

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY MERRICK — PETITIONER
(Your Name)

vs.

CHARLES L. RYAN, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

ANTHONY JAMES MERRICK
(Your Name)
ASPC-Y-Cibola (#051614)
P.O. Box 8909
(Address)

San Luis, Ariz. 85349
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Mr. Merrick alleged that the U.S. Supreme Court supported his arguments in his Habeas Corpus petition and that because the respondent prohibits case citations or law books into the prison, he was prevented from showing case citations that jurists of reason, other than the Supreme Court would disagree with the district court. The Ninth Circuit court of appeals held that Mr. Merrick did not meet the standard set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The case thus presents the following question:

Did the Court of Appeals err in denying a certificate of Appealability when petitioner demonstrated the district court's decision was contrary to decisions of the U.S. Supreme Court and petitioner was an indigent, pro se, prisoner with no access to case citations of other courts, in which to show jurists of reason would disagree with the district court.

Should the district court have appointed counsel to represent the pro se, petitioner when he was diagnosed with mental health issues and the prison prevents him from researching case citations or other legal treatises.

LIST OF PARTIES

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

Anthony Merrick - petitioner

Charles L. Ryan, Director of the ADJC - Respondent

Attorney General of Arizona - Real party in interest

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

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☒ is unpublished.

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

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

[] For cases from **state courts**:

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

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

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

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

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 31, 2018.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 12, 2018, and a copy of the order denying rehearing appears at Appendix B.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), and Hohn v. U.S., 524 U.S. 236, 241 (1998) (supreme court has jurisdiction to review denial of application for certificate of Appealability by circuit judge or appellate panel).

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US CONST. AMEND. V

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

US CONST. AMEND VI

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

U.S. CONST. AMEND I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances,

U.S. CONST., AMEND XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the state; or

(B)(i) there is an absence of available state corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.

(3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) The claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(8) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the federal court shall direct the state to do so by order directed to an appropriate State Official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the state court's factual determination.

(g) A copy of the official records of the state court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the state court shall be admissible in the federal court proceeding.

(h) Except as provided in section 408 of the controlled Substances act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or state collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Prior to the trial in this case, MERRICK filed numerous pretrial motions to preclude evidence and for Constitutional seating, and he objected to the state's motion to preclude MERRICK from not only mentioning his religion, but of presentation of a religious defense. He even attempted to compel witnesses to testify. After the court denied all MERRICK's motions and overruled his objections MERRICK was convicted on November 23, 2011. He was convicted of Count 3, Conspiracy to commit perjury, a class 4 felony; Count 1, Conspiracy to tamper with witnesses, a class 6 felony; Count 2, Conspiracy to tamper with witnesses, a class 6 felony; Count 4, Obstruction of a criminal investigation, a class 5 felony. MERRICK was sentenced to 12 years, 4.5 years, 4.5 years and 6 years respectively, all to be served concurrently.

MERRICK filed a timely notice of Appeal, and on May 14, 2012, Appellate Counsel filed an Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) brief. On June 22, 2012 MERRICK filed a prose supplemental opening brief raising (16) Sixteen grounds for relief: (1) Did the court err in not granting motion to dismiss for lack of jurisdiction, (2) Did the trial court err in denying Appellants motions for preclusion of evidence and reconsideration, (3) Did the court err in denying a motion for neuropsychologist, (4) Did the court err in denying motion for Constitutional seating, (5) Did the court err in precluding a defense, (6) Did the court err in denying appellants motion in limine to preclude phonecalls, (7) Did the court err in not granting a new trial when there was insufficient evidence, (8) Did the court err in not granting a new trial when a defense was precluded, (9) Did the court err in not granting a new trial when appellants right to confront was violated, (10) Did the court err in not granting a new trial when the court

excluded evidence, (11) Did the court err in not granting a new trial when privileged legal communications were presented at trial; (12) Did the court err in not granting a new trial when appellant was denied a willits instruction; (13) Did the court err in not granting a new trial when the state introduced evidence that hadn't been disclosed; (14) Did the court err in not granting a new trial when the prosecution committed misconduct; (15) Did the states use of privileged communications prevent appellant from presenting evidence and testimony; and (16) Did the court err in not granting a mistrial when the state told the jury about appellants convictions.

