ON: (1) SEPTEMBER 11, 2013, SERVED VERIZON LEGAL COMPLIANCE DEPARTMENT WITH A SUBPOENA DUCES TECUM FOR A COPY OF MR. AGUILAR'S CELL PHONE RECORDS; (2) OCTOBER 10, 2013, MOVED IN THE TRIAL COURT FOR THE TUCSON POLICE DEPARTMENT TO TRANSFER CUSTODY OF PETITIONER'S CELL PHONE TO COUNSEL AS ORDERED; (3) OCTOBER 14, 2013, THE MOTION TO TAKE CUSTODY OF THE CELL PHONE BEING GRANTED; AND (4) OCTOBER 21, 2013, TAKING CUSTODY OF MR. AGUILAR'S CELL PHONE, AND WITH HER INVESTIGATOR, COUNSEL CREATES A VIDEO WHEREIN SHE REPEATEDLY STATES, "THAT'S HELPFUL," IN RESPONSE TO TEXT MESSAGES READ BY THE INVESTIGATOR FROM THE CELL PHONE. APP. C AT 16:22-26. IT WAS NEVER MENTIONED BY COUNSEL WHETHER VERIZON WIRELESS LEGAL COMPLIANCE DEPARTMENT COMPLIED WITH THE SUBPOENA DUCES TECUM.

ON OCTOBER 29, 2013, AFTER VOIR DIRE, PIMA DEPUTY COUNTY ATTORNEY O.J. FLORES STATED ON THE RECORD HE WOULD HAVE S.B. AND J.M. DELIVERED TO TRIAL BY A DETECTIVE ON THE FOLLOWING DAY; HOWEVER, IT WAS S.B., ALONE, AND UNDER THE INFLUENCE OF AN UNKNOWN SUBSTANCE WHOM WAS DELIVERED TO TRIAL BY A DETECTIVE ON OCTOBER 30, 2013. APP. C AT 22:8-10, 14-15. AND IT WAS COUNSEL WHOM APOLOGIZED TO THE COURT, MOMENTS BEFORE TESTIMONY BEGAN AT TRIAL, FOR BEING UNSUCCESSFUL AT PERSUADING MR. AGUILAR TO PLEAD GUILTY TO WHAT HE DID NOT DO. Id. AT 14-23.

PRIOR TO OPENING TESTIMONY, THE JURY WAS REMOVED FROM THE COURTROOM AND S.B. WAS MADE TO SWEAR THAT HE WAS NOT UNDER THE INFLUENCE OF ANY DRUG. Id. AT 10. THE RECORD CLEARLY SHOWS THAT WITHOUT PROMPTING, EARLY IN HIS TESTIMONY S.B. LET SLIP FROM BETWEEN HIS LIPS, "I ASSUMED THAT WHAT WAS IN [PETITIONER'S] HAND WAS A PISTOL." APP. B AT 5:9. MUCH OF S.B.'S TESTIMONY WAS LITTERED WITH FANTASTICAL ACTS OF A SUPER-HERO, WHOM, ON THE NIGHT OF MARCH 30, 2012, LOOKED DOWN THE BARREL OF WHAT COULD HAVE ONLY BEEN A BB GUN IN SAVING THE LIFE OF J.M., AND WHEN ASKED DIRECTLY BY A JUROR, THROUGH THE COURT, IF ON THE NIGHT IN

QUESTION THE WITNESS HAD PREVIOUSLY KNOWN MR. AGUILAR, S.B. ANSWERED IN THE NEGATIVE. APP. C AT 16:6-7. IN REACTION TO HEARING S.B. DENY HAVING KNOWN PETITIONER IN THE PAST, ON A NOTEPAD SITTING ATOP THE DEFENSE TABLE IN FRONT OF JANESSA MOSS, MR. AGUILAR WROTE THE FOLLOWING:

WE CAN PROVE HE'S LYING
HIS #S IN MY PHONE
HE CALLED ME IN THE PAST

Id. AT 17:20-22. COUNSEL IMMEDIATELY READ THE NOTE; BUT RATHER THAN USING PETITIONER'S CELL PHONE TO IMPRACH S.B., MS. MOSS, ON RE-CROSS-EXAMINATION, SUBSTITUTED THE CONTEXT OF S.B.'S DENIAL TO THAT HE HAD NOT SEEN MR. AGUILAR PRIOR TO MARCH 30, 2012. Id. AT 16:1.

FOLLOWING S.B.'S TESTIMONY, THE BB GUN WAS ADMITTED INTO EVIDENCE THROUGH THE HEARSAY TESTIMONY OF A POLICE OFFICER. Id. AT 13:4-16. IT WAS BECAUSE A CRIME SCENE SPECIALIST TOLD THE JURY THAT PETITIONER'S FINGERPRINTS WERE NOT FOUND ON THE BB GUN SUBSEQUENT TO THE GUN BEING ADMITTED INTO EVIDENCE AT TRIAL THAT THE ARIZONA COURT OF APPEALS WAS LEFT WITH NO OPTION BUT TO BASE A HARMLESS-ERROR RULING ON S.B.'S SUGGESTIVE IDENTIFICATION OF A PLANTED BB GUN. Id. AT 7-10.

