No. 24-

IN THE

Supreme Court of the United States

TROY THOMAS YORK,

Petitioner,

v.

STATE OF ARIZONA AND
RACHEL MITCHELL,
MARICOPA COUNTY ATTORNEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment confer the right to effective assistance of first collateral review counsel for claims of ineffective assistance of trial counsel, where the State requires that ineffective assistance of trial counsel claims be raised for the first time on collateral review; and, if so, does the State offend the Constitution by failing to provide a reasonable procedure by which that right may be vindicated?

2. Did the Arizona courts deprive Troy York of a fair trial by providing the jury with a deficient selfdefense jury instruction, thereby relieving the State of its burden to disprove York's self-defense justification beyond a reasonable doubt?

3. Did the Arizona courts deprive Troy of a fair trial by giving a deficient jury instruction regarding the definition of dangerous instrument, thereby preventing the jury from properly considering Troy's defense of crime prevention?

4. Did the Arizona courts violate Troy's Sixth (and Fourteenth) Amendment right to trial by jury by imposing a sentence for a dangerous offense without a jury finding of dangerousness, given that neither "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument" nor "the intentional or knowing infliction of serious physical injury" were elements of the offense for which he was convicted?

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

State of Arizona v. Troy Thomas York, Arizona Superior Court, Maricopa County, CR2018-115104-001 (January 28, 2020) (Count 1—Manslaughter, in violation of A.R.S. 13-1103(F)(2) (lesser-included)), (March 28, 2020) (sentence—seven (7) years of incarceration).

State of Arizona v. Troy Thomas York, Arizona Court of Appeals, 1 CA-CR 20-0161 (February 25, 2021) (direct appeal, conviction and sentence affirmed).

State of Arizona v. Troy Thomas York, Arizona Superior Court, Maricopa County, CR2018-115104-001 (April 3, 2023) (denial of post-conviction relief).

State of Arizona v. Troy Thomas York, Arizona Court of Appeals, 1 CA-CR 23-0358 PRPC (November 28, 2023) (denying post-conviction relief)

State of Arizona v. Troy Thomas York, Arizona Supreme Court, No. CR-23-0327-PR (May 2, 2024) (exhaustion of post-conviction remedies).

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PETITION FOR WRIT OF CERTIORARI

Comes now Petitioner Troy York, through counsel undersigned, and respectfully prays that a Writ of Certiorari issue to review the judgment below, i.e., the Arizona Courts' decisions affirming Troy York's conviction and sentence, and affirming the denial of his petition for post-conviction relief in his 2020 trial, conviction, and sentence for manslaughter.

This is that Petition for Certiorari.

OPINIONS/DECISIONS BELOW

The Arizona Court of Appeals' February 25, 2021 memorandum decision in 1 CA-CR 20-0161 affirming Mr. York's conviction and sentence can be found at 2021 WL 734734 is attached as Appendix 8a-30a.

The Maricopa County Superior Court April 3, 2023 order in CR2018-115104-001 denying Mr. York's petition for post-conviction relief is attached as Appendix 4a-7a.

The Arizona Court of Appeals' November 28, 2023 decision order in 1 CA-CR 23-0358 PRPC affirming the denial of Mr. York's petition for post-conviction relief can be found at 2023 WL 8225942, and is attached as Appendix 2a-3a.

The Arizona Supreme Court's May 2, 2024 Minute Letter in CR-23-0327-PR denying review of Mr. York's of the denial of his petition for post-conviction relief is attached as Appendix 1a.

The Arizona Supreme Court denial of review without opinion is published only on Lexis.

JURISDICTION

This Court has jurisdiction over this Petition pursuant to 28 U.S.C. §1257(a).

The Arizona Supreme Court denied review of Mr. York's petition for post-conviction relief on May 2, 2024. On July 18, 2024, this Court granted an extension of time in which to file this instant petition until September 29, 2023. This Petition has been timely filed. Sup. Ct. R. 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution, which has been held to incorporate the Fifth and Sixth Amendments, provides, in pertinent part:

> 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.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be

> deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense . . . .

STATEMENT OF THE CASE

This case is a tragedy for the York family. Gregg York, the youngest of three brothers, is dead. Troy York, the oldest brother, is in prison for manslaughter for shooting and killing his brother Gregg. And their middle brother, Ed, is left dealing with the aftermath of the loss of not one, but both of his brothers. The errors in this case have devastated the already fractured York family.

I. The criminal charges made against Troy

Troy and his brother Gregg engaged in a physical struggle in their shared home that ended when Troy shot his brother twice. After shooting his brother, Troy called 9-1-1 and requested emergency assistance.

For nearly twenty years, Troy York had lived with his younger brother, Gregg, at a house in Phoenix. The house they shared had been left to Gregg in their mother's will. The brothers also shared the home with anywhere between 10 and 20 cats.

Greg did not work, and Troy supported the two through a pension and social security. In early 2018, Gregg suffered a heart attack, and thereafter, he began acting more aggressively. On the evening of March 24, 2018, Gregg was acting vituperative in the kitchen; he became enraged and began attacking Troy, throwing both a bottle of bleach and a wooden chair at Troy. *See* 2021 WL 734734 at ¶4.

Troy, hearing the commotion in the kitchen, grabbed his revolver and approached the kitchen believing an intruder might have entered the home. As Gregg threatened him and threw things at him, Troy backed away; however, he was knocked to the ground by the chair.

> Although he remained on the floor, the victim continued swinging the chair in his direction. To ward off another blow, York aimed his revolver and shot the victim. When the bullet struck, the victim paused only momentarily, and then continued toward York. On the stand, York recounted that the victim had threatened to "rip [his] throat out" as he lunged toward him. Claiming he feared for his life, York testified that he shot his brother a second time.

2021 WL 734734 at ¶10.

Troy called 9-1-1, seeking medical personnel for his brother. 2021 WL 734734 at ¶2. When officers arrived, they found the victim lying on the floor, unresponsive, with two gunshot wounds to the chest. Shortly after medical personnel transported Gregg to a hospital, he was pronounced dead.

II. The jury trial, verdict, and Troy's conviction and sentence.

The State charged Troy with second-degree murder. The Maricopa County Superior Court conducted a six-day jury trial.

At trial, Troy raised two justification defenses: self-defense and use of force in crime prevention. Because Troy never denied that he shot and killed the victim, the sole issue before the jury was whether his use of deadly force was justified under either or both asserted justification defenses.

He was found guilty of the lesser-included charge of manslaughter and received a mitigated term of seven years imprisonment.

III. The direct appeal.

On appeal, Troy argued that the jury instructions were sufficient, specifically with respect to the necessary finding of the dangerousness—as defined by Arizona law—for both his conviction and for sentence-enhancement purposes. Troy challenged the prosecutor's conduct during cross-examination and statements made during closing argument.

The Arizona Court of Appeals affirmed his conviction and sentence. 2021 WL 734734.

IV. The post-conviction proceedings

After initiating post-conviction proceedings, his appointed counsel filed a notice of no colorable claims. He

retained advisory counsel for his pro se brief. Advisory counsel did not ask the court to appoint a ballistics expert or a blood-spatter expert, so that Troy could support his claim of ineffective assistance of counsel with affidavits.

The Maricopa County Superior Court rejected Troy's request for post-conviction relief. The Arizona Court of Appeals affirmed the denial, and the Arizona Supreme Court declined jurisdiction to review the affirmance.

This Petition followed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Troy argued in his July 7, 2020 appellate brief that the trial court's denial of his requested jury instructions violated his Due Process rights under both the Fifth and the Fourteenth Amendments. He also argued the prosecutors' misconduct during trial and during closing arguments violated his rights to fair trial under both the Sixth and the Fourteenth Amendments.

Following his appeal, Troy filed a June 1, 2022 Petition for Post-Conviction relief, seeking either a new trial on his 2020 conviction and sentence for manslaughter, or alternatively, a hearing on his claims of ineffective assistance of counsel. Troy made this request based on his Sixth and Fourteenth Amendment rights to due process. On April 3, 2023, a Maricopa County Superior Court judge denied York's petition.

Troy then sought review of that denial of post-conviction relief with the Arizona Court of Appeals, again asserting his Sixth (and Fourteenth) Amendment rights

to due process. On November 28, 2023, the Arizona Court of Appeals affirmed the denial of post-conviction relief.

Troy then sought review of the Arizona Court of Appeal's decision with the Arizona Supreme Court, again asserting his Sixth and Fourteenth Amendment rights to due process. On May 2, 2024, the Arizona Supreme Court declined to accept jurisdiction and returned jurisdiction to the Maricopa County Superior Court.

Arizona does not provide a means by which Troy could argue the ineffectiveness of his post-conviction relief counsel concerning his ineffectiveness of trial counsel claim, because Arizona does not recognize the right to counsel on an ineffective assistance of trial counsel claim.

Nor can he file a successive petition to raise the claim in State court without exceeding the time limitation set for petitioning for certiorari.

REASONS FOR GRANTING THE WRIT

I. This Court should hold that the Fourteenth Amendment requires the effective assistance of counsel for the first opportunity to raise an ineffective assistance of trial counsel claim whether the first procedural opportunity is on direct appeal or on first collateral review.

York's initial post-conviction relief counsel failed to obtain a blood spatter / crime scene analyst to prove the claim that trial counsel was ineffective by failing to consult an expert to present exculpatory evidence supporting his self-defense claim. This was the only manner in which counsel could have demonstrated prejudice. State law

requires a showing of what the expert would have said, if consulted and called. *See State v. Denz*, 232 Ariz. 441, 442, ¶3 (App. 2013).

York has no forum to vindicate an ineffective assistance of counsel claim against post-conviction relief counsel because Arizona does not recognize the right to effective assistance of counsel in a collateral proceeding embodying the first and only opportunity to raise an ineffectiveness of counsel claim, and therefore provides no process for such a claim's review. York, obtaining new counsel after relief was denied, used the only procedure remaining to him to correct the ineffectiveness, and, in a petition for review pursuant to Rule 32.16(a)(1), asked the Arizona Court of Appeals to remand to the trial court so that new post-conviction relief counsel could present evidence to show prejudice from the trial court's failure to use the expert.

This Court represents the only forum where York's plea to clarify the right to effective assistance of counsel in raising an effectiveness of trial counsel claim can be heard.

Although not yet specifically articulated, this Court's precedents establish that the equal protection and due process clauses of the Fourteenth Amendment guarantee the assistance of counsel in the first proceeding in a state court in which the defendant may for the first time assert a claim of ineffective assistance of trial counsel, whether that opportunity is on direct appeal or in collateral proceedings. The first time an ineffective assistance of counsel claim can be raised is first-tier review of that claim.

Troy asks that this Court announce its recognition of that right and correct the State of Arizona's error concerning the right to counsel in this circumstance, and to clarify the question that this Court left open in *Martinez v. Ryan*, 566 U.S. 1 (2012). Arizona can then, in accordance with *Carter v. Illinois*, be left to "define the mode by which [the right] may be vindicated." 329 U.S. 173, 176 (1946).

A. The Fourteenth Amendment Right to Appellate Counsel

The United States Constitution guarantees a Fourteenth Amendment due process and equal protection right to the assistance of counsel on state court collateral review, if it is the first time an ineffective assistance of trial claim can be raised. Although the Constitution does not enshrine the right to a criminal appeal, where a state grants the ability to appeal, the process must comport with the Fourteenth Amendment. *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956) ("The procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). Arizona guarantees the right to appeal in its state constitution. Ariz. Const. Article II, § 24. Appellate review has thus been, since Arizona became a state in 1912, an integral part of its trial system for finally adjudicating the guilt or innocence of a defendant, and must also comport with the Fourteenth Amendment.