On October 30, 2012, the Arizona Court of Appeals affirmed the convictions. On November 8, 2012, MERRICK attempted to file a motion for reconsideration, but county officials prevented MERRICK from filing the motion, which led to a lawsuit, that resulted in the Ninth circuit court of Appeals holding that grounds in the motion had merit. [MERRICK v. I.L.S., 650 Fed. Appx. 333 (9th cir. 2016)].^{1/}

On July 3, 2013, MERRICK filed a timely petition for post-conviction relief under Rule 32 Ariz. R. Crim. P., raising (5) five grounds: (1) Petitioner was denied effective assistance of counsel on appeal and his state and federal constitutional rights were violated; (2) There has been a significant change in the law applied which led to his conviction that requires a reversal of conviction; (3) Newly discovered material facts exist and they would change the verdict; (4) Prosecutorial Misconduct; and (5) Petitioner has state and federal constitutional rights to testify in his defense.

On January 22, 2014 the state trial court denied the petition. A timely motion for reconsideration was filed on February 3, 2014, and was denied. Then MERRICK filed a timely petition for review in the court of Appeals on March 20, 2014, which the court granted review and denied relief on November 19, 2015.

^{1/}
MERRICK also petitioned the Ariz. Supreme court for review, but they denied it on 4-17-13

On November 30, 2015 MERRICK filed a timely motion for reconsideration, which was denied on December 8, 2015.

On January 13, 2016, MERRICK filed a timely Habeas corpus petition pursuant to 28 USC § 2254, with a memorandum of points and authorities in support. MERRICK raised (19) Nineteen grounds for relief. The first sixteen grounds were from MERRICK's direct appeal. He also raised grounds of Ineffective assistance of Appellate Counsel, prosecutorial misconduct, (P.C.R. grounds 1 and 4 respectively) and illegal sentencing.

MERRICK also filed a motion for the appointment of counsel on May 18, 2016, which the district court denied on May 25, 2016.

On May 13, 2016, the State responded to the Habeas corpus petition and on June 13, 2016 MERRICK replied. On August 12, 2016 the Magistrate issued a report and recommendation stating claims 1, 2, 4, 5, 6, 10, 12, 13, 16 and 19 either do not present cognizable claims or lack merit. The Magistrate held that on claims 3, 7, 8, 9, 11, 14, 15 and 17. MERRICK failed to meet his standard under 28 USC § 2254 (d)(1) and (2). The Magistrate held that claim 18 was procedurally barred. On August 19, 2016 MERRICK filed a timely objection to the Magistrate's report and recommendation.

Before the district court had a chance to rule on the Habeas corpus petition the Arizona Court of Appeals reversed its holding of the October 30, 2012 decision, after MERRICK filed a motion to recall the Mandate, filed December 13, 2016. MERRICK filed a request for judicial notice of the Court of Appeals decision on May 6, 2017, but on July 14, 2017 the district court Judge denied the motion for judicial notice that facts/Law changed, and the district court judge fully adopted the Magistrate's report and recommendation. The district court also held that a certificate of appeal is denied.

On August 2, 2017, MERRICK filed a notice of Appeal, motion for counsel, motion for leave to proceed in forma pauperis, and a motion for a certificate of appealability following denial of COA by the district court, all in the Ninth circuit court of Appeals on all (19) Nineteen grounds. On January 31, 2018, the ninth circuit court of appeals denied the COA, which MERRICK filed a petition for panel reconsideration; Petition for rehearing en banc on February 9, 2018. On March 12, 2018 the Ninth circuit Court of Appeals denied the petition.