ON THE FINAL DAY OF TRIAL, OCTOBER 31, 2013, BECAUSE Mrs. MOSS'S STRATEGY WAS BASED ON AN AFFIRMATIVE DEFENSE, PREDICATED ON THE FACT PETITIONER HAD BEEN INDICTED ON THE INCORRECTLY CHARGED STATUTE, COUNSEL CALLED NO WITNESSES AND ONLY PLAYED IN OPEN COURT THE 9-1-1 RECORDING OF THE CALL PLACED BY J.M., WHEREIN SHE IS HEARD TELLING THE POLICE OPERATOR, "I THINK HE HAS A GUN," AND, "HE MIGHT HAVE A GUN," AND THEN WHEN PROMPTED BY THE OPERATOR WITH: "SO, HE HAS A GUN?", J.M. STATES, "YEAH, HE HAS A GUN." APP. C AT 7:21-24.

AT THE CLOSE OF MR. AGUILAR'S TRIAL - AND WHAT EXPLAINS WHY THE PROSECUTOR HAD A CRIME SCENE SPECIALIST TELL THE JURY PETITIONER'S PRINTS WERE NOT FOUND ON THE BB GUN - AT CLOSING REBUTTAL O.J. FLORES REPEATEDLY TOLD THE JURY, "IT DOESN'T HAVE TO BE THAT GUN," FOR THEM TO FIND MR. AGUILAR GUILTY.

SEE STATE OF ARIZONA V. MICHAEL EDUARDO AGUILAR, PIMA COUNTY SUPERIOR COURT NO. CR20121308-001, R.T. 10/31/2013 AT 13. PETITIONER, ALONE, HAS BROUGHT TO LIGHT HOW, AT THE END OF TRIAL, PIMA DEPUTY COUNTY ATTORNEY O.J. FLORES TOLD A JURY THE BB GUN HE ADMITTED INTO EVIDENCE THROUGH HEARSAY TESTIMONY, DID NOT HAVE TO BE THE GUN NECESSARY FOR FINDING PETITIONER GUILTY.

See Aguilar v. SHINN, No. 4:19-cv-00359, Doc. 1 at 6-11 (D. ARIZ. JUL. 15, 2019).

ON OCTOBER 31, 2013, A CONFUSED AND HALLOWEEN-FESTIVITIES-DESIRING JURY FOUND PETITIONER GUILTY ON BOTH COUNTS OF ATTEMPTED ARMED ROBBERY. APP. C AT 2:15-16. ON FEBRUARY 10, 2014, MR. AGUILAR WAS SENTENCED TO CONCURRENT PRISON TERMS OF 11.25 YEARS. *Id.* AT 16-17. ON DECEMBER 24, 2014, THE ARIZONA COURT OF APPEALS AFFIRMED PETITIONER'S CONVICTION AND SENTENCE. *Id.* AT 3:9-10. AS PREVIOUSLY MENTIONED, "THE COURT OF APPEALS REVIEWED THE EVIDENCE PRESENTED AS TO THE BB GUN AND DETERMINED THAT, EVEN WITHOUT THE ERRONEOUSLY ADMITTED TESTIMONY....THE PRESENCE OF THE GUN WAS 'OTHERWISE ESTABLISHED' BY UNTAINTED TESTIMONY, ADMISSION OF THE TAINTED TESTIMONY COULD NOT HAVE UNDERMINED THE JURY'S FINDING OF GUILT BEYOND A REASONABLE DOUBT," ACCORDING TO THE DISTRICT COURT. APP. B AT 8:5-6, 10-12.

ON JUNE 24, 2015, MR. AGUILAR FILED A NOTICE OF POST-CONVICTION RELIEF (PCR). APP. C AT 3:13. IT WAS REVEALED TO PCR COUNSEL, THAT VANESSA MOSS FAILED TO RETURN CUSTODY OF PETITIONER'S CELL PHONE TO TULSON POLICE; AND AFTER MRS. MOSS SEARCHED FOR THE CELL PHONE FOR

OVER EIGHTEEN MONTHS WITHOUT SUCCESS, ON DECEMBER 27, 2016, PCR COUNSEL FILED MR. AGUILAR'S PCR PETITION IN THE TRIAL COURT. APP. C AT 3:15. THE OPERATIVE CLAIM IN THE PETITION ALLEGED "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BECAUSE [S]HE FAILED TO USE INFORMATION ALLEGEDLY CONTAINED ON AGUILAR'S CELL PHONE TO IMPROVE S.B." *Id.* AT 16-17; APP. B AT 8:14-19.

ON FEBRUARY 27, 2018, THE TRIAL COURT CONDUCTED THE FIRST OF THREE EVIDENTIARY HEARINGS. APP. C AT 3:20. AT THE INITIAL EVIDENTIARY HEARING, VANESSA MOSS TESTIFIED UNDER OATH THAT SHE DID NOT SEE THE NOTE PETITIONER WROTE AT TRIAL MATERIAL TO S.B.'S CONTACT INFORMATION, BECAUSE SHE BELIEVED MR. AGUILAR "ADDED THE NOTE REGARDING S.B.'S CONTACT INFORMATION AFTER THE TRIAL." *Id.* AT 17:19-20. NEAR THE CONCLUSION OF HER TESTIMONY, MRS. MOSS ASSURED THE COURT THAT SHE HAD MOST RECENTLY SPOKE WITH HER TRIAL INVESTIGATOR, ADAM KIRCHLER, WHO HAD INFORMED TRIAL COUNSEL THAT SHORTLY AFTER THE CONCLUSION OF TRIAL, MR. KIRCHLER BUBBLE WRAPPED PETITIONER'S CELL PHONE, AND MAILED IT TO A PRISON IN BUCKEYE, ARIZONA. AGUILAR V. SHINN, No. 4:19-cv-00359, Doc. 1 AT 17-25 (D. ARIZ. JUL. 15, 2019).

