

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN FRANK KARBAN — PETITIONER
(Your Name)

VS.

ATTY GENERAL FOR STATE OF — RESPONDENT(S)
ARIZONA, ET AL.,

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

STEPHEN FRANK KARBAN
(Your Name)

ARIZONA STATE PRISON, FLORENCE/SOUTH UNIT
P.O. BOX 8400
(Address)

FLORENCE, AZ 85132
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. DID THE NINTH CIRCUIT COURT OF APPEALS ERROR WHEN IT DENIED PETITIONER'S REQUESTED CERTIFICATE OF APPEALABILITY?

2. DID THE DISTRICT AND ARIZONA STATE COURTS ERROR BY FINDING THAT STATE APPELLATE COUNSEL WAS EFFECTIVE, CONTRARY TO OTHER STATE AND FEDERAL HOLDINGS?

3. DID THE DISTRICT COURT AND ARIZONA STATE COURTS ERROR BY FINDING PETITIONER'S SELF-REPRESENTATION RIGHT AT TRIAL WAS NOT VIOLATED AND PRECLUDED FROM REVIEW?

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:

1. ATTORNEY GENERAL - STATE OF ARIZONA

2. DIRECTOR OF ARIZONA DEPARTMENT OF CORRECTIONS

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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☒ is unpublished.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 B,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☒ is unpublished.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 D 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☒ is unpublished.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 MARICOPA COUNTY SUPERIOR COURT, AZ ST. court appears at Appendix E 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☒ is unpublished.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 MARCH 12, 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was AUG. 21, 2014. A copy of that decision appears at Appendix D.

☐ 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

AMENDMENT 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."

"PUBLIC TRIAL" RIGHT BECAME VIOLATED WHEN THE TRIAL COURT HALTED DISCUSSION OF EVIDENCE ADMISSIBILITY IN OPEN COURT AND MOVED THE DISCUSSION INTO CHAMBERS.

"ASSISTANCE OF COUNSEL" RIGHT BECAME VIOLATED WHEN THE TRIAL COURT HALTED DISCUSSION OF EVIDENCE ADMISSIBILITY IN OPEN COURT AND MOVED THE DISCUSSION INTO CHAMBERS WITHOUT THIS PETITIONER, WHO WAS ACTING AS HIS OWN COUNSEL, AND CONTINUED THE DISCUSSION EX-PARTE WITH THE STATES PROSECUTORS AND OFF-RECORD.

"ASSISTANCE OF COUNSEL" RIGHT BECAME VIOLATED WHEN THE PETITIONER WAS APPOINTED INEFFECTIVE APPELLATE COUNSEL FOR HIS DIRECT APPEAL.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

FOLLOWING A LENGTHLY JURY TRIAL IN MARICOPA COUNTY, ARIZONA, THE PETITIONER WAS FOUND GUILTY OF SEXUALLY ABUSING THREE (3) ADOPTED DAUGHTERS. BEFORE THE ARIZONA TRIAL, THE PETITIONER WAS A RESIDENT OF MICHIGAN WHERE HE LIVED WITH THE COMPLAINANTS IN THE INSTANT CASE. THESE SAME ADOPTED DAUGHTERS HAD MADE IDENTICAL ALLEGATIONS TO THE AUTHORITIES IN MICHIGAN. FOLLOWING A TRIAL IN MICHIGAN, THE PETITIONER WAS FOUND NOT GUILTY. DURING THE MICHIGAN TRIAL, PETITIONER WAS REPRESENTED BY RETAINED COUNSEL. THEREAFTER, ARIZONA AUTHORITIES WERE NOTIFIED OF ALLEGATIONS SAID TO HAVE OCCURRED IN ARIZONA DURING A FAMILY VACATION IN 2002. THOSE ALLEGATIONS ARE THE BASIS OF PETITIONER'S CURRENT CRIMINAL CONVICTIONS.