Included among the due process guarantees on appeal incorporated by the Fourteenth Amendment is the right to effective assistance of counsel in of-right appellate proceedings. *Evitts v. Lucey*, 469 U.S. 387, 396-97

(1985). "A first appeal as of right . . . is not adjudicated in accordance with due process of law if the appellant does not have the effective assistance of an attorney." *Id.*

This Court has articulated the distinction between the Sixth Amendment right to trial counsel and the Fourteenth Amendment right to appellate counsel. *See Evitts*, 469 U.S. at 392. "The trial-level right to counsel, created by the Sixth Amendment and applied to the States through the Fourteenth Amendment, *see Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), comprehends the right to effective assistance of counsel. *See Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980)." *Id.* "Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." *Id.* at 395.

Conversely, "the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective," see *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); among those safeguards is the right to counsel, see *Douglas v. California*, 372 U.S. 353 (1963)." *Id.* Though the right to effective appellate counsel is not grounded in the Sixth Amendment, considerations similar to those grounded in the Sixth Amendment right to counsel apply to appellate counsel, too:

> To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—

> like an unrepresented defendant at trial—is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

Id. at 396.

The purpose of a direct appeal in Arizona is to determine whether an individual defendant has been lawfully convicted. *Strickland v. Washington* mandates that a defendant has not been lawfully convicted if he has not received the effective assistance of trial counsel. 466 U.S. 668, 686 (1984). "The right to counsel is the right to effective assistance of counsel." *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.1 (1970)). Thus, this Court has reasoned, the right to appellate counsel is the right to effective assistance of appellate counsel on direct review to determine whether an individual has been lawfully convicted. *Evitts*, 469 at 396.

A person convicted by trial in Arizona, as this Court well knows, cannot raise the claim that he was unlawfully convicted due to ineffective assistance of trial counsel until collateral review. This person "has not previously had an adequate opportunity to present his [ineffective assistance of trial counsel claim] fairly in the context of the State's appellate process." *Id.* at 402 (internal quotations

omitted). Here, as in *Evitts*, it follows that for purposes of analysis under the Due Process Clause, an ineffective assistance of trial counsel claim relegated to collateral review is an appeal as of right, "triggering the right to counsel recognized in *Douglas* v. *California*, 372 U.S. 353 (1963)." *Id.*; *c.f. Martinez*, 566 U.S. at 8 (The initial-review collateral proceeding is a prisoner's "one and only appeal" as to an ineffective assistance of trial counsel claim and "may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings.").

B. State of Arizona Law

Arizona Rule of Criminal Procedure, Rule 33, adopted in 2020, provides for collateral review of convictions by plea, allowing a defendant to initiate a second PCR proceeding within thirty days of the denial of relief, to allege ineffectiveness of PCR counsel. Ariz. R. Crim. Proc. 33.4(b)(3)(C). The procedure comports with this Court's recognition of pleading defendants' right to counsel on initial review. *See Halbert v. Michigan*, 545 U.S. 605 (2005). Arizona courts have justified the discrepancy with the equal protection argument that since those convicted by trial have an opportunity for review of appellate counsel's ineffectiveness, those convicted by plea must have an opportunity to challenge the ineffectiveness of first-level review counsel. *Osterkamp v. Browning*, 250 P.3d 551, 557-558, ¶24 (App. 2011).

Rule 32, governing collateral review of convictions by trial, contains no similar provision because Arizona does not recognize the Fourteenth Amendment right to counsel in first tier collateral review for defendants convicted by trial, even though it is the first time a defendant may assert

a claim of ineffective assistance of trial counsel. *State v. Escareno-Meraz*, 307 P.3d 1013, 1014, ¶4 (App. 2013); *State* v. *Spreitz*, 39 P. 3d 525, 527, ¶9 (2002) (appellate court will not address an ineffective assistance of trial counsel claim, regardless of merit, on direct appeal.)

In *State v. Mata*, the Arizona Supreme Court adopted the Ninth Circuit's reasoning that the Sixth Amendment right to counsel does not extend to state collateral proceedings, even where the state collateral proceeding is the first and only time an ineffectiveness of trial counsel can be raised. 916 P.2d 1035, 1052 (1996) (citing *Bonin v. Vasquez*, 999 F.2d 425, 430 (1993) ("[T]he protections of the Sixth Amendment right to counsel do not extend to either state collateral proceedings or federal habeas corpus proceedings.")). Both *Mata* and *Bonin* rely on this Court's pronouncement in *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) that "[t]here is no constitutional right to an attorney in state post-conviction proceedings" to conclude that the "Sixth Amendment does not confer that right." *See Mata*, 916 P.2d at 1052.

Both courts are correct that the right to appellate counsel does not derive from the Sixth Amendment. The right derives, rather, from the Fourteenth Amendment. "The right to counsel on appeal stems from the due process and equal protection clauses of the Fourteenth Amendment." *Martinez v. Court of Appeal*, 528 U.S. 152, 155, 161 (2000). The right extends to any of-right post-conviction proceeding. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (limiting the due process right to appellate counsel of-right proceedings).

Coleman was abrogated in *Martinez v. Ryan* when this Court left open the question whether a state prisoner has a right to effective assistance of counsel in collateral proceedings, where an ineffectiveness of trial counsel claim may be brought for the first and only time. *See Martinez*, 566 U.S. at 8. Furthermore, *Evitts v. Lucey* stands in direct contradiction with *Mata* and *Bonin*, not least because the right to effective assistance of appellate counsel derives, not from the Sixth Amendment, but from the Fourteenth.

This Court denied certiorari on the Arizona case announcing the view that no right to effective assistance of counsel exists on collateral review, even if it is the first and only time a defendant can raise an ineffective assistance of trial counsel claim. *See Mata v. Arizona*, 449 U.S. 921 (1980). And Arizona courts have held fast to the holding in *Mata* even in the face of *Evitts* and *Halbert*, both recognizing the right to counsel, and thereby the right to the effective assistance of counsel, on first-tier review.

The endless progression of ineffective assistance of counsel claims the Arizona Supreme Court warned of is not a necessary consequence of announcing the right to effective assistance of counsel in making an effective assistance of trial counsel claim because recognizing the right to effective assistance in this limited context goes no further than *Moffit* or *Evitts*, but merely recognizes the right to effective assistance of counsel in the first instance a person convicted by trial can fairly present his claim that ineffectiveness of trial counsel resulted in an unlawful conviction. A second petition for post-conviction relief like that allowed under Arizona Rules of Criminal Procedure, Rule 33, limited to the effectiveness of post-

conviction relief counsel *only* as to an ineffectiveness of trial counsel claim does not impose much of a burden on Arizona's reviewing courts, and provides an opportunity for a convict to exhaust the claim for federal review. It has the bonus effect of eliminating the need for the *Martinez v. Ryan* exception to state default on federal habeas corpus review.

C. No federal forum exists for vindicating the right.

While *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), carved out an equitable exception to the state exhaustion of claims requirement where ineffectiveness of post-conviction relief counsel results in default of an ineffectiveness of trial counsel claim, the claim cannot be developed in federal court except under rare circumstances outlined in AEDPA in federal court. *Shinn v. Ramirez*, 596 U.S. 366 (2022). Nor can ineffective assistance of appellate or post-conviction relief counsel claim be raised or developed in a federal district court because *Davila v. Davis* foreclosed the possibility of federal habeas corpus review of such claims, despite four justices agreeing that the same *Martinez* and *Trevino v. Thaler* rationale applied. 582 U.S. 521, 539 (2017), Breyer, J., joined by Ginsberg, J., Sotomayor, J., and Kagan, J., *dissenting.*

II. The Arizona Court of Appeals violated Troy's Fifth and Fourteenth Amendment rights by denying his right to present his self-defense arguments.

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, . . . the Due Process Clause protects the accused against conviction

except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

To be entitled to a self-defense jury instruction under Arizona law, a defendant need only present enough evidence to raise a reasonable doubt about whether he was justified in using deadly force. *State v. Hunter*, 142 Ariz. 88, 89 (1984) (citing *Everett v. State*, 88 Ariz. 293, 297 (1960); A.R.S. § 13-115(A)). Once such evidence is presented, the burden shifts to the State to prove beyond a reasonable doubt that the defendant's conduct was not justified. *Hunter*, 142 Ariz. at 89 (1984) (citing *Everett*, 88 Ariz. at 297). Thus, if a defendant requests an instruction that the State must disprove self-defense beyond a reasonable doubt, it is required. *See State v. Evans*, 125 Ariz. 140, 142 (App. 1980) (citations omitted).

Defense counsel in this case requested the full self-defense Recommended Arizona Jury Instruction in this case, which includes the instruction that the State must disprove self-defense beyond a reasonable doubt:

> If evidence was presented that raised this justification defense, then the State has the burden of proving beyond a reasonable doubt that the Defendant did not act with such justification. If the State fails to carry this burden, then you must find the Defendant not guilty of the charge.

Revised Arizona Jury Instructions (RAJI), Statutory Criminal Instruction 4.05. However, this paragraph immediately followed only the crime-prevention instruction

and was not repeated for the earlier self-defense instruction. [*See* Inst.#95, Final Jury Instructions (Jan. 27, 2020).]

Arizona courts—following this Court's precedent—have noted the importance of clarity in self-defense instructions:

> "The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof." . . . It is vital that the jury not misunderstand the concept of the defendant's burden of proof on self-defense; the jury must be instructed with great care to prevent the misunderstanding of this concept.

State v. Denny, 119 Ariz. 131, 134 (1978) (quoting *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978)).

Like in *Hunter*, this jury "might have approached the situation" in more than one way:

- The jury might have thought that the burden shifting instruction applied to both self-defense and the crime prevention defense, or

- The jury might have thought that the burden-shifting instruction applied only to the defense of crime prevention.

Hunter, 142 Ariz. at 90. This Court has warned about the dangers of such misinterpretation regarding a defendant's claim of self-defense and the State's burden:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship's* mandate.

Martin v. Ohio, 480 U.S. 228, 233-34 (1987) (citing *Winship*, 397 U.S., at 364, 90 S.Ct. at 1072). Arizona courts

> have reversed convictions, even though the jury was generally and even extensively instructed about general burden of proof, because [the Court] found that the jury was not clearly instructed as to burden of proof regarding the justification issue,

Hunter, 142 Ariz. at 90 (citing *State v. Denny*, 119 Ariz. 131 (1978); *State v. Garcia*, 114 Ariz. 317 (1977)). This is true regardless of whether the defendant objected at trial. *Id.*

Unfortunately, the Arizona Court of Appeals did not reverse in this case. Because the trial court here failed to take the "great care" necessary to ensure the jury did not misunderstand the burden of proof on self-defense, Troy respectfully requests that this Court order a new trial. *Lakeside*, 435 U.S. at 340, 98 S.Ct. at 1095, cited in *Denny*, 119 Ariz. at 134.

In this case, the evidence supporting the self-defense claim was powerful.

- First, the 911 call audio demonstrated that Troy told the 911 operator that Gregg came after him and was going to kill him before Troy shot him. [Tr. Exh. 7]

- Next, the photos of the scene tend to corroborate Troy's statement to the 911 operator that his brother tore up his room and came after him: a fan and other objects were knocked over in Troy's room and two dining room chairs were toppled over on the living room floor.

- In addition, Gerry Church's testimony regarding Gregg's aggressive behavior on the morning of the incident corroborated Troy's claim that Gregg's behavior that day was particularly irrational.