ON APRIL 2, 2018, AT THE SECOND EVIDENTIARY HEARING,

ADAM KIRCHLER TOOK THE STAND AND TESTIFIED THAT HE MOST RECENTLY HAD INFORMED TRIAL COUNSEL, AFTER TRIAL HE BUBBLE WRAPPED MR. AGUILAR'S CELL PHONE AND PLACED IT WITH PETITIONER'S ATTORNEY FILE WITHIN THE CONFINES OF THE MOSS LAW FIRM. APP. C AT 17:8-14. THE CELL PHONE WAS NEVER FOUND, AND THE TRIAL COURT "FIND[ING] THAT ANY MISHANDLING OF THE PHONE BY DEFENSE COUNSEL IS A HOT ISSUE GIVEN THE [TRIAL] COURT'S ULTIMATE RULING IN THIS CASE.[I]" Id. AT 13-14. THE TRIAL COURT ALSO FOUND "DEFENSE COUNSEL'S THEORY TOO SPECULATIVE" CONCERNING THE ALLEGATION PETITIONER DOCTORED THE NOTE HE WROTE TO HER AFTER THE FACT. Id. AT 18:1.

ARIZONA REVISED STATUTES SECTION 13-2809 MAKES "[D]ESTROY[ING], MUTILAT[ING], ALTER[ING], CONCEAL[ING] OR REMOV[ING] PHYSICAL EVIDENCE WITH THE INTENT TO IMPAIR ITS VERITY OR AVAILABILITY.... A CLASS 6 FELONY." A.R.S. § 13-2809(A)(1), (C).

ON AUGUST 30, 2018, THE STATE TRIAL COURT DENIED MR. AGUILAR PCR RELIEF. APP. C AT 4:1. ON JULY 1, 2019, THE ARIZONA COURT OF APPEALS GRANTED REVIEW BUT ALSO DENIED RELIEF. Id. AT 2-3.

II. HABEAS COURT PROCEEDINGS BELOW

ON JULY 6, 2015, MR. AGUILAR FILED THE FIRST OF TWO PETITIONS FOR WRIT OF HABEAS CORPUS, ALERTING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA TO THE FACT HE WAS ACTUALLY INNOCENT. AGUILAR V. RYAN, NO. 4:15-CV-00286, DOC. 1 AT 6. IN BRINGING MR. AGUILAR'S CLAIM OF ACTUAL INNOCENCE, IT TOOK MAGISTRATE JUDGE LYNNETTE C. KIMMIONS 499 DAYS TO DEEM THE PETITION AS FILED "PREMATURE," BASED ON A PCR PROCEEDING PENDING IN THE STATE TRIAL COURT. AGUILAR V. RYAN, 2016 U.S. DIST. LEXIS 159383, AT *4-*5 (D. ARIZ. NOV. 17, 2016). THE NINTH CIRCUIT SUBSEQUENTLY DENIED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY (COA). AGUILAR V. RYAN, NO. 16-17229, 2017 U.S. APP. LEXIS 27188 (9TH CIR. APR. 14, 2017). SEE APP. D.

IT TOOK THE STATE COURTS OVER FOUR YEARS TO ADJUDICATE MR. AGUILAR'S PCR PROCEEDING THEN, ON JULY 15, 2019, HE FILED A SECOND PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254. AGUILAR V. SHANK, NO. 4:19-CV-00359, DOC. 1. THE DISTRICT COURT WAITED UNTIL NOVEMBER 13, 2019, TO ORDER RESPONDENTS TO ANSWER THE SECOND PETITION. Id. AT DOC. 13. ON JANUARY 24, 2020, RESPONDENTS ANSWERED WITH EXHIBITS. DOCS. 21-23.

ON FEBRUARY 10, 2020, PETITIONER MOVED IN THE DISTRICT COURT IN ORDERING RESPONDENTS TO ADD AS AN EXHIBIT THE VIDEO WHEREIN VANESSA MOSS IS REPEATEDLY HEARD CHARACTERIZING THE INFORMATION ON MR. AGUILAR'S CELL PHONE AS "HELPFUL." DOC. 25. ON FEBRUARY 13, 2020, PETITIONER MOVED IN THE DISTRICT COURT FOR AN ORDER IN OBTAINING TRANSCRIPTS COLLECTED WITH THE ILLEGAL INCREASE OF MR. AGUILAR'S BOND AMOUNT. DOC. 29. ON MARCH 31, 2020, THE DISTRICT COURT DENIED THE MOTIONS FOR THE VIDEO AND REPORTER TRANSCRIPT FOR MAY 8, 2012. DOC. 41. ON APRIL 2, 2020, PETITIONER REPLIED TO RESPONDENTS ANSWER. DOC. 42.

ON JULY 22, 2021, MAGISTRATE JUDGE JACQUELINE RATAALL FILED A REPORT AND RECOMMENDATION (RR), CALLING FOR THE DISTRICT COURT TO DISMISS MR. AGUILAR'S HABEAS PETITION. DOC. 68 AT APP. C. ON AUGUST 23, 2021, THE DISTRICT COURT ORDERED PETITIONER TO LIMIT HIS OBJECTION TO THE RR TO TEN PAGES. DOC. 73. ON AUGUST 31, 2021, MR. AGUILAR FILED HIS TEN-PAGE OBJECTIONS TO THE 23-PAGE RR. DOC. 75.