MERRICK now petitions this court, pursuant to Hohn v. U.S., 524 U.S. 236, 241 (1998), for certiorari.

REASONS FOR GRANTING THE PETITION

The Ninth circuit's denial of a certificate of Appealability misapplied the *Barefoot v. Estelle*, 463 U.S. 880 (1983) test for obtaining a C.O.A. In *BAREFOOT* this court held that a petitioner must show only one of four elements to obtain a C.O.A.: 1) The petitioner must demonstrate that the issues are debatable among jurists of reason; 2) That a court could resolve the issues in a different manner; 3) The questions are adequate to deserve encouragement to proceed further; 4) That is not squarely foreclosed by statute, Rule or authorized court decision or that is not lacking any factual basis in the record. *id.*, at 893, n.4, 894. See also *Garner v. Pogue*, 558 F.2d 548 (9th cir. 1977).

Here, the Ninth circuit held that MERRICK "has not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling'". *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-EL v. Cockrell*, 537 U.S. 322, 327 (2003)".

The Ninth circuit's decision failed to consider not only the four *BAREFOOT* elements, their interpretation and application of *BAREFOOT* was unreasonable. Especially when the standard for obtaining a C.O.A. is relatively low. *SLACK v. McDANIEL*, 529 U.S., at 483. See also *Jefferson v. Welborn*, 2000 WL 862 846, at n.3 (explaining that a COA should issue unless the claims are "utterly without merit"); *Miller-EL v. Cockrell*, 537 U.S., at 338 (A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for Habeas corpus), and if doubt exists, a COA should issue. See *Lambright v. Stewart*, 220 F.3d 1020, 1025 (9th cir. 2000) (en banc). As shown below, MERRICK met the *BAREFOOT* standards, and a COA should issue.

I. WAS THE NINTH CIRCUIT'S
DECISION TO DENY A COA
IN CONFLICT WITH DECISIONS
OF THIS COURT AND OTHER
FEDERAL AND STATE COURTS

A. The Ninth circuit's misapplication of the COA standards warrants this
Court's Attention.

The Ninth circuit's opinion misapplied the standards of issuing a COA under *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Gonzales v. Thaler*, 565 U.S. 134 (2012); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); and 28 U.S.C. § 2253(c)(2).

1. PROCEDURAL BAR OF GROUND/CLAIM 18

The district court held that claim 18 in the petition for Habeas corpus [Prosecutorial Misconduct] was procedurally barred. However, the district court was required to conduct an independent review of the constitutional claims component of *Slack v. McDaniel*, supra, yet they failed to. MERRICK argued to the Ninth circuit that the district court had failed to follow the *Slack* Mandate [constitutional claims component] and that jurists of reason could differ as to whether this claim was properly dismissed on a procedural bar. The Ninth circuit, however did not address the clear violation of *Slack* by the district court. Therefore, Under *SLACK*, a COA should issue as MERRICK demonstrated that jurists of reason would find it debatable whether claim 18 states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *SLACK*, at 484.

2. CONFLICTS WITH DECISIONS OF THE COURTS ON THE REMAINING CLAIMS

Both the district court and the Ninth circuit's holding that MERRICK failed

to show that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right is directly contrary to the holdings of this court, other federal courts and state courts of last resort.

2). HABEAS CORPUS CLAIM 1.

i). In *Marston's Inc., v. Strand*, 114 Ariz. 260 (1977), the Arizona Supreme Court adopted a rule this court set forth in *Branzburg v. Hayes*, 408 U.S. 665 (1972) that a Grand Jury is prohibited from hearing evidence that has a constitutional, statutory, or privilege.

ii). The Arizona Supreme Court also established Rule 1101 (d) of the Arizona rules of evidence, which provides that the Arizona rules of evidence does apply in a grand jury, and Rule 501 of the Arizona rules of Evidence provides that privilege is governed by the Constitution of the United States, the Constitution of Arizona, or applicable statute or rule.