- Finally, photos of Troy after the incident showed red marks and welts on his back, which is consistent with his testimony that he was on his back on the floor during the attack.

Therefore, this case involved ample evidence from which the jury could have concluded that Troy was justified in using lethal force in self-defense.

Because we cannot know whether the jury applied the proper burden of proof to the self-defense claim, the error is prejudicial. Applying the appropriate standard of proof, a reasonable jury could have reached a different verdict in this case.

III. The Arizona Court of Appeals violated Troy's Fifth and Fourteenth Amendment rights by providing an incomplete jury instruction on the element of use of a dangerous instrument.

Defense counsel requested that the following Revised Arizona Jury Instruction be given in this case:

> "Dangerous instrument" means anything that is readily capable of causing death or serious physical injury under the circumstances in which it is used[/]attempted to be used.

[Inst.#74, at 16.] However, the court instructed the jury as follows:

> Dangerous instrument anything that could be used to cause death or serious physical injury.

[Inst.#95, at 11.]

The judge erred in giving the incomplete version of the instruction. The trial court has a "duty to instruct on the law relating to the facts of the case when the matter is vital to a proper consideration of the evidence, even if not requested by the defense and failure to do so constitutes fundamental error." *State v. Avila*, 147 Ariz. 330, 337 (1985).

Under Arizona law, whether the underlying crime for the justification defense was committed using a dangerous instrument is "vital to a proper consideration of the evidence." *State v. Schad*, 142 Ariz. 619, 620 (1984). In *State v. Schad*, the court instructed that the jury could find premeditation for first-degree murder if the killing was committed during the attempt to commit several enumerated felonies, including kidnapping and robbery, the two underlying felonies in Schad's case. *Id.* However, the trial judge failed to "define either felony in its instructions to the jury." *Id*, The Arizona Supreme Court held that the knowledge of the elements of the underlying felonies was vital to the jury's proper consideration of felony murder. *Id* As in *Schad*, the deficient instruction regarding the definition of dangerous instrument here was error because it was vital to the jury's proper consideration of the justification defense of crime prevention.

The deficient instruction on the definition of dangerous instrument struck to the heart of Troy's defense of crime prevention. If a defendant presents any evidence at trial that the crime was justified, he is entitled to an instruction on that justification defense. *Hunter*, 142 Ariz. at 89. Here, the court failed to properly instruct the jurors regarding the definition of dangerous instrument, thereby depriving the jurors of vital information necessary to consider the elements of the underlying offense of Aggravated Assault—and essentially depriving the defendant of the crime prevention defense altogether.

This deprived Troy of a right essential to his defense. In Schad, the court found the error to be fundamental because of "[t]he possibility that they convicted *Schad* of first-degree murder based on the deficient instruction."

Schad, 142 Ariz. at 621. In this case, we cannot know whether the jurors rejected the self-defense theory of crime prevention based on the deficient instruction. Therefore, like in *Schad*, it is possible Troy's justification defense was rejected and he was ultimately convicted as a result of the deficient instruction. This is fundamental error.

Because Troy had submitted the slightest evidence that the crime may have been justified to prevent Gregg from committing aggravated assault, the burden of proof shifted to the state to prove the lack of justification beyond a reasonable doubt. *See Hunter*, 142 Ariz. at 89. The court's instructional error potentially relieved the State of its burden of proving lack of justification beyond a reasonable doubt. Like the deficient selfdefense jury instruction in Hunter, the error in the present case is fundamental.

The term dangerous instrument "used in its ordinary sense" would be of little help to the jury in deciding this case. In *State v. Zaragoza*, the word "attempt" was not defined by the judge in the final jury instructions. 135 Ariz. 63, 66 (1983). The Court found nonfundamental error, in part, "because the ordinary definition of 'attempt' and the § 13-1001 definition of 'attempt,' . . . are essentially the same." *See also State v. Cox*, 217 Ariz. 353, 356 ¶20 (2007) (holding that because under A.R.S. § 1-213, "[w]ords and phrases shall be construed according to the common and approved use of the language[,]" no error in court's failure to define "control" because it "is not a technical term requiring an explanation to the average juror" and "has a commonly understood meaning.")

Such is not the case with dangerous instrument. Unlike the word attempt, the legislature has given the

term dangerous instrument a "peculiar meaning" which would require a jury instruction to explain the legislature's definition of the term. The fundamental error, therefore, is not cured by a commonly understood meaning of the term dangerous instrument.

A properly instructed jury could have reached a different verdict. Although evidence was sufficient for a jury to find there was no reasonable justification of crime prevention, "that was not the only possible reasonable conclusion". *State v. Juarez-Orci*, 236 Ariz. 520, ¶23 (2015).

It is also possible that the jury rejected the crime prevention defense based solely on a finding that a chair is not a dangerous instrument. *Id.* Because the jury could have reached a different verdict absent the error, York was prejudiced by the error.

In *State v. James*, the Arizona Supreme Court set forth guidelines for assessing whether improper jury instructions prejudiced a defendant: "The jury instructions are evaluated in the context of case-specific factors, including the evidence at trial, the defense offered and the parties' arguments to the jury." 231 Ariz. 490,494 ¶15 (2013) (citing *State v. Valverde*, 220 Ariz. 582 (2009)). Here, the instructional error went to an element of the underlying crime, which was inherent to the justification defense of crime prevention.

- Although much of the evidence presented at trial was uncontested, the inferences to be gleaned from those facts were hotly disputed.

- Troy admitted to pulling the trigger of his revolver and shooting his brother twice. The real question for the jury to answer was whether Troy's actions were justified.

Thus, the defenses raised at trial were directly impacted by the fundamental error.

- Further, evidence was presented that Gregg was wielding a heavy wooden chair.

- In addition, the State presented photos that showed two of these chairs toppled over on the ground as if they had landed there in the midst of a struggle.

Whether the chair qualifies as a dangerous instrument was essential to Troy's crime prevention defense. The accurate legal definition of dangerous instrument is essential to this defense. Thus, because his defense "squarely implicated the applicable fundamental error," the evidence at trial tends to demonstrate that Troy was prejudiced by the error. *James*, 231 Ariz. at 494, ¶16.

Finally, the parties' arguments to the jury do not alleviate the prejudice. In evaluating jury instructions, the closing arguments of counsel are also considered. *State v. Johnson*, 205 Ariz. 413,417, ¶11 (citing *State v. Bruggeman*, 161 Ariz. 508, 510 (App. 1989)).

But argument alone is not sufficient to take the place of an instruction that should have been given by a judge. *See State v. Schad*, 142 Ariz. 619, 620 (1984). Here, the State's comments in closing actually work to confuse the

jurors further. The State comingles the two justification defenses when she says that swinging a chair "is not deadly force." The State then informed the jury that the way his brother swung the chair could not have put Troy in reasonable apprehension for his safety.

Thus, the only "definition" of dangerous instrument presented by the prosecutor implies that 1) swinging the chair is not deadly force; and 2) the victim would have had to break it and use a wooden shard to stab Troy in order for it to be considered a dangerous instrument. This conflates the standards for crime prevention and selfdefense, suggesting that a person claiming the justification defense of crime prevention would have to have a "reasonable fear for [their] life" in order for the victim's actions to constitute aggravated assault. That is not the standard for the crime prevention defense. Troy only had to reasonably believe that deadly force was necessary to prevent the commission of aggravated assault—placing someone in reasonable apprehension of imminent physical injury using a dangerous instrument.

Defense counsel makes several references to dangerous instrument in closing, but none offers a clear definition of dangerous instrument. This only further confused the jury. Thus, like in *State v. James*, the closing arguments here are not sufficient to cure the court's failure to provide the full instruction regarding the definition of dangerous instrument.

The jury could have reached a different verdict if they were properly instructed that the chair, as it was used, qualifies as a dangerous instrument. Therefore, Troy has established prejudice.

IV. The Arizona Court of Appeals violated Troy's Sixth Amendment rights to a fair jury trial by affirming his conviction despite the lack of a jury finding of "dangerousness" in his crime, a sentence-enhancing factor under Arizona law, and clear *Blakely* error.

The Arizona Court of Appeals also erred by affirming Troy's conviction and sentenced despite the absence of a jury finding that his crime was "dangerous" for sentence-enhancement purposes under Arizona law. As this Court has made clear,

> [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Blakely v. Washington, 542 U.S. 296, 301 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Even "facts that increase mandatory minimum sentences must be submitted to the jury[.]" *Alleyne v. United States*, 470 U.S. 99, 116 (2013). Thus, a judge cannot impose sentence for dangerous felony under A.R.S. § 13-704 without the jury finding the dangerous nature of the offense. *State v. Hampton*, 213 Ariz. 167, 182 ¶70 (2006).

Troy did not admit to dangerousness. Therefore, it should have been submitted to the jury unless the use of a deadly weapon or the intentional or knowing infliction of serious physical injury was an element of the offense for which the jury returned a unanimous verdict. *State v. Grylz*, 136 Ariz. 450,459 (1983).

Under Arizona law, when the fact of dangerousness is not an element of the offense that the jury must find in determination of guilt, there must be a separate factual finding as to the allegation of dangerousness. *State v. Parker*, 128 Ariz. 97, 98 (1981). This is true even when there is overwhelming evidence presented at trial that qualifies the crime as a dangerous offense:

> The fact that the proof showed the use of a weapon does not satisfy the statutory requirement that the element of the dangerous nature of the felony be charged and be found to exist by the trier of fact.

State v. Parker, 128 Ariz. 97, 98 (1981).

In *State v. Grylz*, the Court held that the use or exhibition of a deadly weapon or dangerous instrument is not an element of second-degree murder. In fact, the jurors in *Grylz* were given the same instruction as the jurors here, which allows the jury to find a defendant guilty with merely reckless—not intentional or knowing—conduct. 136 Ariz. at 459. The court found, given the fact that the jury instruction allowed jurors to impose guilt upon finding reckless disregard for human life, the jury did not find dangerousness:

> Working with this instruction, the jury may have found appellant guilty of second-degree murder because, under circumstances showing an indifference to human life, he caused the death of [the victim] by consciously disregarding a grave risk of death. If that is the case, the jury

> did not make the dangerous nature finding required by [A.R.S. § 13-704].

Id. at 459.

To determine if dangerousness is inherent to an offense, courts compare the statutory definitions of the offense and of dangerousness. *State v. Larin*, 233 Ariz. 202,212, ¶38 (App. 2013). The court then considers if "an element of the offense charged contains an allegation and requires proof' of dangerousness. *State v. Parker*, 128 Ariz. 97, 99 (1981). A.R.S. § 13-l 103(A)(l).

Reckless manslaughter does not require a finding that offense was committed using deadly weapon or dangerous instrument; nor does it involve the intentional or knowing infliction of serious physical injury. A.R.S. § 13-l 103(A)(l). Further, Manslaughter by Sudden Quarrel or Heat of Passion does not include the use of a deadly weapon or dangerous instrument as an element of the offense—and the offense can be committed by acting with reckless disregard for human life, not knowingly or intentionally causing serious physical injury as required by A.R.S. § 105(13).A.R.S. § 13-l104(A)(2).

Here, because we do not know which theory of manslaughter the jury found, nor whether the jury's verdict on the theory of manslaughter was unanimous, a separate finding of dangerousness was required.

Imposition of an illegal sentence is fundamental error. *State v. Thues*, 203 Ariz. 339, 340, ¶4 (App.2002). "A sentence longer than that authorized by law is fundamental error." *State v. Gatliff*, 209 Ariz. 362, 364, ¶9 (2004).