ON NOVEMBER 24, 2021, PETITIONER WAS RELEASED FROM PRISON. DOC. 80. ON FEBRUARY 11, 2022, MR. AGUILAR GAVE NOTICE OF HIS CHANGE OF ADDRESS TO 108 NORTH Ave-

NIDA CAROLINA. DOC. 81. ON MAY 5, 2022, PETITIONER WAS ARRESTED, BOOKED INTO THE PIMA COUNTY ADULT DETENTION COMPLEX, WHERE HE IS CURRENTLY BEING HELD AWAITING TRIAL FOR THE DEATH OF A CALL GIRL. DOC. 82. AT MIDNIGHT, ON JUNE 2, 2022, MR. AGUILAR WAS TAKEN TO THE JAIL'S MEDICAL UNIT, WHERE HE WAS TORTURED AND ABUSED. DOCS. 83, 85; SEE ALSO AGUILAR V. THORNELL, NO. 4:23-cv-00264-PCC, DOC. 7 AT 9-14 (D. ARIZ. JUL. 14, 2023).

ON AUGUST 22, 2022, WHEN IT BECAME OBVIOUS TO PETITIONER THAT THE DISTRICT COURT NEVER INTENDED TO GRANT HABEAS RELIEF, MR. AGUILAR HAD TO BE FURNISHED WITH COPIES OF HIS STATE AND FEDERAL COURT RECORDS HE HAD MAINTAINED POSSESSION OF FOR ALMOST A DECADE, AND LOST AFTER HIS ARREST. DOCS. 87, 90, 93, 94, 95, 99, 107, 108, 109, 110, 125, 126.

ON AUGUST 31, 2022, THE DISTRICT COURT ADOPTED THE MAGISTRATE JUDGE RR, DISMISSING MR. AGUILAR'S PETITION FOR WRIT OF HABEAS CORPUS, AND DENYING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY. APP. B. AFTER HAVING BEEN GRANTED ADDITIONAL TIME TO FILE A NOTICE OF APPEAL WHILE PETITIONER DILIGENTLY SOUGHT TO OBTAIN HIS STATE AND FEDERAL COURT RECORDS, ON OCTOBER 31, 2022, HE FILED A NOTICE OF APPEAL. DOCS. 96, 97, 98, 101, 102.

ON JANUARY 3, 2023, PETITIONER FILED HIS MOTION FOR CERTIFICATE OF APPEALABILITY IN THE NINTH CIRCUIT. AGUILAR V. ARIZONA DEPARTMENT OF CORRECTIONS; REHABILITATION AND REENTRY, No. 22-16707 AT DOCKET ENTRY No. 8. ON JUNE 15, 2023, MR. AGUILAR'S REQUEST FOR A COA WAS DENIED. Id. AT DOCKET ENTRY No. 15; APP. A. ON SEPTEMBER 13, 2023, THE NINTH CIRCUIT DENIED PETITIONER'S MOTION FOR RECONSIDERATION OF THE DENIAL IN THE ISSUANCE OF A COA. Id. AT DOCKET ENTRY No. 26.

ON SEPTEMBER 1, 2023, MR. AGUILAR FILED A MOTION FOR RELIEF FROM JUDGMENT IN THE DISTRICT COURT, PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE. AGUILAR V. SHINN, No. 4:19-cv-00359-JGZ, Docs. 118, 120, 122, 123, 124. ON NOVEMBER 1, 2023, THE DISTRICT COURT DENIED THE RULE 60(b) MOTION, ALONG WITH MR. AGUILAR'S MOTION FOR INDEPENDENT ACTION (Doc. 111), HIS MOTION FOR APPOINTMENT OF COUNSEL (114), AND AN ASSORTED OTHER FILINGS SUBMITTED BY PETITIONER. Doc. 126. HOWEVER, MOST SURPRISINGLY, THE DISTRICT COURT DID PROVIDE MR. AGUILAR WITH Docs. 68, 91. Id.

ON NOVEMBER 29, 2023, THE CLERK OF THE DISTRICT COURT STRUCK FROM THE RECORD PETITIONER'S RULE 59(e) PROCEEDING. Docs. 127, 128, 129, 130.

REASONS FOR GRANTING THE PETITION

IN DENYING PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, THE NINTH CIRCUIT COURT OF APPEALS KEPT AVAILABLE AS DANGEROUSLY ACCEPTABLE PRECEDENT, FOR CRIMINAL DEFENSE COUNSEL TO SUPPRESS AT TRIAL, THEN SPOILATE, EXCULPATORY IMPEACHING PHYSICAL EVIDENCE, PRIOR TO THE ADJUDICATION OF THE PENDING CRIMINAL MATTER IN THE STATE AND FEDERAL COURTS. SEE AGUILAR V. SHINN, 2021 WL 9374894, 2021 U.S. DIST. LEXIS 210874, AT *28 (D. ARIZ., JUL 22, 2021) ("THE COURT FINDS THAT ANY MISHANDLING OF THE PHONE BY DEFENSE COUNSEL IS A HOT ISSUE GIVEN THE COURT'S ULTIMATE RULING IN THIS CASE."); AGUILAR V. SHINN, 2022 WL 392116, 2022 U.S. DIST. LEXIS 157454, AT *13 (D. ARIZ., AUG. 31, 2022) ("AS THOROUGHLY EXPLAINED BY THE MAGISTRATE JUDGE AND PCR STATE COURT, AGUILAR'S COUNSEL WAS NOT INEFFECTIVE."). MOREOVER, CONTRARY TO THE NINTH CIRCUIT'S OPINION THAT NO JURIST OF REASON WOULD FIND IT DEBATABLE WHETHER PETITIONER STATED A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT, IN LESS-DETRIMENTAL EVIDENTIARY CIRCUMSTANCES WITHIN THE SIXTH AMENDMENT'S ASSISTANCE-OF-COUNSEL FRAMEWORK, THE SUPREME COURT HELD THAT COUNSEL'S DEFICIENT PERFORMANCE "ALTER[ED] THE ENTIRE EVIDENTIARY PICTURE" BEFORE THE JURY, STRICKLAND V.