AFTER THE CASE BEGAN IN ARIZONA, THE PETITIONER INVOKED HIS SIXTH AMENDMENT SELF-REPRESENTATION RIGHTS, WHICH WERE GRANTED BY THE TRIAL COURT. THEREAFTER, PETITIONER FILED ALL PRE-TRIAL MOTIONS, CONDUCTED JURY SELECTION AND EXAMINED ALL TRIAL WITNESSES. AT NO TIME AFTER INVOKING HIS SELF-REPRESENTATION RIGHTS DID THE PETITIONER WAIVER IN, OR RELINQUISH, HIS ROLE OF SELF-REPRESENTATION, CONTINUING THROUGH SENTENCING.

RELEVANT TO THIS COURT'S ACCEPTANCE OF THIS PETITION ARE TWO (2) EVENTS OCCURRING DURING THE PETITIONER'S ARIZONA TRIAL: 1) THE INTRODUCTION OF RELIGION TO BOLSTER WITNESS/COMPLAINANT VERACITY; AND, 2) THE INVOLUNTARY EXCLUSION OF PETITIONER, WHO WAS SELF-REPRESENTING, FROM AN IN-CHAMBERS CONFERENCE REGARDING EVIDENCE ADMISSIBILITY, OCCURRING DURING TRIAL WHICH WAS EX-PARTE AND WENT UNRECORDED.

REGARDING RELIGION, IT IS UNDISPUTED THAT THE SELF-REPRESENTING PETITIONER FAILED TO OBJECT TO ITS INTRODUCTION BY THE STATE'S PROSECUTOR. THE TRIAL RECORD ESTABLISHES THE PROSECUTOR INTRODUCED RELIGION IN HER OPENING STATEMENT, THROUGHOUT THE DIRECT EXAMINATION OF EACH COMPLAINANT AND THE EXAMINATION OF PETITIONER'S FORMER WIFE. TO BE CLEAR, RELIGION WAS NOT INTRODUCED OR "THE DOOR OPENED" BY PETITIONER. DURING CLOSING STATEMENTS, THE PROSECUTOR CONTINUED UTILIZING RELIGION TO BOLSTER WITNESS VERACITY AND ATTACK THE PETITIONER'S LACK OF SIMILAR BELIEFS. BECAUSE THE TRIAL LACKED ANY PHYSICAL OR MEDICAL EVIDENCE OR A WITNESS TO ANY ABUSE, CREDIBILITY WAS PARAMOUNT TO THE STATE'S CASE.

REGARDING THE SELF-REPRESENTATION VIOLATION, DURING TRIAL AND IN OPEN COURT, THE PETITIONER WAS HIMSELF ARGUING A PRE-TRIAL MOTION IN LIMINE RULING. (APPENDIX H). THE TRIAL COURT ABRUPTLY HALTED THE ARGUMENT AND MOVED THE HEARING INTO CHAMBERS, EXCLUDING THE SELF-REPRESENTING PETITIONER.

THE IN-CHAMBERS HEARING INCLUDED THE PROSECUTION AND ADVISORY COUNSEL. THE HEARING IN-CHAMBERS WAS NOT RECORDED

AND THERE IS NO EVIDENCE OF WHAT WAS DISCUSSED.

FOR HIS DIRECT APPEAL, THE PETITIONER WAS REPRESENTED BY COURT APPOINTED COUNSEL, KERRIE DROBAN. DROBAN FILED A BRIEF IN WHICH NO RELIEF WAS GRANTED. DROBAN DID NOT PRESENT THE INTRODUCTION OF RELIGION. BECAUSE THE SELF-REPRESENTATION VIOLATION IS NOT FOUND WITHIN THE TRIAL RECORD (APPENDIX H), AND BECAUSE A PRIOR STATE DECISION (APPENDIX G) REQUIRED THE SELF-REPRESENTATION VIOLATION TO BE RAISED IN POST-CONVICTION PROCEEDINGS, IT WAS NOT, AND COULD NOT BE, RAISED ON DIRECT APPEAL.

THE PETITIONER THEREAFTER FILED HIS OWN POST-CONVICTION (ARIZ. R. Cr. P. 32), PETITION (APPENDIX F). PETITIONER PRESENTED APPELLATE COUNSEL'S INEFFECTIVENESS FOR FAILING TO RAISE, AMONG OTHER ISSUES, THE IMPROPER INTRODUCTION OF RELIGION. PETITIONER ESTABLISHED THAT, EVEN WITHOUT OBJECTION AT TRIAL, IN ARIZONA, THE INTRODUCTION OF RELIGION TO BOLSTER WITNESS VERACITY IS REVERSIBLE ERROR. SEE STATE V. THOMAS, 130 ARIZ. 432 (1981). HAD APPELLATE COUNSEL BRIEFED THIS SINGLE ISSUE, PETITIONER'S APPELLATE OUTCOME WOULD HAVE BEEN DIFFERENT.