Thus, failure to impose a sentence in conformity with the mandatory sentencing statues results in an illegal sentence which must be vacated. *Thues*, 203 Ariz. at 340, ¶4. Dangerous crimes typically involve stricter and steeper sentences. In this case, Troy York's sentence of 7 years for a dangerous offense is longer than the five-year presumptive sentence authorized by law. The error, therefore, is fundamental.

CONCLUSION

WHEREFORE, Petitioner Troy York respectfully requests that this Court accept certiorari to answer important federal questions, and to reverse the Arizona Court of Appeals.

Respectfully submitted this 30th day of September, 2024.

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APPENDIX

TABLE OF APPENDICES

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APPENDIX A — ORDER OF THE SUPREME COURT, STATE OF ARIZONA, FILED MAY 2, 2024

SUPREME COURT
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

TRACIE K. LINDEMAN
Clerk of the Court

May 2, 2024

RE: STATE OF ARIZONA v TROY THOMAS YORK
Arizona Supreme Court No. CR-23-0327-PR
Court of Appeals, Division One
No. 1 CA-CR 23-0358 PRPC
Maricopa County Superior Court
No. CR2018-115104-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 2, 2024, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Justice Bolick, Justice Lopez, Justice Beene and Justice King participated in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX B — MEMORANDUM DECISION OF THE STATE OF ARIZONA COURT OF APPEALS, DIVISION ONE, FILED NOVEMBER 28, 2023

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-CR 23-0358 PRPC

STATE OF ARIZONA,

Respondent,

v.

TROY THOMAS YORK,

Petitioner.

November 28, 2023, Filed

Petition for Review from the Superior Court
in Maricopa County
No. CR2018-115104-001
The Honorable Warren J. Granville, Judge (Retired)

REVIEW GRANTED; RELIEF DENIED

Appendix B

MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell, and Judges Kent E. Cattani and Anni Hill Foster delivered the decision of the Court.

PER CURIAM:

¶1 Petitioner Troy Thomas York seeks review of the superior court's order denying his petition for post-conviction relief. This is petitioner's first petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, the petition for review, State's response, and Petitioner's reply. We find that petitioner has not established an abuse of discretion.

¶4 We grant review but deny relief.

APPENDIX C — MINUTE ENTRY OF THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, FILED MARCH 30, 2023

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2018-115104-001 DT

STATE OF ARIZONA

v.

TROY THOMAS YORK (001)

March 30, 2023

HONORABLE WARREN J. GRANVILLE

MINUTE ENTRY

This Court has reviewed Defendant's pro se Petition and Reply, the State's Response, and the case file, and makes the following findings and rulings.

Defendant seeks relief on grounds of ineffective assistance of trial counsel from his jury conviction for the lesser-included offense of Manslaughter following the Court of Appeals affirming his conviction and sentence in *State v. Troy*, 1-CA-CR-20-0161 (Feb. 25, 2021).

At trial, the evidence showed that Defendant and his brother engaged in a physical struggle in their shared

home that ended when Defendant shot his brother twice. After shooting his brother, Defendant called 9-1-1 and requested emergency assistance. When officers arrived, they found the victim lying on the floor, unresponsive, with two gunshot wounds to the chest. Shortly after medical personnel transported the victim to a hospital, he was pronounced dead.

The State charged Defendant with Second-Degree Murder. At trial, Defendant raised two justification defenses: self-defense and use of force in crime prevention. Because he never denied that he shot and killed the victim, the sole issue before the jury was whether his use of deadly force was justified under either or both asserted justification defenses.

Defendant's alternative justification theories were predicated on the same factual basis. He testified that following a verbal dispute, the victim attacked him with a wooden chair. Thus, he acted in self-defense or in a justified attempt to prevent his brother's aggravated assault. After considering his testimony, the jury made the credibility finding that Defendant's actions were not justified, but rather, a result of sudden quarrel and adequate provocation by the victim.

Defendant's pro se Petition follows the filings of two well-qualified attorneys, who had reviewed the record independently of one another concluded that no basis for postconviction relief exists.

Appendix C

Defendant's claims of ineffective assistance of trial counsel can be grouped into four categories: failure to object to the testimony of three expert witnesses, failure to present known evidence, failure to object to prosecutorial misconduct, and failure to retain defense expert witnesses.

Defendant maintains that the testimony of the State's ballistics expert, blood spatter expert, and a medical examiner were not qualified. In fact, each of them testified about their extensive training, education, and experience in the field in which they were asked to opine. Having met the criteria of Rule 702, any objection to their testimony would have been overruled. Thus, Petitioner is afforded no relief on this issue. *See e.g.*, *State v. Berryman*, 178 Ariz. 617, 622 (App. 1994); *State v. Abdin*, No. 2 CA–CR 2016–0103–PR, 2016 WL 3063798, at *3, ¶ 9 (Ariz. App. May 31, 2016) (mem. decision); *See also Styers v. Schiro*, 547 F.3d 1026, 1030 (9th Cir. 2008).

Defendant's "suppressed" evidence" is couched as both "newly discovered" and ineffective for trial counsel's failure to introduce. The proffered evidence is that the victim earlier told neighbors that he wanted to kill himself and that he had law enforcement training that made his hands deadly weapons. Both facts were known before trial, and so, cannot qualify as "newly discovered".

Defense counsel's tactical decision not to present evidence of "suicide by brother" or the nature of the victim's hands was sound. Either would have been inconsistent with Defendant's testimony regarding

the unexpected life-threatening episode of his brother attacking him with a deadly chair. Defendant's tactical decisions and the failure to present the evidence does not satisfy either prong of *Strickland*. *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23 (App. 1999);

Defendant's claims of alleged prosecutorial misconduct are precluded because they were addressed and rejected by the Court of Appeals during direct appeal.

Defendant claims that defense counsel was ineffective for failing to retain any expert witnesses. His petition fails to identify what their testimony would have been had they been called to testify. As such, the claim fails. *State v. Carpenter*, 2015 WL 2381358, at *1, ¶ 4 Moreover, no expert could assist the jury in assessing the reasonableness of Defendant's claimed justification for shooting his brother twice in the chest at point blank range. Any such claim otherwise is speculative, and thus, no basis for relief. *State v. Tison*, 129 Ariz. 546, 556(1981); *State v. McDaniel*, 136 Ariz. 188, 198 (1983).

For the foregoing reasons,

Defendant's pro se Petition is denied summarily pursuant to Rule 32.6(c).

APPENDIX D — MEMORANDUM DECISION OF THE STATE OF ARIZONA COURT OF APPEALS, DIVISION ONE, FILED FEBRUARY 25, 2021

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

No. 1 CA-CR 20-0161

STATE OF ARIZONA,

Appellee,

v.

TROY THOMAS YORK,

Appellant.

February 25, 2021, Filed

Appeal from the Superior Court in Maricopa County
No. CR2018-115104-001
The Honorable Warren J. Granville, Judge (Retired)

AFFIRMED

MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge D. Steven Williams and Judge James B. Morse Jr. joined.

Appendix D

CAMPBELL, Judge:

¶1 Troy Thomas York appeals his conviction and sentence for manslaughter. He challenges the superior court's jury instructions on both self-defense and the definition of a dangerous instrument. We reverse a conviction based on an erroneous jury instruction "only if the instructions, taken together, would have misled the jurors." *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35, 969 P.2d 1168 (1998). "Whe[n] the law is adequately covered by instructions as a whole," we uphold the jury's verdict. *Id.* York also alleges the prosecutor engaged in misconduct, that viewed in the aggregate, amounted to reversible error. For the following reasons, we affirm.

BACKGROUND[1]

¶2 After shooting his brother in their shared home, York called 9-1-1 and requested emergency assistance. When officers arrived, they found the victim lying on the floor, unresponsive, with two gunshot wounds to the chest. Shortly after medical personnel transported the victim to a hospital, he was pronounced dead.

¶3 The State charged York with second-degree murder. At trial, York raised two justification defenses: self-defense and use of force in crime prevention. Because York never denied that he shot and killed the victim, the sole issue

1. We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93, 314 P.3d 1239 (2013).

before the jury was whether his use of deadly force was justified under one or both asserted justification defenses.

¶4 York's alternative justification theories were predicated on the same factual basis: He testified that following a verbal dispute, the victim attacked him with a wooden chair. First, York claimed that he acted in self-defense: lawfully using deadly force to protect himself against the victim's use, or apparent, attempted, or threatened use, of unlawful deadly physical force. Second, he asserted that his conduct was justified to prevent the crime of assault with a dangerous instrument: lawfully stopping the victim from swinging, or threatening to swing, a chair with the intent to place York in reasonable apprehension of imminent physical injury.

¶5 At trial, officers testified that they observed no injuries on York, other than some red marks across his back, when they took him into custody. During the arrest, officers removed both a knife and pepper spray from York's belt.

¶6 Detectives who responded to the home testified that the scene did not match York's report to 9-1-1. There was no evidence of an altercation or disturbance in York's bedroom, the place York had identified as the point of origin of the altercation during his 9-1-1 call, and items that were precariously "stacked" in the bedroom entrance remained undisturbed.

¶7 To determine where the victim was standing when he was shot, a detective specializing in bloodstain-pattern analysis examined the blood evidence and concluded

that the victim was shot while he was standing outside of York's bedroom door. The detective explained that the victim's "post-shooting movements" may have knocked over a chair, fan, and carpet box before he collapsed on the floor, but the bloodstain evidence was inconsistent with a scenario in which the victim was holding a chair over his head when he was shot.

¶8 Taking the stand in his own defense, York testified that the victim had been agitated the morning of the shooting and had argued with a neighbor. Afterward, the victim talked about the verbal altercation incessantly, so York told him to shut up. Later that evening, York heard the victim yelling from the kitchen, "stop" and "get out." Fearing a possible intruder, York grabbed his revolver before checking on the victim. Upon seeing no intruder, York asked the victim what had happened, and the victim mumbled something incoherent, appearing agitated. Having received no explanation, York told the victim to settle down or he would call the police.

¶9 At that point, according to York, the victim got a "crazy look on [his] face," grabbed a bottle of bleach, and threw it at him. In an apparent rage, the victim then moved into the living room, lifted a chair, and began swinging it at York.

¶10 Upon being struck with the chair, York fell to the ground. Although he remained on the floor, the victim continued swinging the chair in his direction. To ward off another blow, York aimed his revolver and shot the victim. When the bullet struck, the victim paused only momentarily, and then continued toward York. On the

stand, York recounted that the victim had threatened to "rip [his] throat out" as he lunged toward him. Claiming he feared for his life, York testified that he shot his brother a second time.

¶11 After an eight-day trial, the jury acquitted York of second-degree murder but found him guilty of the lesser-included offense of manslaughter, based on the alternative theories that he (1) committed second-degree murder upon a sudden quarrel or heat of passion, or (2) recklessly killed the victim. The jurors were not required to unanimously agree on either theory to return a conviction for manslaughter. No aggravation phase was held, and the jurors were not asked to find whether the offense was dangerous. The superior court nonetheless sentenced York as a dangerous offender under A.R.S. § 13-704(L) to a mitigated term of seven years' imprisonment.

DISCUSSION

I. Jury Instructions

¶12 York challenges the superior court's jury instructions on both self-defense and the definition of a dangerous instrument. Because York failed to object to the instructions at trial, he has forfeited the right to obtain appellate relief absent fundamental, prejudicial error. *State v. Escalante*, 245 Ariz. 135, 140, 142, ¶¶ 12, 21, 425 P.3d 1078 (2018).