WASHINGTON, 466 U.S. 1180, 1196 (1984), AND RESULTS INTO "A REASONABLE PROBABILITY THAT... AT LEAST ONE JUROR WOULD HAVE HARBORED A REASONABLE DOUBT" AS TO MR. AGUILAR'S GUILT. BLICK V. DAVIS, 137 S. CT. 759, 776 (2017).

IN GRANTING PETITIONER A WRIT OF CERTIORARI, THE COURT SHALL TASK ITSELF WITH THE DEBATE OVER THE APPROPRIATE SUPREME COURT DOCTRINE MOST APPLICABLE TO THE NOVEL CLAIM PRESENTED, AND NOT THE DEBATE OF WHETHER PETITIONER WAS DENIED A CONSTITUTIONAL RIGHT. FROST V. GILBERT, 835 F.3d 883, 888-89 (9TH CIR. 2016) ("THE STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY IS LOW").

MR. AGUILAR FURTHER SUBMITS THAT HIS ACTUAL INNOCEENCE FALLS UNDER THE FIRST AMENDMENT'S LIBERTY CLAUSE AS A CONSTITUTIONAL RIGHT. CITLOW V. NEW YORK, 268 U.S. 682, 686 (1925) ("FOR PRESENT PURPOSES WE MAY AND DO ASSUME THAT FREEDOM OF SPEECH AND OF THE PRESS - WHICH ARE PROTECTED BY THE FIRST AMENDMENT FROM ABRIDGMENT BY CONGRESS - ARE AMONG THE FUNDAMENTAL PERSONAL RIGHTS AND 'LIBERTIES' PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FROM IMPAIRMENT BY THE STATES." (EMPHASIS IN ORIGINAL)). "WHILE THIS COURT HAS NOT ATTEMPTED TO DEFINE WITH EXACTNESS

THE LIBERTY THUS GUARANTEED, THE TERM HAS RECEIVED MUCH CONSIDERATION AND SOME OF THE INCLUDED THINGS HAVE BEEN DEFINITELY STATED." GRISWOLD V. CONNECTICUT, 381 U.S. 479, 488 (1965) (QUOTING MEYERS V. NEBRASKA, 262 U.S. 390, 399 (1923)). "WITHOUT DOUBT, IT DENOTES NOT MERELY FREEDOM FROM BODILY RESTRAINT BUT ALSO [FOR EXAMPLE,] THE RIGHT... TO MARRY, ESTABLISH A HOME AND BRING UP CHILDREN...." Id.

"THERE [ALSO] CAN BE NO DOUBT THAT IN ENACTING § 2254, CONGRESS SOUGHT TO INTERPOSE THE FEDERAL COURTS BETWEEN THE STATES AND THE PEOPLE, AS GUARDIANS OF THE PEOPLE'S FEDERAL RIGHTS - TO PROTECT THE PEOPLE FROM UNCONSTITUTIONAL ACTION." KEED V. ROSS, 460 U.S. 1, 10 (1984) (INTERNAL QUOTATIONS AND CITATIONS OMITTED) (EMPHASIS ADDED). THE BILL OF RIGHTS - AMONG THE MOST FUNDAMENTAL OF THE "NATIONAL LAWS" AND THE PRINCIPAL SOURCE OF HABEAS CORPUS CLAIMS - WAS ADDED TO THE CONSTITUTION, IN PART AT LEAST TO PROTECT UNPOPULAR PERSONS, CAUSES, AND CLASSES FROM THE "PREVALENCY OF A LOCAL SPIRIT" IN STATE COURTS, "TO BE RELIED UPON FOR THE INFLEXIBLE EXECUTION OF THE NATIONAL LAWS." THE FEDERALIST NO. 81, AT 486 (CLINTON ROSSITER ed. 1961) (A. HAMILTON). "THE BILL OF RIGHTS ... IS THE ULTIMATE GUARDIAN OF INDIVIDUAL RIGHTS." MASSACHUSETTS

V. Upton, 466 U.S. 727, 739 (1984) (BRENNAN, J.; MARSHALL, J.,
DISSENTING) (EMPHASIS ADDED). AS AN EXAMPLE OF THE "LOCAL
SPIRIT" ALEXANDER HAMILTON WAS ALL TOO FAMILIAR WITH AND
PETITIONER SEEKS PROTECTION FROM:

AT THE TIME OF TUCSON'S PIONEER HOTEL
FIRE IN 1972, LOUIS TAYLOR WAS AN AFRICAN
AMERICAN MALE OF SIXTEEN. ARRESTED NEAR
THE HOTEL, HE WAS CONVICTED ON THE BASIS
OF LITTLE MORE THAN THAT PROXIMITY AND
TRIAL EVIDENCE THAT "BLACK BOYS" LIKE
TO SET FIRES. HE HAS SPENT A LIFETIME OF
42 YEARS IN PRISON FOLLOWING HIS WRONGFUL
CONVICTION.

TAYLOR V. CITY OF PHOENIX, 913 F.3d 930, 939 (9TH CIR. 2019)
(SCHROEDER, CIRCUIT JUDGE, DISSENTING).

NOW REMAINING ARE BUT HIS GUARDIANS WHOM RIDE
THE WRIT OF CERTIORARI, WHICH MR. AGUILAR SUBMITS AS
THE SUPREME REASON FOR GRANTING THE PETITION.