FOLLOWING THE GUIDANCE WITHIN STATE V. FRANTZ (APPENDIX G), THE PETITIONER ALSO RAISED HIS SELF-REPRESENTATION VIOLATION IN HIS PETITION SEEKING POST-CONVICTION RELIEF. THE TRIAL COURT ABANDONED THE TEXT IN STATE V. FRANTZ, PRECLUDED PETITIONER'S CLAIM, AND HELD PETITIONER SHOULD HAVE RAISED THE ISSUE ON DIRECT APPEAL. WHILE ARIZONA DIRECTED FRANTZ TO RAISE HIS VIOLATION IN POST-CONVICTION PROCEEDINGS, WHEN THIS PETITIONER FOLLOWED FRANTZ, ARIZONA CHANGED ITS POSITION, HOLDING THIS

PETITIONER SHOULD HAVE RAISED THE VIOLATION ON DIRECT APPEAL - EVEN THOUGH THE TRIAL RECORD IS DEVOID OF SUFFICIENT EVIDENCE TO ADDRESS THE VIOLATION. THIS BECAME AN INCONSISTENT APPLICATION OF PROCEDURAL RULES DETRIMENTAL TO THE PETITIONER. SEE FORD V. GEORGIA, 478 U.S. 411, 423 (1991) (FOR A CLAIM TO BE BARRED, A STATE RULE MUST BE "FIRMLY ESTABLISHED AND REGULARLY FOLLOWED."). THIS INCONSISTENCY WAS ARGUED TO THE ARIZONA COURT OF APPEALS AND ULTIMATELY TO THE ARIZONA DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS WHEN SEEKING FEDERAL HABEAS CORPUS RELIEF.

THROUGHOUT THE POST-CONVICTION PROCESS THE PETITIONER HAS NEVER BEEN AFFORDED AN EVIDENTIARY HEARING TO CREATE A RECORD ESTABLISHING WHY APPELLATE COUNSEL ABANDONED CLAIMS KNOWN TO REVERSE A DEFENDANT'S CASE ON APPEAL. RATHER, EACH COURT DETERMINED PETITIONER'S APPELLATE COUNSEL WAS EFFECTIVE REGARDLESS OF PREVIOUS HOLDINGS TO THE CONTRARY.

AS ARTICULATED BELOW, THERE ARE LEGAL AUTHORITIES WHICH HOLD APPELLATE COUNSEL WAS NOT EFFECTIVE IN SIMILAR SITUATIONS. AT A MINIMUM, THOSE CASES ESTABLISH WITH CERTAINITY JURISTS OF REASON WOULD FIND APPELLATE COUNSEL'S EFFECTIVENESS DEBATHABLE. AS SUCH, IT WAS ERROR FOR THE PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY (APPENDIX J) TO BE DENIED. LIKEWISE, PETITIONER ESTABLISHED ARIZONA DOES NOT CONSISTENTLY APPLY THE PROCEDURAL BAR-DEFAULT DOCTRINE WHEN ADDRESSING SELF-REPRESENTATION VIOLATIONS.

B. LEGAL ARGUMENTS

1. IT WAS ERROR TO DENY PETITIONER'S REQUEST FOR
A CERTIFICATE OF APPEALABILITY.

AFTER DENIAL OF HABEAS RELIEF BY THE DISTRICT COURT
(APPENDIX B), THE PETITIONER FILED A TIMELY NOTICE OF APPEAL
AND SUBMITTED AN EXPRESS REQUEST FOR A CERTIFICATE OF
APPEALABILITY (APPENDIX J). THE DENIAL OF THE REQUEST
(APPENDIX A), HOLDS THE REQUEST "IS DENIED BECAUSE APPELLANT
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." THIS IS AN ERRONEOUS FINDING BECAUSE:

1. PETITIONER HAS SHOWN APPELLATE COUNSEL WAS,
IN-FACT, INEFFECTIVE.

A DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO EFFECTIVE
APPELLATE COUNSEL. EVITT'S V. LUCEY, 469 U.S. 387 (1985). WHEN
APPELLATE COUNSEL ABANDONS ISSUES THAT ARE CLEARLY STRONGER
THAN THOSE PRESENTED IN THE APPELLATE BRIEF, A DEFENDANT CAN
OVERCOME THE PRESUMPTION THAT COUNSEL WAS EFFECTIVE. SMITH
V. ROBBINS, 528 U.S. 259 (2000). APPELLATE COUNSEL'S SUBMITTED
BRIEF FAILED TO ACQUIRE ANY RELIEF FOR THIS PETITIONER. WHAT
IS A KNOWN FACT, BASED ON THE HOLDING OF STATE V. THOMAS, IF

APPELLATE COUNSEL HAD MERELY PRESENTED THE IMPROPER INFUSION OF RELIGION INTO PETITIONER'S TRIAL, REVERSAL WAS REQUIRED EVEN ABSENT ANY CONTEMPORANEOUS OBJECTION. IN FARINA V. SECTY, FLORIDA DEPT. OF CORR., 536 FED. APPX 966(11TH CIR. 2013), A CASE IDENTICAL TO PETITIONER'S, INCLUDING PROCEDURAL PRESENTATION, THE ELEVENTH CIRCUIT HELD: 1) THE STATE'S REJECTION OF FARINA'S CLAIM WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS; 2) PROSECUTOR'S USE OF RELIGION CONSTITUTED FUNDAMENTAL ERROR; AND, 3) APPELLATE COUNSEL'S FAILURE TO RAISE THE MISCONDUCT CONSTITUTED INEFFECTIVE ASSISTANCE, WARRANTING FEDERAL HABEAS RELIEF. BECAUSE OF THESE TWO CASES, IT IS IMPOSSIBLE NOT TO FIND COUNSEL'S EFFECTIVENESS "DEBATABLE." THOMAS ESTABLISHES THE REVERSIBLE LAW EXISTED AT THE TIME OF PETITIONER'S DIRECT APPEAL. FARINA ESTABLISHES THAT THE FAILURE TO RAISE A REVERSIBLE CLAIM INVOLVING RELIGION IS, IN ITSELF, INEFFECTIVENESS.

b. PETITIONER HAS SHOWN HIS SELF-REPRESENTATION RIGHTS WERE VIOLATED AND THE COURT'S PROCEDURAL RULE BARRING THE CLAIM OR ITS CONSIDERATION FOR REVIEW WAS INCONSISTENTLY APPLIED.

A DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION. FARETTA V. CALIFORNIA, 422 U.S. 806 (1977). WITH THAT RIGHT, A PRO-SE DEFENDANT MUST BE IN CONTROL OF HIS OWN DEFENSE. McKASKLE V. WIGGINS, 465 U.S. 168 (1984). LIKEWISE, A DEFENDANT IS ENTITLED TO COUNSEL AT ALL "CRITICAL STAGES" OF

HIS TRIAL, ESCOBEDO V. ILLINOIS, 378 U.S. 478 (1964). A CRITICAL STAGE IS "WHERE RIGHTS ARE PRESERVED OR LOST." (WHITE V. MARYLAND, 373 U.S. 59, 60 (1963)). WHERE COUNSEL IS TOTALLY ABSENT OR PREVENTED FROM ATTENDANCE, CONSTITUTIONAL ERROR IS FOUND WITHOUT ANY NEED TO SHOW PREJUDICE. UNITED STATES V. CRONIG, 466 U.S. 648, 659 (1984).

1. BEFORE THIS PETITIONER PRESENTED HIS SELF-REPRESENTATION VIOLATION TO THE STATE TRIAL COURT IN HIS RULE 32 PETITION FOR POST-CONVICTION RELIEF, THE ARIZONA COURT OF APPEALS ISSUED A MEMORANDUM DECISION IN STATE V. FRANTZ, 2 CA-CR 99-0145.