¶13 To establish fundamental error, a defendant first must prove the superior court committed error. Next,

a defendant must show that such error (1) went to the foundation of the case, (2) took from the defendant a right essential to his defense, or (3) was so egregious that the defendant could not possibly have received a fair trial. *Id.* at 142, ¶ 21. "If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice[.]" *Id.* To establish prejudice, a defendant must show "a reasonable jury could have plausibly and intelligently" reached a different verdict absent the error. *Id.* at 144, ¶ 31. Fundamental error occurs in "rare cases" and is "curable only via a new trial." *Id.* In applying the "could have" standard, we examine the entire record, including the parties' theories and arguments, as well as the evidence presented at trial. *Id.*

A. Self-Defense Instruction

¶14 The superior court granted York's request to instruct the jurors on both self-defense and use of force in crime prevention. Both defenses, if successful, would justify York's actions, rendering him not guilty of the charged offenses. In the final instructions, the self-defense instruction immediately preceded the crime-prevention instruction. The self-defense instruction primarily tracked the Revised Arizona Jury Instructions ("RAJI") Statutory Criminal Instruction 4.05 (5th ed. 2019), but the court omitted the final paragraph of the RAJI on self-defense, which shifts the burden of proof to the State:

> The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry

> this burden, then you must find the defendant not guilty of the charge.

The court's crime-prevention instruction followed RAJI 4.11. At the end of this instruction, the court included RAJI 4.11's burden-shifting paragraph, which is nearly identical to the burden-shifting paragraph the court omitted from the self-defense instruction:

> If evidence was presented that raised this justification defense, then the State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge.

¶15 York does not challenge the crime-prevention instruction, nor does he argue the burden-shifting language the court gave was legally insufficient. Instead, he argues the superior court committed fundamental error by not specifically informing the jurors that the burden-shifting instruction applied to each justification defense. York points out that the burden-shifting paragraph at the conclusion of the crime-prevention instruction referred to "this justification defense," which he argues "may have" caused the jurors to misunderstand that the State also bore the burden of proof regarding his self-defense claim.

¶16 While there is no dispute that the jurors received the legally correct burden-shifting language, they were not specifically instructed that it applied to both justification

defenses. Arguably, a juror may have interpreted the phrase "this justification defense" as referring solely to the crime-prevention defense, rendering the self-defense instruction ambiguous and legally deficient.

¶17 Counsel attempted to clarify the ambiguity in the instruction. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343 (App. 2013) (explaining appellate courts "consider [jury] instructions in context and in conjunction with the closing arguments of counsel" when evaluating their sufficiency); *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823 (App. 1989) ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions."). In closing argument, defense counsel explained the burden-of-proof allocation to the jurors:

> If evidence was presented that raised . . . these justification defenses, . . . [t]*he burden is on the State, the State then has the burden of proving beyond a reasonable doubt that the Defendant did not act with justification. If the State fails to carry this burden, that's it. You must find the Defendant not guilty of the charge. That's the law.* (Emphasis added.)

In rebuttal closing argument, the prosecutor stressed that "the State has the burden of proof. The State *always* has the burden of proof[.]" (Emphasis added.) Nonetheless, even with these attempts to clarify the shifting burden regarding self-defense, neither attorney ever directly stated that the burden-shifting instruction applied to both justification defenses.

¶18 As in *State v. Hunter*, the given instructions did not make clear that the State was required to disprove York's claim of self-defense if he provided evidence to support it. 142 Ariz. 88, 89-90, 688 P.2d 980 (1984) (concluding the given self-defense instruction constituted fundamental error because it was unclear that the State was required "to disprove beyond a reasonable doubt that [the defendant] acted in self-defense"). In *State v. Cannon*, 157 Ariz. 107, 107, 755 P.2d 412 (1988), the supreme court concluded the omission of a burden-shifting instruction entirely was not fundamental error because the jury had been instructed on the State's general burden of proof. In contrast, the jurors in York's trial were instructed that the State carried the burden to prove, beyond a reasonable doubt, that York's conduct was not justified, but only concerning the crime-prevention defense

¶19 Read in their entirety, we conclude the given instructions did not apprise the jury that the burden of proof shifted to the State if York presented evidence of self-defense. Because York has met his burden to show that the instructions were given in error, we must determine whether he has demonstrated resulting prejudice.

¶20 To establish prejudice, York only speculates that the jurors "may have" been confused about the shifting burden of proof regarding self-defense. This assertion, however, is belied by the jury's finding that York was guilty of manslaughter. In reaching the manslaughter verdict, the jury necessarily rejected York's crime-prevention defense. In other words, to find York guilty of manslaughter, the jurors had to determine that the victim had not used the

chair in a manner to commit an assault such that York's use of deadly force was justified.

¶21 Given the jurors' determination that the victim had not placed York even in *reasonable apprehension of physical injury*, they could not have reasonably concluded the victim committed a more severe act involving *deadly force*, as required to sustain the self-defense claim. Although York contends that the victim lunged at him while threatening to kill him, leaving him no choice but to fire the second shot, this explanation fails to recognize that by that point, York had already shot the victim. Based on the manslaughter verdict, the jurors did not accept York's claim that the victim was committing aggravated assault when York fired the initial shot. Because the jurors implicitly rejected York's justification defense of crime prevention, we are not persuaded that had they been properly instructed on the burden-shifting aspect of self-defense, they could have reasonably reached a different verdict.

B. Dangerous-Instrument Instruction

¶22 Next, York challenges the superior court's instruction that a "dangerous instrument is anything that could be used to cause death or serious physical injury." He argues the court erred by failing to include the additional, qualifying language found in A.R.S. § 13-105(12) and RAJI 1.0512: "under the circumstances in which it is used, attempted to be used, or threatened to be used." He asserts the absence of the additional language may have led the jurors to conclude that his crime-prevention

defense failed merely because the jurors did not consider a chair a dangerous instrument.

¶23 Asserting he suffered no prejudice from the alleged error, the State argues that the given instruction inured to York's benefit because omitting the additional language made the definition less restrictive. In other words, under the given instruction, an object would always be a dangerous instrument if it *theoretically* could be used to cause death or serious physical injury, without regard to how the object was used in the given circumstance.

¶24 Assuming, without deciding, that the challenged instruction amounted to fundamental error, we discern no prejudice. The attorneys' closing arguments sufficiently clarified the definition of dangerous instrument. *See Johnson*, 205 Ariz. at 417, ¶ 11. Contrary to York's assertion on appeal, defense counsel explained at length why the chair was a dangerous instrument:

> [T]hreatening to hit somebody with a heavy dining room chair is a crime. It's aggravated assault . . . it's assault with a dangerous instrument. Think of it as—as the same sort of assault as threatening or swinging a baseball bat at somebody. You can do serious damage, if not kill somebody with something—with an instrument like that in your hands.

Later, after reading the definition of dangerous instrument to the jurors, defense counsel continued:

> So that's pretty broad. Big rock could cause death or serious physical injury. A bat, one of these chairs over here. A monitor, if I'm swinging it at someone's head, could cause death or serious physical injury, lots of things. . . . [N]ot to beat this dead horse, but being hit with a dining room chair, like a baseball bat, or even a heavy enough nightstick, can break bones, crush skulls, smash faces, break windpipes, do all the things necessary to fit that definition.

¶25 The jury heard York's testimony-that the victim used a large wooden chair to knock him to the ground and nearly unconscious, and that the victim then continued to swing the chair while York was laying prone on the floor. York explained that he fired the first shot because he was afraid the victim would beat him to death with the chair. In addition, a detective also testified that a chair can be as lethal as a gun, depending on how it is used. Given this evidence, York has failed to show any prejudice from the asserted error. *See State v. James*, 231 Ariz. 490, 494, ¶ 15, 297 P.3d 182 (App. 2013) (explaining trial evidence is considered when assessing jury instructions).

¶26 In sum, had the jurors accepted York's account, the given instruction would not have compelled them to reject his crime-prevention defense. In fact, as the State suggests, the superior court's instruction made it *easier* for the jury to find the chair was a dangerous instrument. Under York's version of events, the way the victim allegedly wielded the chair clearly rendered it a potentially lethal weapon. Therefore, York has failed to establish that

a reasonable jury could have reached a different verdict had the dangerous-instrument instruction included the additional language.

II. Alleged Prosecutorial Misconduct

¶27 York argues the State engaged in prosecutorial misconduct that deprived him of a fair trial. Specifically, he contends the prosecutor engaged in unduly argumentative cross-examination, impugned the integrity of defense counsel, and depicted him as a liar. Viewed in the aggregate, York argues the cumulative effect of the alleged misconduct amounted to a denial of due process. Because York did not raise a claim of prosecutorial misconduct at trial, we review only for fundamental, prejudicial error. *Escalante*, 245 Ariz. at 140, 142, ¶¶ 12, 21.

¶28 "We evaluate each instance of alleged prosecutorial misconduct to determine if error occurred and, if so, its effect." *State v. Goudeau*, 239 Ariz. 421, 465, ¶ 192, 372 P.3d 945 (2016). We then address the cumulative effect of any misconduct. *Id.* "The defendant must show that the offending statements were so pronounced and persistent that they permeate[d] the entire atmosphere of the trial and so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Gallardo*, 225 Ariz. 560, 568, ¶ 34, 242 P.3d 159 (2010) (internal quotations omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial."

State v. Moody, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119 (2004) (internal quotations omitted).

A. Cross-Examination of York

¶29 York first challenges the following questions and comments by the prosecutor during her cross-examination of him as unduly argumentative: (1) "There's not a question before you," when York began to offer an unprompted remark; (2) "Please let me finish my question," after York interrupted the prosecutor; (3) "It's just a yes or no question," cutting off York's expository response; (4) "I agree," following York's statement that he did not see himself in a photo of his bedroom taken by investigators; (5) "Did the bleach bottle grow legs after it was thrown?"; and (6) referring to York's account as a "story" and restricting his answer by stating he could offer further explanation on redirect examination.

¶30 Although the prosecutor vigorously cross-examined York, and the record reflects several combative exchanges, the questioning did not deny him a fair trial. *See State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830 (1995) ("The questioning may have been argumentative. Nevertheless, the misconduct was not so egregious that it permeated the entire trial and probably affected the outcome."[2]).

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2. In that case, the prosecutor's questions and remarks included: "And you expect the jury to believe this story, Mr. Bolton?"; "Stranger things have happened. You bet, Mr. Bolton."; and "So you are in a nice position here, we don't have any information with which to charge you with murder, do we?" *Id.* at 307-08.

As in *Bolton*, "the prosecutor here did not call defendant pejorative names, refer to matters not in evidence, suggest unfavorable matter for which no proof exists, or abuse defendant in any other way." 182 Ariz. at 308. Additionally, because the cited instances were brief and made during an isolated portion of a single day in a multiple-day trial, the comments did not sufficiently permeate the entire trial as to affect its outcome.

¶31 York further protests the prosecutor's line of questioning that implied he was able to tailor his testimony to counter the State's case because he had reviewed the evidence before trial and listened to the trial testimony. He argues the prosecutor unconstitutionally "used the system of compulsory process against [him] to imply that because he received the evidence prior to trial and had an opportunity to 'think about' the case for a while, it 'helped his testimony' at trial."