ARGUMENT

I. DID THE NINTH CIRCUIT ERR IN REFUSING TO ISSUE A
CERTIFICATE OF APPEALABILITY AND LEAVE OPEN THE OPPOR-
TUNITY FOR FUTURE SUPPRESSION AND SPOILIATION OF
PHYSICAL EVIDENCE BY DEFENSE COUNSEL, INITIATING
THE UNDERMINING OF THE ADVERSARIAL PROCESS OUR
NATION'S SYSTEM OF JUSTICE RESTS UPON.

"It is ABIDING TRUTH THAT 'NOTHING CAN DESTROY A GOVERNMENT MORE QUICKLY THAN ITS FAILURE TO OBSERVE ITS OWN LAWS, OR WORSE, ITS DISREGARD OF THE CHARTER OF ITS OWN EXISTENCE.'" COOPER V. PIMA COUNTY SHERIFF DUNIK, 963 F.2d 1220, 1223 (9TH CIR. 1992) (QUOTING OREGON V. HASS, 420 U.S. 714, 724-25 (1975) (BRENNAN, J., DISSSENTING) (QUOTING HARRIS V. NEW YORK, 401 U.S. 222, 232 (1971) (BRENNAN, J., DISSSENTING))). ONE NEED GO NO FURTHER IN FINDING THE DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS THAN MOMENTS BEFORE THE BEGINNING OF TESTIMONY AT TRIAL, WHEN PROSECUTOR, JUDGE AND COUNSEL BRAINSTORMED FOR A CONVICTION, AND THE COURT VOICED ITS BIASED ASSUMPTION THAT "THE REASON [MR. AGUILAR] KNOWS SO MUCH ABOUT [S.B.], THEY PROBABLY USED [DRUGS] TOGETHER." APP. C AT 22:14-23:21.

THE NINTH CIRCUIT BEGAN AND ENDED ITS CERTIFICATE-OF-APPEALABILITY ANALYSIS WITH THE BRIEFEST OF LIPSERVICE. APP. A; TOWARD V. DRETKE, 542 U.S. 274, 276, 282 (2004) ("A COA SHOULD ISSUE IF THE APPLICANT HAS 'MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT,' 28 U.S.C. § 1253(c)(2), WHICH WE HAVE INTERPRETED TO REQUIRE THAT THE 'PETITIONER MUST DEMONSTRATE THAT REASONABLE JURISTS WOULD FIND THE DISTRICT

COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG."; COURT REVERSES 5TH CIRCUIT'S DENIAL OF COA, WHICH HEREBY "PAID LIPSERVICE TO THE PRINCIPLES GUIDING ISSUANCE OF A COA," AND "HOPED THAT REASONABLE JURISTS WOULD FIND DEBATABLE OR WRONG THE DISTRICT COURT'S DISPOSITION OF TENNARD'S ... CLAIM, AND THAT TENNARD IS THEREFORE ENTITLED TO A CERTIFICATE OF APPEALABILITY"; BUCK V. DAVIS, 580 U.S. 100, 115-17 (2017) (THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA) "SETS FORTH A TWO-STEP PROCESS: AN INITIAL DETERMINATION WHETHER A CLAIM IS REASONABLY DEBATABLE, AND THEN - IF IT IS - AN APPEAL IN THE NORMAL COURSE"; "[A] CLAIM CAN BE DEBATABLE EVEN THOUGH EVERY JURIST OF REASON MIGHT AGREE, AFTER THE COA HAS BEEN GRANTED AND THE CASE HAS RECEIVED FULL CONSIDERATION, THAT PETITIONER WILL NOT PREVAIL"; "OF COURSE WHEN A COURT OF APPEALS PROPERLY APPLIES THE COA STANDARD AND DETERMINES THAT A PRISONER'S CLAIM IS NOT EVEN DEBATABLE, THAT NECESSARILY MEANS THE PRISONER HAS FAILED TO SHOW THAT HIS CLAIM IS MERITORIOUS. BUT THE CONVERSE IS NOT TRUE. THAT A PRISONER HAS FAILED TO MAKE THE ULTIMATE SHOWING THAT HIS CLAIM IS MERITORIOUS DOES NOT LOGICALLY MEAN HE FAILED TO MAKE A PRELIMINARY SHOWING

THAT HIS CLAIM WAS DEBATABLE. THUS, WHEN A REVIEWING COURT [] INVERTS THE STATUTORY ORDER OF OPERATION AND 'FIRST DECIDES' THE MERITS OF AN APPEAL, ... THEN JUSTIFIES ITS DENIAL OF A COA BASED ON ITS ADJUDICATION OF THE ACTUAL MERITS, 'IT HAS PLACED TOO HEAVY A BURDEN ON THE PRISONER AT THE COA STAGE.'; "[U]NTIL THE PRISONER SECURES A COA, THE COURT OF APPEALS MAY NOT RULE ON THE MERITS OF HIS CASE"). AS "THE STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY [SHOULD BE] LOW." FROST V. GILBERT, SUPRA, IT "SHOULD [ALSO] ORDINARILY BE ROUTINE." JONES V. BASINGER, 635 F.3d 1030, 1040 (7th Cir. 2011).