iii). Under Arizona Revised Statutes §§ 12-2233, 12-2235, 13-4062 (2)(3)(4); 32-2085, 32-3283, and 41-1493 et seq. any and all communications to or from clergy, counselor, physician or attorney while in their official capacity are privileged and cannot be presented in a court without a knowing, intelligent and voluntary waiver of the privilege.

iv). This court has held that there is a liberty interest under the due process clause of the Fourteenth Amendment to the United States Constitution in a state following its laws and Rules. *Clemons v. Miss.*, 494 U.S. 738 (1990) (Petitioner denied a state created liberty interest under the due process clause); *Hicks v. Okl.*, 447 U.S. 343 (1980) (Petitioner was arbitrarily denied a state created right violated due process clause).

v). Federal courts are bound by the Arizona State Supreme Court's interpretation of its state laws. *Holgerson v. Knowles*, 309 F.3d 1200, 1201 (9th Cir. 2005); *Mendez v.*

Small, 298 F.3d 1154, 1158 (9th cir. 2002) (state courts have the last word on their laws)

vi). MERRICK claimed in the Habeas Corpus that the prosecution submitted privileged letters and phonecalls that he had with his clergy/counselor/physician that were taken from church records or Jail phone records, in the grand jury and as a result an indictment was returned. MERRICK argued that he had never knowingly, intelligently or voluntarily waived his privilege, and therefore state laws and rules mandated that evidence be excluded from a grand jury.

CONCLUSION OF CLAIM 1.

Given these facts, statutes, Rules and decisions the petitioner did demonstrate a substantial showing of the denial of a Fourteenth Amendment right to due process and that jurists of reason could disagree with the district court on this point, especially when the decision conflicts with decisions of this court and the state supreme court.

b). HABEAS CORPUS CLAIM 2.

i). Prior to the trial MERRICK filed a motion to preclude privileged evidence.

This included letters and phonecalls to his clergy/counselor/physician for the purpose of confession, counseling and guidance.

ii). This motion was based upon clergy/counselor/physician privileges under A.R.S. §§ 12-2233; 12-2235; 13-4062(2)(3)(4); 32-2085; 32-3283 and 41-1493 et seq. as well as decisions of this court. *Hernandez v. Comm.*, 490 U.S. 680 (1989); *Epperson v. Ark.*, 397 U.S. 97 (1968); *McKaskle v. Vela*, 464 U.S. 1053 (1984); *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam); *Gray v. Netherland*, 518 U.S. 152 (1996); *Picard v. Connor*, 404 U.S. 270 (1971); *U.S. v. Lovasco*, 431 U.S. 783 (1977); *Estelle v. McGuire*, 502 U.S. 62 (1991); *Pulley v. Harris*, 465 U.S. 37 (1984), and *Barclay v. Florida*, 463 U.S. 939 (1983), wherein this court held that Government may not interpret religious practices for an adherent. as that is the exclusive province of the adherent, and the Government may not

determine the truth or falsity of the religion or its practices.

iii). The state court denied the motion stating that "It didn't feel that these were confessions, counseling or guidance", which contradicted decisions of this court. The court then allowed all the privileged letters and phone calls in the trial.

iv). The district court's decision relied on the interpretation of a decision by the Arizona Court of Appeals from 2012 that itself contradicted decisions of this court. Furthermore in 2017 the Arizona Court of Appeals corrected and changed the facts of the 2012 decision, but the district court ignored it,

v). State law, as stated above, created a liberty interest under the due process clause of the Fourteenth Amendment in the state precluding the evidence, see *Clemons v. Miss.*, *supra*; *Hicks v. Okl.*, *supra*, and thus, MERRICK did demonstrate a substantial showing of the denial of a constitutional right. Jurists of reason could disagree with the district court and this claim was adequate to deserve encouragement to proceed further.