¶32 There is no due process violation when a prosecutor comments on the fact that a defendant had the opportunity to hear evidence and tailor his or her testimony accordingly. *Portuondo v. Agard*, 529 U.S. 61, 68-75, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). When defendants take the stand, their credibility may be impeached and their testimony challenged like that of any other witness. *Id.* at 69; *see*, *e.g.*, *State v. Trammell*, 245 Ariz. 607, 609, ¶ 9, 433 P.3d 11 (App. 2018) ("[A] jury is free to weigh and assess witness credibility, which includes a testifying defendant's motivation."). Here, the prosecutor's series of questions permissibly sought to identify various gaps in the evidence that York explained to bolster his version

of events. Consequently, York has shown no error, much less fundamental error, in the cross-examination.

B. Comments in Rebuttal Closing Argument

¶33 "Prosecutors have wide latitude in presenting their arguments to the jury[.]" *State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203 (2007) (internal quotation omitted). "[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152 (1993). A prosecutor may not "improperly appeal to the jurors' emotions, passions, or prejudices by urging them to convict [the] defendant for reasons wholly irrelevant to his own guilt or innocence." *State v. Herrera*, 174 Ariz. 387, 397, 850 P.2d 100 (1993) (internal quotations omitted). "While commentary about the defense's theory is common, [a]n argument that impugns the integrity or honesty of opposing counsel is . . . improper." *State v. Hulsey*, 243 Ariz. 367, 390, ¶ 99, 408 P.3d 408 (2018) (internal quotations omitted).

¶34 York cites the emphasized phrases in the following portion of the prosecutor's rebuttal closing argument to assert the prosecutor impermissibly depicted him as a liar:

> It's important to think about the way in which the defense was presented to you during the trial and today, and it fits pretty well with your jury instructions on what self-defense is. And it's interesting that when this was freshest,

the day that it happened on 911, we hear him describing that his psychotic brother came after him. Those are the initial statements about this case.

But then when the evidence didn't suggest that [the victim] had any mental health problems at all, he's not taking meds, he's not seeing a counselor, there's no evidence that [the victim] had any kind of mental health problem whatsoever in this trial. So then *his story evolves*, and we hear during opening statements about this intruder, and about the chairs.

The story about the intruder is a *very manufactured detail* to try to explain the very significant fact that the Defendant has [a] gun in his hand in the first place. That's a *manufactured story by defense.* There's no evidence at all that an intruder ever was in this house or that [the victim] ever yelled about a hypothetical intruder being in the house. There's no evidence of that, other than *their story.*

We also heard during trial about how after the Defendant hears that we're highlighting that these chairs sure don't look like they were recently broken, he says, "Oh, yeah, I've got that broken piece in the house right now," and he offers to bring it.

> Well, the State has the burden of proof. The State always has the burden of proof, but they're entitled to present evidence to help their case. And wouldn't he have brought that piece of wood to help his case *if he really had access to it*? (Emphasis added.)

¶35 The challenged remarks permissibly criticized York's defense. York testified that he retrieved his revolver because he heard his "psychotic" brother yelling and he was concerned an intruder may have entered the house. This event purportedly led to the altercation that culminated in him shooting the victim. In rebuttal, the prosecutor argued the evidence, and the reasonable inferences drawn from it, undermined York's version of events. In doing so, the prosecutor urged the jurors to consider the fact that York did not tell the 9-1-1 operator many of the significant details presented at trial—such as his concern about the intruder and the victim attacking him with a chair. The prosecutor did not ask the jurors to convict York for reasons irrelevant to their determination of his guilt. *See State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345 (2000); *Herrera*, 174 Ariz. at 397. Nor were the prosecutor's comments unduly inflammatory. *Herrera*, 174 Ariz. at 397.

¶36 York next contends the highlighted phrases below improperly impugned defense counsel's integrity and misstated the evidence:

> And then today during close[ing] arguments, defense counsel is saying that [the victim] didn't just say he was going to rip off [York's] face, or grab his face, or whatever it was. *Now we're hearing that* [the victim] *also lunged at him* as he's saying this, after he's been shot. Well, *that's a very convenient thing to say* after I have just explained and your instructions have just explained that words alone are not adequate provocation. Remember that *defense counsel's description of these events are not evidence.* (Emphasis added.)

¶37 First, we agree with York's contention that the prosecutor incorrectly implied there was no evidence to support defense counsel's argument that the victim "lunged" at York before he fired the second shot. *See supra* ¶ 10. We therefore construe the prosecutor's statements as merely a mistake or insignificant impropriety. *See State v. Price*, 111 Ariz. 197, 201, 526 P.2d 736 (1974) ("While there may have been some misstatements of fact they appear to be inadvertent and not of such magnitude as to be prejudicial."); *State v. Ramos*, 235 Ariz. 230, 238, ¶ 25, 330 P.3d 987 (App. 2014) ("Although some of the prosecutor's comments suggested that defense counsel was attempting to mislead the jury, we cannot say that those statements did more than criticize defense tactics.").

¶38 Moreover, we presume the jurors followed the superior court's instructions that lawyers' comments are not evidence. *Morris*, 215 Ariz. at 336-37, ¶ 55. To the extent the prosecutor's comments misstated the evidence, the

superior court's instructions "negated their effect," and no prejudice resulted. *Id.* at 337, ¶ 55. On this record, there is no reasonable likelihood the prosecutor's statements could have affected the jurors' verdict, particularly given that the jurors acquitted York of second-degree murder. *See State v. Stuard*, 176 Ariz. 589, 600, 863 P.2d 881 (1993) (noting the jurors' decision to acquit the defendant of certain charges "demonstrate[d] the jury's careful and proper consideration of the evidence"); *see also Moody*, 208 Ariz. at 459, ¶ 145.

¶39 Despite her mischaracterization of defense counsel's argument, the prosecutor's remarks did not constitute personal attacks on defense counsel's integrity. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 171-72, 800 P.2d 1260 (1990) (finding a prosecutor's comments that defense counsel "blind sided" witnesses, used "innuendo and inference," made an "outrageous" argument, and accused witnesses were "not improper . . . and certainly did not rise to the level of fundamental error"). Instead, the comments, made during rebuttal argument, were intended to demonstrate weaknesses in the defense's case. We find no prosecutorial error in the State's rebuttal closing argument, let alone error that would violate due process.

¶40 Finally, because we discern no prosecutorial misconduct in the individual allegations, we cannot find cumulative error. *State v. Bocharski*, 218 Ariz. 476, 492, ¶ 75, 189 P.3d 403 (2008) ("Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness.").

Appendix D

III. Sentence Enhancement under A.R.S. § 13-704(L)

¶41 Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), York argues the superior court illegally enhanced his sentence as a dangerous offender under A.R.S. § 13-704(L) because the jurors did not make a separate finding that the offense was dangerous. *See* A.R.S. § 13-105(13) (defining dangerous offense as an "offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person"). Our review is again limited to fundamental, prejudicial error because York did not object to the enhancement of his sentence. *Escalante*, 245 Ariz. at 140, 142, ¶¶ 12, 21.

¶42 Generally, a jury must find whether an offense is dangerous. *State v. Larin*, 233 Ariz. 202, 212, ¶ 38, 310 P.3d 990 (App. 2013). "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 542 U.S. at 301 (internal quotation omitted). "[A] trial court's imposition of a sentence in violation of a defendant's right to a jury trial constitutes an illegal sentence and is therefore fundamental error." *State v. Johnson*, 210 Ariz. 438, 440, ¶ 8, 111 P.3d 1038 (App. 2005). However, a separate jury finding is not required if the dangerous nature of an offense is inherent in the jury's verdict and "admitted or found by the trier of fact." A.R.S. § 13-

704(L);[3] *see also State v. Andersen*, 177 Ariz. 381, 384, 868 P.2d 964 (App. 1993) ("The defendant's testimony can supply the requisite admission.").

¶43 On both direct and cross-examination, York repeatedly admitted that he shot the victim twice with his revolver. *See State v. Spratt*, 126 Ariz. 184, 186, 613 P.2d 848 (App. 1980) (stating a firearm is a deadly weapon "unless it is permanently inoperable"). Therefore, York's testimony established that he used a deadly weapon in committing the offense, and the superior court did not err by failing to submit the allegation of dangerousness to the jury. *See* A.R.S. § 13-704(L); *Andersen*, 177 Ariz. at 384.

¶44 Moreover, "*Blakely* error . . . can be harmless if no reasonable jury, on the basis of the evidence before it, could have failed to find [the factors] . . . necessary to expose the defendant to the sentence imposed." *State v. Hampton*, 213 Ariz. 167, 183, ¶ 72, 140 P.3d 950 (2006). Here, the uncontroverted evidence established that (1) York shot the victim with his revolver, and (2) the victim died from the gunshot wounds. York admitted he shot the victim to the 9-1-1 operator, confirmed that he shot the victim twice in his testimony, and a medical examiner testified that the victim died from the gunshot wounds. In fact, York's sole defense was that he was justified in shooting the victim. On these facts, no reasonable juror could have failed to find the offense was dangerous.

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3. The parties agree, as do we, that dangerousness was not inherent in the offense of conviction.

¶45 Accordingly, York has not carried his burden to establish fundamental error and resulting prejudice.

CONCLUSION

¶46 For the foregoing reasons, we affirm York's conviction and sentence.

APPENDIX E — PETITION OF THE SUPREME COURT IN AND FOR THE STATE OF ARIZONA, DATED DECEMBER 28, 2023

IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA

CR

Court of Appeals Division 1
1 CA-CR 23-0358 PRPC

Maricopa County Superior Court
CR 2018-115104-001

STATE OF ARIZONA,

Plaintiff,

vs.

TROY THOMAS YORK,

Defendant.

GRAND CANYON LAW GROUP LLC
Angela Poliquin (No. 023790)
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Attorneys for Defendant

Appendix E

PETITION FOR REVIEW
Post-Conviction Relief (Rule 32)

Petitioner, Troy Thomas York, by and through undersigned counsel, and pursuant to Arizona Rules of Criminal Procedure, Rule 32.16, hereby files this Petition for Review from the Court of Appeals' denial of relief on review of his timely Rule 32 Petition for Post-Conviction Relief. (*See* Minute Entry (ME) March 30, 2023). For the following reasons York asks this Court to remand for an evidentiary hearing to develop facts in support of his claims through the testimony of his trial lawyer.

This Court has jurisdiction to accept review under article VI, section 5(3) of the Arizona Constitution.

I. ISSUE PRESENTED FOR REVIEW.

Did the trial court abuse its discretion in failing to hold an evidentiary on York's colorable claim that trial counsel was ineffective for failing to consult with experts or call them as witnesses in York's murder trial?

II. REASONS TO ACCEPT REVIEW.

Faulty due process is a matter of statewide importance which is likely to recur. *See Horne v. Polk*, 242 Ariz. 226, 229 (2017). Trial court decisions declining to grant an evidentiary hearing on a timely petition for post-conviction relief are a matter of statewide importance which occurs with some regularity.

Appendix E

In Arizona, a defendant who exercises his right to trial and a direct appeal does not have a right effective assistance of counsel for his of-right post-conviction relief petition. *Coleman v. Thompson,* 501 U.S. 722, 752 (1991). This is true even though there exists a state-created right to counsel on post-conviction proceedings after exhaustion of the appellate process. *State v. Armstrong,* 176 Ariz. 470, 475 (App. 1993) (citing *Pennsylvania v. Finley,* 481 U.S. 551, 556 (1987)).