IN STRICKLAND V. WASHINGTON, WHEN ESTABLISHING A STANDARD FOR DETERMINING WHEN A CRIMINAL DEFENDANT HAD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, THE COURT WORRIED THAT "THE EXISTENCE OF DETAILED GUIDELINES FOR REPRESENTATION COULD DISTRACT COUNSEL FROM THE OVER-riding mission of VIGOROUS ADVOCACY OF THE DEFENDANT'S CASE." 466 U.S. 668, 689 (1984). THE COURT ALSO FEARED THAT "THE AVAILABILITY OF INTRUSIVE POST-TRIAL INQUIRY INTO ATTORNEY PERFORMANCE OR OF DETAILED GUIDELINES FOR ITS EVALUATION WOULD ENCOURAGE THE PROLIFERATION OF INEFFECTIVE CHALLENGES." Id. AT 690. AS TO THE NOVEL INEFFECTIVE-ASSISTANCE-

OF-COUNSEL CLAIM, THE DEFENSE BECAME TRIFOLD. SEE WRIGHT V. VAN PATTEN, 552 U.S. 120, 120 (2008) ("THE DISTRICT COURT DENIED RELIEF, BUT THE SEVENTH CIRCUIT REVERSED, HOLDING THAT THE CASE'S NARS CLAIM SHOULD BE RESOLVED UNDER UNITED STATES V. CRONIN, 466 U.S. 648 [1] (PREJUDICE MAY BE PRESUMED), RATHER THAN STRICKLAND [1] (REQUIRING A SHOWING OF COUNSEL'S DEFICIENT PERFORMANCE AND PREJUDICE TO DEFENDANT).). BUT IT IS IN STRICKLAND, THE SUPREME COURT ADVISED, LOWER COURTS WERE TO FIND THAT A DEFENDANT HAD FAILED TO "SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT." 466 U.S. AT 694. AND THE DIFFICULTIES OF ESTIMATING PREJUDICE AFTER THE FACT ARE EXACERBATED BY THE POSSIBILITY THAT EVIDENCE OF INJURY TO THE DEFENDANT MAY BE MISSING FROM THE RECORD PRECISELY BECAUSE OF THE INCOMPETENCE OF COUNSEL. Id. AT 710 (MARSHALL, J., DISSENTING); SEE ALSO VINIAN O. BERGER, THE SUPREME COURT AND DEFENSE COUNSEL: OLD ROAD, NEW PATHS - A DEAD END?, 86 COLUM. L. REV. 9, 93 (1986) ("SUPERIMPOSING AN OUTCOME-CENTERED PREJUDICE ELEMENT ON THE BASIC INEFFECTIVENESS CLAIM RISKS NOT ONLY UNWARRANTED IMPOSITION ON COURTS CONFRONTED WITH THE SPECULATIVE

TASK OF TRYING ISSUES OF GUILT AND INNOCENCE ON A COLD OR BELATEDLY BEEFED UP RECORD, BUT ALSO GREAT UNFAIRNESS TO THE DEFENDANTS.").

BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT HELD THAT "(1) COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND (2) AGUILAR DID NOT SUFFER PREJUDICE"; AND FAILED TO SHOW THAT JURISTS OF REASON WOULD FIND IT DEBASABLE WHETHER HE STATED A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT, DESPITE THE FACT "COUNSEL [COULD] HAVE USED EVIDENCE OF COMMUNICATIONS IN [PETITIONER'S] CELL PHONE TO IMPEACH S.B.'S TESTIMONY THAT S.B. DID NOT KNOW AGUILAR", IN ANSWER TO A QUESTION POSED DIRECTLY FROM A JUROR. APP. B AT 8:14-22. IT WAS OBVIOUS TO THE TRIAL COURT THE TWO KNEW EACH OTHER. APP. C AT 22:27-23:1. IT WAS ALSO OBVIOUS A MEMBER OF JURY PANEL AT MR. AGUILAR'S TRIAL BELIEVED IT TO BE MATERIALLY ESSENTIAL TO HIS OR HER VERDICT IF THE TWO KNEW EACH OTHER - NOT WHETHER S.B. HAD SEEN PETITIONER IN THE PAST. "HAD COUNSEL LOCATED AND INTRODUCED [S.B.'S CONTACT INFORMATION], THE PHONE RECORD WOULD HAVE 'ALTERED' THE ENTIRE EVIDENTIARY PICTURE' BEFORE THE JURY, STRICKLAND, 406 U.S. AT 696, RESULTING IN 'A REASONABLE PROBABILITY THAT... AT LEAST

ONE JUROR WOULD HAVE HARBORED A REASONABLE DOUBT AS TO [MR. AGUILAR'S] GUILT." APP. E AT 1-2; YORK V. DUCART, 736 F.2D 620, 630 (9TH CIR. 2018) (CITING BUCK V. DAVIS, 137 S.Ct. 759 AT 776).

LIPSERVICE. "THE PURPOSE [OF THE EFFECTIVE ASSISTANCE GUARANTEE OF THE SIXTH AMENDMENT] IS SIMPLY TO ENSURE THAT CRIMINAL DEFENDANTS RECEIVE A FAIR TRIAL." STRICKLAND, 466 U.S. AT 699. PHYSICAL EVIDENCE PROVING THE GOVERNMENT'S KEY WITNESS LIED IN ANSWER TO A QUESTION A JUROR ASKED BEGINS AND COMPLETES "THE PROPER MEASURE OF ATTORNEY PERFORMANCE [AS TO] REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS." Id. AT 699. ALL CONTRARY CONCLUSIONS TO THE FACT PETITIONER SUFFERED PREJUDICE IS BLACK AND WHITE LIPSERVICE. THE SUPPRESSION AND SPOILIATION OF HIS CELL PHONE ACTS AS A SUFFICIENT "SHOWING THAT COUNSEL'S ERRORS WERE SO SERIOUS AS TO DEPRIVE [MR. AGUILAR] OF A FAIR TRIAL, A TRIAL WHOSE RESULT IS RELIABLE." Id. AT 697. IT IS LIPSERVICE - WITH HYPERBOLE FOR SUPPORT - TO HOLD PETITIONER RECEIVED A FAIR TRIAL. "[C]OUNSEL OWES THE CLIENT A DUTY OF LOYALTY." Id. AT 698. ONE MUST SEARCH LONG AND HARD FOR A SEMBLANCE OF ALLEGIANCE IN COUNSEL'S APOLOGY TO THE TRIAL COURT FOR MR