c). HABEAS CORPUS CLAIM FOUR

i). Prior to MERRICK's trial he filed a motion for constitutional seating that was based upon Amendments 1, 5, 6, and 14 to the United States Constitution.

ii). The state court's decided that a jury would not be partial based on where the defendant sat in the courtroom, and they therefore denied the motion.

iii). The question raised is an important question that should be settled by this court, as the states decision appears to conflict with decisions of this court and other federal courts and directly conflicts with social sciences that a defendant seated farther from a jury, than the state, does make a jury impartial towards a defendant, see also *Estelle v. Williams*, 425 U.S.

501, 96 S.Ct. 1691 (1976); *Jackson v. Brown*, 513 F.3d 1057 (9th Cir. 2008) (Both stating that "[t]he state cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes..."); *Griffin v. Ill.*, 351 U.S. 12, 76 S.Ct. 585 (1956); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068 (1970) (one of the essential due process safeguards that attends the accused at his trial is the presumption of innocence).

iv). The seating arrangement, as found by social sciences, does create a negative inference of dangerousness and guilt, if the state sits closer to the jury.

v). MERRICK attached an article with several hundred additional articles and tests that supported his claim and the jury's conscious and unconscious negative view of MERRICK, due to where he sat in the trial, and that he objected to this compelled self incrimination and the unfair trial and impartial jury.

vi). Jurists of reason could disagree with the district court and this question was adequate to be encouraged to proceed further.

d). HABEAS CORPUS CLAIM FIVE

i). Prior to the trial the state court granted the state's motion to preclude MERRICK from introducing religious evidence or a religious defense, or of religious arguments regarding his religion. MERRICK objected and later appealed.

ii). Under A.R.S. § 41-1493.01 MERRICK had a state statutory right to present a religious defense, which was confirmed by the state supreme court in *State v. Hardesty*,

iii). On April 15, 2017 the Arizona Court of Appeals agreed that MERRICK did have a statutory right to present a religious defense under ARS § 41-1493.01.

iv). The district court and Ninth Circuit court of Appeals are bound by these decisions. See *Holgersen v. Knowles*, 309 F.3d 1200, 1201 (9th Cir. 2005); *Mendez v. Small*,

298 F.3d 1154, 1158 (9th cir. 2002)

v). The state court improperly restricted MERRICK's Sixth and Fourteenth Amendment rights to present evidence of significant value, including testifying on his own behalf, and under *Washington v. Texas*, 388 U.S. 14 (1967), this court held that this practice denied a fair trial under the Fifth and Fourteenth Amendments to the United States constitution. see Also *Rock v. Ark.*, 483 U.S. 44 (1987).

vi). The district court and the Ninth circuit's decisions are directly and indirectly contrary to *Washington* and *Rock*, *supra*. This demonstrates that jurists of reason could disagree with the district court, as the court was wrong.

e). HABEAS CORPUS CLAIM EIGHT

i). MERRICK requested his 6th Amendment Constitutional right to compel the testimony of DOMINICK HURLEY for his trial, wherein he would testify to more than 14 facts that were material in demonstrating MERRICK's factual innocence, but the court denied his request.

ii). In a pretrial hearing, Hurley testified to more than 14 material facts that demonstrated MERRICK's factual innocence, yet the court ruled that it found only one fact.

iii). Under *Clark v. Arizona*, 548 U.S. 735, 770 (2006), this court held that state courts may not prohibit evidence, unfairly, which was followed by, *Bowling v. Rose*, 3F.3d 559, 561-62 (1st cir. 1993); *Christie v. Hollins*, 409 F.3d 120, 125-26 (2nd cir. 2005); *U.S. v. Turningbear*, 357 F.3d 730, 735 (8th cir. 2004); *U.S. v. Arbolaez*, 450 F.3d 1283, 1294-95 (11th cir. 2006); *U.S. v. Simpson*, 992 F.2d 1224, 1230 (D.C. cir. 1993) (All cases on the denial of compulsory process rights). The district court's decision is in conflict.