Thus, York's only avenue would be to raise the issue that post-conviction relief counsel was ineffective by failing to produce evidence of a colorable claim through expert testimony as an excuse for procedural default in habeas corpus. See 28 U.S.C. § 2254; *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). When ineffective assistance of post-conviction relief counsel results in procedural default of a claim, the *Martinez v. Ryan* relaxed cause-and-prejudice standard applies. *Nguyen v. Curry*, 736 F.3d 1287, 1295 (9th Cir. 2013), citing *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).

> "In *Martinez*, this Court recognized a "narrow exception" to the rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution. 566 U. S., at 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272. There, the Court held that ineffective assistance of state postconviction counsel may constitute "cause" to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such

> claims for the first-time during state collateral proceedings. *See ibid.*

Shinn v. Ramirez, 142 S. Ct. 1718, 1733 (2022)

This showing, easy enough here, opens the door for *de novo* review in federal court, depriving Arizona courts of the deference to which they are entitled under federal habeas corpus law. *Rodney v. Filson,* 916 F.3d 1254, 1258 (9th Cir. 2019). Thus, Arizona can retain its right of first review by remand to correct PCR counsel's errors and to permit York an opportunity to prove his PCR claim that his trial counsel's failure to consult with experts was ineffective assistance prejudicing the outcome of his trial. He can do this through experts in this same PCR proceeding so that the claim can be properly put to rest in state courts, entitling Arizona to the double deference the AEDPA affords.

III. FACTS MATERIAL TO CONSIDERATION OF THE ISSUES.

Troy and his brother engaged in a physical struggle in their shared home that ended when Defendant shot his brother twice. (ME March 30, 2023, at p. 1) After shooting his brother, Defendant called 9-1-1 and requested emergency assistance. (*Id.*) When officers arrived, they found the victim lying on the floor, unresponsive, with two gunshot wounds to the chest. (*Id.*) Shortly after medical personnel transported the victim to a hospital, he was pronounced dead. (*Id.*)

Appendix E

The State charged Defendant with Second-Degree Murder. (*Id.*) At trial, Defendant raised two justification defenses: self-defense and use of force in crime prevention. (*Id.*) Because he never denied that he shot and killed the victim, the sole issue before the jury was whether his use of deadly force was justified under either or both asserted justification defenses. (*Id.*) He was found guilty of the lesser-included charge of manslaughter and received a mitigated term of seven years imprisonment. (R.T. 2/28/2020, at 6, 13.)

Troy lost his appeal. *State v. York*, 1 CA-CR 20-0161, 2021 Ariz. App. Unpub. LEXIS 228, 2021 WL 734734 (App. Div. 1 2021). After initiating Rule 32 proceedings, his appointed counsel filed a notice of no colorable claims, despite the existence of multiple issues. (Notice of No Colorable Claims, 01/07/2021) He retained advisory counsel for his pro se brief. (Notice of Appearance, 3/24/2022) Advisory counsel did not ask the court to appoint a ballistics expert or a blood spatter expert, so that Troy could support his claim of ineffective assistance of counsel with affidavits.

IV. REASONS WHY THIS PETITION SHOULD BE GRANTED.

The Court reviews a trial court's dismissal of a petition for post-conviction relief for abuse of discretion or error of law. *State v. Reed*, 252 Ariz. 236, 238, ¶6 (App. 2021). The court's legal decisions are reviewed de novo. *Id.* This Petition should be granted because the trial court abused its discretion when it dismissed York's claim rather than

setting an evidentiary hearing. Furthermore, this is the appropriate opportunity to correct PCR counsels' errors so that Troy has an opportunity to have his colorable claims heard.

The United States and Arizona constitutions both guarantee the right to 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 defend in person, and by counsel. ..."). The United States Supreme Court has held that the Sixth Amendment, as applied to the states by the Fourteenth Amendment, includes "the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *State v. Torres*, 208 Ariz. 340, 342, ¶ 6 (2004).

A two-pronged test is applied to determine whether a conviction should be reversed on grounds of ineffective assistance of counsel. A petitioner 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; *State v. Lee*, 142 Ariz. 210, 214 (1984). To succeed on an ineffective assistance of counsel claim, defendant must proffer allegations that, if taken as true, demonstrate incompetency of counsel paired with a reasonable probability that the outcome could have been different. *State v. Rogers*, 113 Ariz. 6, 9 (1976).

Appendix E

In *State v. Denz*, Division 2 held that when counsel does not seek the advice of an independent expert, a "decision to not consult with an expert before settling on a defense strategy cannot qualify as a reasoned decision [and] therefore [falls] below prevailing professional norms. 232 Ariz. 441, 447, ¶ 19 (App. 2013).[1] In *Denz*, the defendant had provided an expert affidavit as an exhibit to his PCR, which stated that the expert would have testified in contradiction to the state's experts. *Id.* at 442, ¶ 3. Additionally, the court held an evidentiary hearing investigating trial counsel's strategy. *Id.* at 446, ¶ 14.

It is clear that failure to consult blood spatter and ballistics experts prior to trial is ineffective because "[a]bsent sufficient information about an expert's potential testimony, or specialized knowledge and experience about the factual issues involved, counsel cannot reasonably evaluate whether an expert's opinion would be valuable or weigh the risks or benefits of calling an expert at trial." *Id.* at ¶ 12.

To establish prejudice, Troy needed to show what the experts would have said. Advisory counsel did not inform Troy that he needed to consult experts and obtain affidavits to make that argument. Advisory counsel did not seek appointment of experts to review the blood spatter and ballistics findings, and failed to the same degree that trial counsel did. In order to properly evaluate the claim, the trial court needed to conduct an evidentiary hearing,

1. This Court recently followed Denz in the unpublished case State v. Cooper. 1 CA-CR 21-0421 PRPC, 2023 Ariz. App. Unpub. LEXIS 233, 2023 WL 2320314 (App. Div. 1, 2023).

and at least allow inquiry into trial counsel's strategy concerning ballistics and blood spatter.

V. CONCLUSION AND PRAYER FOR RELIEF

The trial court abused its discretion in failing to grant an evidentiary hearing because Troy had raised a colorable claim. He asks this Court to remand to the trial court to allow retained counsel to consult blood spatter and ballistics experts, and for an evidentiary hearing.

RESPECTFULLY SUBMITTED this 28th day of December, 2023.

GRAND CANYON LAW GROUP

/s/ Angela Poliquin
Attorney for Petitioner

APPENDIX F — PETITION FOR REVIEW OF THE STATE OF ARIZONA COURT OF APPEALS, DIVISION ONE, FILED AUGUST 24, 2023

IN THE COURT OF APPEALS, DIVISION ONE
IN AND FOR THE STATE OF ARIZONA

1 CA-CR 22-

Maricopa County Superior Court
CR 2018-115104-001

STATE OF ARIZONA,

Plaintiff,

vs.

TROY THOMAS YORK,

Defendant.

GRAND CANYON LAW GROUP LLC
Angela Poliquin (No. 023790)
1930 East Brown Road, Suite 102
Mesa, Arizona 85203-5138
Telephone: 480.400.5555
Facsimile: 888.507.3031
courts@grandcanyon.law
Attorneys for Defendant

Appendix F

PETITION FOR REVIEW
Post-Conviction Relief (Rule 32)

Petitioner, Troy Thomas York, by and through undersigned counsel, and pursuant to Arizona Rules of Criminal Procedure, Rule 32.16, hereby files this Petition for Review from the trial court's dismissal of his timely Rule 32 Petition for Post-Conviction Relief. (*See* Minute Entry (ME) March 30, 2023). For the following reasons York asks this Court to accept review and vacate his conviction. In the alternative, York requests that this Court remand for an evidentiary hearing to develop facts in support of his claims through the testimony of his trial lawyer.

This Court has jurisdiction under A.R.S. §§ 13-4031 and -4239 and Ariz. R. Crim. P. 32.16.

I. ISSUES PRESENTED FOR REVIEW.

A. Did the trial court abuse its discretion in failing to hold an evidentiary on York's colorable claim that trial counsel was ineffective for failing to consult with experts or call them as witnesses in York's murder trial?

II. FACTS MATERIAL TO CONSIDERATION OF THE ISSUES.

Troy and his brother engaged in a physical struggle in their shared home that ended when Defendant shot

his brother twice. (ME March 30, 2023, at p. 1) After shooting his brother, Defendant called 9-1-1 and requested emergency assistance. (*Id.*) When officers arrived, they found the victim lying on the floor, unresponsive, with two gunshot wounds to the chest. (*Id.*) Shortly after medical personnel transported the victim to a hospital, he was pronounced dead. (*Id.*)

The State charged Defendant with Second-Degree Murder. (*Id.*) At trial, Defendant raised two justification defenses: self-defense and use of force in crime prevention. (*Id.*) Because he never denied that he shot and killed the victim, the sole issue before the jury was whether his use of deadly force was justified under either or both asserted justification defenses. (*Id.*) He was found guilty of the lesser-included charge of manslaughter and received a mitigated term of seven years imprisonment. (R.T. 2/28/2020, at 6, 13.)

Troy lost his appeal. *State v. York*, 1 CA-CR 20-0161, 2021 Ariz. App. Unpub. LEXIS 228, 2021 WL 734734 (App. Div. 1 2021). After initiating Rule 32 proceedings, his appointed counsel filed a notice of no colorable claims. (Notice of No Colorable Claims, 01/07/2021) He retained advisory counsel for his pro se brief. (Notice of Appearance, 3/24/2022) Advisory counsel did not ask the court to appoint a ballistics expert or a blood spatter expert, so that Troy could support his claim of ineffective assistance of counsel with affidavits.

Appendix F

III. REASONS WHY THIS PETITION SHOULD BE GRANTED.

The Court reviews a trial court's dismissal of a petition for postconviction relief for abuse of discretion or error of law. *State v. Reed*, 252 Ariz. 236, 238, ¶6 (App. 2021). The court's legal decisions are reviewed de novo. *Id.* This Petition should be granted because the trial court abused its discretion when it dismissed York's claim rather than setting an evidentiary hearing. Furthermore, this is the appropriate opportunity to correct PCR counsels' errors so that Troy has an opportunity to have his colorable claims heard.

The United States and Arizona constitutions both guarantee the right to 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 defend in person, and by counsel. . . ."). The United States Supreme Court has held that the Sixth Amendment, as applied to the states by the Fourteenth Amendment, includes "the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *State v. Torres*, 208 Ariz. 340, 342, ¶ 6 (2004).

A two-pronged test is applied to determine whether a conviction should be reversed on grounds of ineffective assistance of counsel. A petitioner 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; *State v. Lee*, 142 Ariz. 210, 214 (1984). To succeed on an ineffective assistance of counsel claim, defendant must proffer allegations that, if taken as true, demonstrate incompetency of counsel paired with a reasonable probability that the outcome could have been different. *State v. Rogers*, 113 Ariz. 6, 9 (1976).

In *State v. Denz*, Division 2 held that when counsel does not seek the advice of an independent expert, a "decision to not consult with an expert before settling on a defense strategy cannot qualify as a reasoned decision [and] therefore [falls] below prevailing professional norms. 232 Ariz. 441, 447, ¶ 19 (App. 2013).[1] In *Denz*, the defendant had provided an expert affidavit as an exhibit to his PCR, which stated that the expert would have testified in contradiction to the state's experts. *Id.* at 442, ¶ 3. Additionally, the court held an evidentiary hearing investigating trial counsel's strategy. *Id.* at 446, ¶ 14.