FAILURE AT MANIPULATING PETITIONER INTO PLEADING GUILTY TO WHAT HE DID NOT DO, BECAUSE "[H]E IS [MOST] UNPREDICTABLE." App. C at 22:14-23:17. "THIS CASE IS AN EXAMPLE OF OFFICIALS WHO DELIBERATELY CHOOSE TO IGNORE THE LAW AND THE CONSTITUTION IN FAVOR OF THEIR OWN METHODS." COOPER V. DUBNIK, 963 F.2d 1220, 1252 (9th Cir. 1992). "FOR VICTIMS CAUGHT IN THEIR SNARE, THE CONSTITUTION OF THE UNITED STATES BECOMES A USELESS PIECE OF PAPER. *Id.* LIESERVICE OF THE LOCAL SPIRIT.

CONCERNING THE NOVELTY OF THE "MISHANDLING" OF MR. AGUILAR'S CELL PHONE BY COUNSEL, BRADY V. MARLAND, 373 U.S. 83, 87 (1963), "HELD THAT SUPPRESSION OF MATERIAL EVIDENCE JUSTIFIES A NEW TRIAL 'IRRESPECTIVE OF THE GOOD FAITH OR BAD FAITH' [INVOLVED]." GIGLO V. UNITED STATES, 405 U.S. 150, 154 (1972) (QUOTING AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §3.11(a)). "WHEN THE 'RELIABILITY OF A GIVEN WITNESS MAY WELL BE DETERMINATIVE OF GUILT OR INNOCENCE,' NONDISCLOSURE OF EVIDENCE AFFECTING CREDIBILITY FALLS WITHIN THIS GENERAL RULE." *Id.* (QUOTING MARLE V. ILLINOIS, 360 U.S. 264, 269 (1959)). FURTHERMORE, THE COURT MAY "DISAGREE WITH A STATE COURT'S CREDIBILITY DETERMINATION, WHEN GUIDED BY AEDPA, col-

CLIQUE THE DECISION WAS UNREASONABLE OR THAT THE FACTUAL PREMISE WAS INCORRECT BY CLEAR AND CONVINCING EVIDENCE." MILLER-EL V. COCKRELL, 537 U.S. 322, 340 (2003). THE CLEAR AND CONVINCING EVIDENCE SHOWING THE UNREASONABLENESS OF THE STATE AND HABEAS COURTS' DECISIONS IN REGARD TO S.B.'S CREDIBILITY AND LACK THEREOF EXISTS IN THE RECORD, APP. B AT 5:12-6:3. WHERE S.B. TESTIFIED AT TRIAL HE HAD REMAINED SOBER AND DRUG-FREE FOR YEARS PRIOR TO THE NIGHT IN QUESTION AND TRIAL, A EX POST FACTO PRESENTENCE REPORT IN S.B.'S NAME REVEALED S.B. GAVE PERJURED TESTIMONY. *Id.* "[T]HE NEWLY PRESENTED EVIDENCE MAY INDEED CALL INTO QUESTION THE CREDIBILITY OF THE WITNESSES PRESENTED AT TRIAL." SCHULTE V. DELO, 513 U.S. 298, 330 (1995).

IN WHAT CAN ONLY BE DEEMED AS PAGES OF LIPSERVICE BELOW, LOST ON THE LOWER COURTS IS THE PREMISE UPON WHICH STRICKLAND HAS AT ITS FOUNDATION:

THE COURT HAS NOT ELABORATED ON THE MEANING OF THE CONSTITUTIONAL REQUIREMENT OF EFFECTIVE ASSISTANCE IN THE LATTER CLASS OF CASES.... IN GIVING MEANING TO THE REQUIREMENT, HOWEVER, WE MUST TAKE ITS PURPOSE - TO ENSURE A FAIR TRIAL - AS THE GUIDE. THE BENCHMARK FOR JUDGING ANY CLAIM OF INEFFECTIVENESS MUST BE

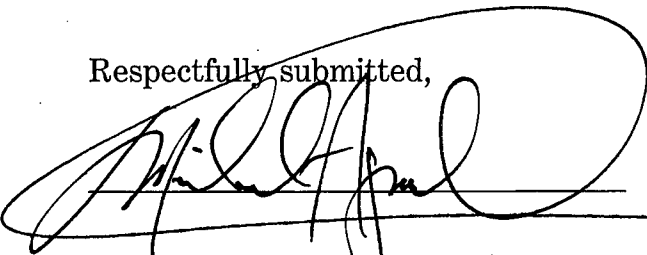
WHETHER COUNSEL'S CONDUCT SO UNDERMINED
THE PROPER FUNCTIONING OF THE ADVERSARIAL
PROCESS THAT THE TRIAL CANNOT BE RELIED
UPON AS HAVING PRODUCED A JUST RESULT.

STRECKLAND, AT 686. "OF ALL THE RIGHTS THAT AN ACCUSED
PERSON HAS, THE RIGHT TO BE REPRESENTED BY COUNSEL IS BY
FAR THE MOST PERVASIVE FOR IT AFFECTS HIS ABILITY TO AS-
SERT ANY OTHER RIGHTS HE MAY HAVE." CRONIC, 466 U.S. AT 654.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: DECEMBER 11, 2023