iv). The district court and the Ninth circuit also ignored the holding in *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003), regarding accepting unrefuted evidence.

v). Jurists of reason could disagree with the district court that denying MERRICK the opportunity to call Hurley as a witness, who would testify to MERRICK's innocence, does violate his Federal constitutional rights.

f). HABEAS CORPUS CLAIM FOURTEEN

i). On direct Appeal MERRICK raised a claim of PERJURY and LYING--- Prosecutorial Misconduct under Napue v. Ill., 360 U.S. 264 (1959), and the state courts did not address the claim.

ii). On Habeas Corpus review, the district court did not address this Napue claim, even though it was raised and argued. MERRICK demonstrated more than a dozen instances of perjury on material facts, which mandated that the case be reversed.

iii). Jurists of reason could disagree with the district court, especially when it contradicted Napue v. Ill., supra.

g). HABEAS CORPUS CLAIM SEVENTEEN

i). MERRICK identified and argued that Appellate counsel failed to identify and argue claims on direct Appeal, as required under Smith v. Robbins, 528 U.S. 259, 285 (2000), MERRICK included the grounds above, including claim 5, that the court of Appeals admitted was a non-frivolous claim.

ii). On April 15, 2017 the Arizona Court of Appeals held that claim 5 on his prose direct appeal brief had merit, when they agreed that the superior court had erred in not allowing MERRICK to argue religion, submit religious evidence and religious defense. Therefore, both prongs of Strickland v. Washington, 466 U.S. 668 (1984) was shown and the case should have been remanded.

iii) Under *Anders v. California*, 386 U.S. 738 (1967); *Evitts v. Lucey*, 469 U.S. 357 (1985); and *Miller v. Keene*, 882 F.2d 1428, 1433 (9th Cir. 1989), the Appellate counsel was supposed to argue the claims, especially claim 5, in the Arizona Court of Appeals.

iv). Because *Merrick* demonstrated that he was deprived of his federal constitutional rights to have counsel argue his non-frivolous claims on Appeal he has demonstrated that jurists of reason could disagree with the district court. He has also demonstrated that this issue was adequate to deserve encouragement to proceed further.

B. IMPORTANCE OF THE QUESTIONS PRESENTED

This case presents fundamental questions of importance to the nation because it affects all pro-se inmates, whom have a mental health issue and a prison system that does not allow them to have access to case decisions. Moreover, claim 4 involves questions of Federal Constitution provisions that have never been directly heard by this court, or any court. Furthermore, This court has not yet interpreted the term; "adequate to deserve encouragement to proceed further." *Barefoot*, at 893, n.4, 894. This appears to apply to each of Merricks claims.

II. SHOULD AN ATTORNEY BE APPOINTED AS AN EXCEPTIONAL CIRCUMSTANCE WHEN A PRO SE, INDIGENT INMATE WITH PHYSICAL AND MENTAL HEALTH ISSUES AND THE STATE PRISON PREVENTS INMATES FROM HAVING CASE COTIONS OR LEGAL MATERIALS

The district court denied the appointment of counsel request stating that there was no exceptional circumstances and petitioner was articulated

and the claims were unlikely to be successful (Doc. 14-1, 5-25-16), and on a certificate of Appeal request, the Ninth circuit held that the issue was moot, since a COA was denied.

Here, MERRICK has diagnosed mental health issues that prevents him from articulating his claims properly and the prisons policies prevents him from knowing the law and disputes of circuit courts or any courts. This is an exceptional circumstance wherein counsel should be appointed in this criminal case.

CONCLUSION

Based on the foregoing, the petitioner has demonstrated each of the four Barefoot elements, and has demonstrated that jurists of reason could differ with the district court, and these issues are adequate to be encouraged to appeal. The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 05/10/2018