It is clear that failure to consult blood spatter and ballistics experts prior to trial is ineffective because "[a]bsent sufficient information about an expert's potential testimony, or specialized knowledge and experience about the factual issues involved, counsel cannot reasonably evaluate whether an expert's opinion would be valuable or

1. This Court recently followed Denz in the unpublished case State v. Cooper. 1 CA-CR 21-0421 PRPC, 2023 Ariz. App. Unpub. LEXIS 233, 2023 WL 2320314 (App. Div. 1, 2023).

weigh the risks or benefits of calling an expert at trial." *Id.* at ¶ 12.

To establish prejudice, Troy needed to show what the experts would have said. Advisory counsel did not inform Troy that he needed to consult experts and obtain affidavits to make that argument. Advisory counsel did not seek appointment of experts to review the blood spatter and ballistics findings, and failed to the same degree that trial counsel did. In order to properly evaluate the claim, the trial court needed to conduct an evidentiary hearing, and at least allow inquiry into trial counsel's strategy concerning ballistics and blood spatter.

IV. CONCLUSION AND PRAYER FOR RELIEF

The trial court abused its discretion in failing to grant an evidentiary hearing because Troy had raised a colorable claim. He asks this Court to remand to the trial court to allow retained counsel to consult blood spatter and ballistics experts, and for an evidentiary hearing.

RESPECTFULLY SUBMITTED this 24th day of August, 2023.

GRAND CANYON LAW GROUP

/s/ Angela Poliquin
Attorney for Petitioner

APPENDIX G — PETITION FOR POST-CONVICTION RELIEF IN THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, FILED JUNE 1, 2022

SUPERIOR COURT OF ARIZONA
IN MARICOPA COUNTY

Case Number: CR2018-115104-001

STATE OF ARIZONA

v.

TROY THOMAS YORK (001)

PETITION FOR POST-CONVICTION RELIEF
Under

☒ **Rule 32** (after trial or probation violation hearing, or after sentence of death)

☐ **Rule 33** (after plea of guilty or no contest, after the admission of probation violation, or after an automatic violation of probation)

INSTRUCTIONS TO THE DEFENDANT

(1) You must first file a Notice Requesting Post-Conviction Relief before you file this petition.

(2) Answer the questions in this petition in readable handwriting or by typing. Use additional blank

pages for completing your answers, if necessary, but write on only one side of the page.

(3) Indicate above whether you are filing this petition under Rule 32 or Rule 33. If you are filing under Rule 32, answer question 2. If you are filing under Rule 33, answer question 3.

(4) Do not raise issues you have already raised on your appeal (if any) or in a previous petition for post-conviction relief (if any). Include in this petition every ground for relief you are aware of and that has not been raised and decided previously. If you do not raise such a ground now, you may not be able to raise it later.

(5) File your completed petition with the Clerk of Superior Court where you were convicted and sentenced (or mail it to the Clerk of Superior Court for filing).

There are time limits for filing the petition.

- If you file under Rule 32, see the time limits in Rule 32.7.

- If you file under Rule 33, see the time limits in Rule 33.7.

Appendix G

STATEMENTS MADE TO THE COURT, UNDER OATH:

1. Information about the defendant:

   Name: Troy Thomas York

   Current Status: ☐ On Probation ☒ Incarcerated ☐ On Parole ☐ On Community Supervision Inmate Number (if any): ADC# 342345

2. Rule 32 reason(s) for requested relief: Defendant claims the following grounds for relief: (Place a check mark next to the reason(s) that apply to your case):

☒ The Defendant's conviction was obtained, or the Defendant's sentence was imposed, in violation of the United States or Arizona constitutions (Rule 32.1 (a)), specifically:

☒ The Defendant was denied the constitutional right to representation by a competent and effective lawyer at every critical stage of the proceeding.

☐ The State used evidence at trial it obtained during an unlawful arrest.

☐ The State used evidence at trial it obtained during an unconstitutional search and seizure.

☐ The State used an identification at trial that violated the Defendant's constitutional rights.

☐ The State used a coerced confession at trial; used a statement obtained in the absence of a lawyer, at a time when representation by a lawyer was constitutionally required; or there was other infringement of the Defendant's right against self-incrimination.

☒ The State suppressed favorable evidence.

☒ The State used perjured testimony.

☐ There was a violation of the Defendant's right not to be placed twice in jeopardy for the same offense or punished twice for the same act.

☐ To determine the Defendant's sentence, the State used a prior conviction that was obtained in violation of the United States or Arizona constitutions or Arizona statutes.

☒ The abridgement of any other right guaranteed by the constitution or the laws of this state, or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if retrospective application of that right is required.

☐ The court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the Defendant. (Rule 32.1 (b).)

☐ The sentence is not authorized by law. (Rule 32.1 (c).)

☐ The Defendant continues to be or will continue to be in custody after his or her sentence expired. (Rule 32.1 (d).)

☒ Newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. (Rule 32.1 (e).)

☒ The failure to timely file a notice of appeal was not the Defendant's fault. (Rule 32.1 (f).)

☐ There has been significant change in the law that, if applicable to the Defendant's case, would probably overturn the Defendant's conviction or sentence. (Rule 32.1 (g).)

☒ This petition demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the Defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752. (Rule 32.1 (h).)

☒ Any other ground within the scope of Rule 32, Arizona Rules of Criminal Procedure (Please specify the grounds below):

Prosecutorial misconduct?

3. Rule 33 reason(s) for requested relief: Defendant claims the following reasons/grounds for relief. (Place a check mark next to the reason(s) that apply to your case):

☐ Rule 33.1(a): The Defendant's plea or admission to a probation violation was obtained, or the Defendant's sentence was imposed, in violation of the United States or Arizona constitutions.

☐ The Defendant was denied the constitutional right to representation by a competent and effective lawyer at every critical stage of the proceeding.

☐ There was a violation of the Defendant's right not to be punished twice for the same act.

☐ The abridgement of any other right guaranteed by the constitution or the laws of this state, or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if retrospective application of that right is required.

☐ The court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the Defendant. (Rule 33.1 (b).)

☐ The sentence is not authorized by law or by the plea agreement. (Rule 33.1 (c).)

☐ The Defendant continues to be or will continue to be in custody after his or her sentence expired, (Rule 33.1 (d).)

☐ Newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. (Rule 33.1 (e).)

☐ The failure to timely file a notice of post-conviction was not the Defendant's fault. (Rule 33.1 (f).)

☐ There has been a significant change in the law that, if applicable to the Defendant's case, would probably overturn the Defendant's conviction or sentence. (Rule 33.1 (g).)

☒ [my mistake /s/ TY]
This petition demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the Defendant guilty of the offense beyond a reasonable doubt. (Rule 33.1 (h).)

4. Supporting facts and documents:

A. The Defendant submits the following facts and legal authorities in support of this petition. (If you need more space, attach a sheet labeled "#4 A Post-Conviction Relief" containing the rest of your explanation.)

see included sheets

B. Identify any newly discovered material facts in support of a claim for newly discovered evidence. Specify when the Defendant learned of these facts for the first time, and how they would have affected the trial or proceeding. (If you need more space, attach a sheet labeled "#4 B Post-Conviction Relief" containing the rest of your explanation.)

My brother spoke with a neighbors son about commiting suicide. My brother had Law-enforcement training. His hands were deadly weapons. Both state and defense counsel knew this (I also included this in #4A)

C. The following affidavits, transcripts, and documents are attached in support of the petition:

Affidavits [Exhibit(s) #_____

Transcripts [Exhibit(s) #_____

Documents [Exhibit(s) #_____

D. No affidavits, transcripts or other supporting documents are attached because:

I am under a time constraint, and am not in possession of said transcripts. My Court appointed Attorney has abandoned me since October of 2021

5. Actions taken:

The Defendant has taken the following actions to secure relief from his conviction or sentence: (Place a check mark in the appropriate box below.)

A. Appeal? YES ☒ or NO ☐ (If yes, name the courts to which the appeals were taken, date of appeals, number, and result.)

Appeals court, on or about March of 2021. Don't know number, Denied. Although numerous errors, insufficient of and by themselves. Through Ignorance, I did not submit a pro-per to argue that although each error by itself was deemed insufficient, what about the sum of the total. Since I had Representation, I asked, why can't you Resubmit. Answer. It would be unethical and frivolous

B. Previous Post-Conviction Proceedings? YES ☐ or NO ☒ (If yes, name the court in which the previous petitions were filed, dates, and results. Include any appeals from decisions on those petitions.)

C. Previous Habeas Corpus or Special Action Proceedings in the Courts of Arizona?

YES ☐ or NO ☒ (If yes, name the court(s) in which such petitions were filed, dates, numbers,

and results, including all appeals from decisions on such petitions.)

D. Habeas Corpus or Other Petitions in Federal Courts: YES ☐ or NO ☒ (If yes, name the districts in which petitions were filed, dates, court numbers – civil action or miscellaneous, and results, including all appeals from decisions on such petitions.)

E. If the answers to one or more of the questions 5A, 5B, 5C, or 5D are "yes," explain why the issues that are raised in this petition have not been finally decided or raised before. (State facts.)

Ineffective counsel was not raised, perhaps my direct appeals public defender could have done a better Job?

6. Relief requested: Because of the foregoing reasons, the relief which the Petitioner/Defendant requests is: (Place a check mark in the appropriate box):

A. ☒ Release from custody and discharge.

B. ☒ A new trial.

C. ☐ Correction of Sentence.

D. ☒ The right to file a delayed appeal.

E. ☐ Other relief (specify):

At this point and time, I believe all three apply to me D – Addendums if Necessary!?

DECLARATION: I declare under penalty of perjury that the information contained in this form and in any attachments is true to the best of my knowledge or belief.

5-12-22	/s/ Troy York
Date	Defendant's Signature

Appendix G

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#4 A-Post-Conviction Relief

Trial counsel failed to object to most anything. Testimony of States witnesses exceeded qualifications and included speculation and hypotheticals Balistics expert for state went into general crime-scene analysis. He mispresented ammunition in both the revolver, and extra rounds. Not on my person, by the way, but found in my bed. He misrepresented the ammo, from socially responsible to irresponsible. He misrepresented the holster, from old and worn out, to unethically dangerous. He didn't even get the rotation of the cylinder correct. He played to prosecution, that things were somehow manipulated. To a person with basic knowledge of such things, he didn't just misrepresent, He Lied!

The medical examiner was asked to provide additional crime scene analysis and make Hypotheticals. He couldn't even determine entry or exit wound to WRIST! Again no objections.

Suppressed Evidence: Both state and defense counsel knew my brother had Law-enforcement Training. His hands were dangerous weapons! My brother spoke with a neighbors son about commiting Suicide (Learned of Days before trial!)

Appendix G

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#4 A Post-Conviction Relief

The state made several argumentative statements that went without objection

She took several Liberties to shift burden of proof from state to defendant. Again no objections

The prosecutors argument that wound to wrist was obtained with hands up in Surrender!

Physically impossible in this universe, and she knows it. But apparently the Jury believed it!

Despite hypothetical questioning by state, my Attorney never objected to speculation or challenged the qualifications of the states experts

No experts were retained, or even consulted on my behalf

The blood spatter analyst used by the state was an investigator for the County attorneys office. My Attorney never challenged his Qualifications, through at Daubert hearing. Very little challenge to his bias or method by defense counsel. In fact No at Daubert hearing was conducted with any of the states experts!

Appendix G

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#4 A Post-Conviction Relief

The mere Fact of being poor, should not condemn me to Subpar treatment and Justice (An Abridgement of my Sixth Amendment Rights) under both Arizona and Federal Law.

A win at any cost, Sabotages all Sense of Justice and Fair-play, and undermines the moral values of our Society. I ask, should not our Arbiters of Justice set a higher standard!?