(APPENDIX G). FRANTZ HAD RAISED HIS SELF-REPRESENTATION ON DIRECT APPEAL AND THE APPELLATE COURT DIRECTED FRANTZ TO PRESENT HIS CLAIM IN THE RULE 32 POST-CONVICTION PROCESS. WHEN THIS PETITIONER FOLLOWED THAT GUIDANCE, THE STATE TRIAL COURT IGNORED THE APPELLATE COURT'S DIRECTIVE IN FRANTZ AND HELD THIS PETITIONER'S CLAIM SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

(APPENDIX E). SINCE THE STATE TRIAL COURT'S INITIAL PRECLUSION, THIS PETITIONER HAS CONSISTANTLY ARGUED THE INCONSISTANT APPLICATION OF THE STATE'S PROCEDURAL PRECLUSION OF ANALYZING THE MERITS OF THIS VIOLATION.

WHEN THE TRIAL COURT INITIALLY ADDRESSED THIS VIOLATION, THE COURT AGREED PETITIONER HAD A RIGHT TO BE PRESENT IN-CHAMBERS, BUT THAT PETITIONER HAD FAILED TO SHOW PREJUDICE. (APPENDIX E).

WITH THE IN-CHAMBERS CONFERENCE NEVER RECORDED, THERE IS NO RECORD FROM WHICH TO ARGUE PREJUDICE. THAT IS WHY ALL OF THIS PETITIONER'S BRIEFS INCORPORATE ARGUMENTS THAT THIS

EVENT WAS ALSO A DEPRIVATION OF COUNSEL CLAIM SUBJECT TO THE PRESUMPTION OF PREJUDICE. WHILE ADVISORY COUNSEL WAS PRESENT IN-CHAMBERS, THE PETITIONER NEVER WAIVED OR RELINQUISHED HIS SELF-REPRESENTATION RIGHT TO PERMIT ADVISORY COUNSEL TO SPEAK OR ACT ON BEHALF OF PETITIONER. (APPENDIX H). THE PRESENCE OF STANDBY OR ADVISORY COUNSEL, WHEN NOT ACTIVELY INVOLVED IN A DEFENDANT'S CASE, DOES NOT SATISFY A SIXTH AMENDMENT RIGHT TO COUNSEL. KING V. BORBY, 433 F.3d 483, 490 (6th CIR. 2006); UNITED STATES V. DAVIS, 269 F.3d 514, 520 (5th CIR. 2001).

IT IS EVIDENT THIS PETITIONER ESTABLISHED A CONSTITUTIONAL RIGHT WAS VIOLATED. IT IS EVIDENT THIS PETITIONER ESTABLISHED AN INCONSISTANT APPLICATION OF A PROCEDURAL RULE USED IN A DETRIMENTAL MANNER AGAINST THIS PETITIONER. IT IS EVIDENT JURISTS OF REASON WOULD FIND IT DEBATABLE THAT PETITIONER WAS WITHOUT COUNSEL AT A CRITICAL STAGE. AND, IT IS EVIDENT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING. THEREFORE, IT WAS ERROR FOR THE NINTH CIRCUIT TO DENY PETITIONER'S APPLICATION SEEKING A CERTIFICATE OF APPEALABILITY.

2. IT WAS ERROR TO FIND PETITIONER'S APPELLATE COUNSEL WAS "EFFECTIVE."

IN MAKING THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL/ PROSECUTORIAL MISCONDUCT CLAIM IN STATE AND FEDERAL COURTS, PETITIONER ASSERTED THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE PROSECUTOR HAD ACTED IMPROPERLY BY USING RELIGION

TO BOLSTER WITNESS VERACITY ON SEVERAL OCCASIONS: DURING OPENING STATEMENT, DURING DIRECT EXAMINATION OF EACH COMPLAINANT, DURING DIRECT EXAMINATION OF PETITIONER'S FORMER WIFE, AND DURING CLOSING ARGUMENTS. EACH STATE BRIEF AND HABEAS BRIEF CITE TO PORTIONS OF THE RECORD WHERE THESE EVENTS OCCURRED. THE PROSECUTION USED RELIGION TO BOLSTER WITNESS VERACITY AND USED RELIGION TO ATTACK THE PETITIONER FOR LACKING DEVOTION TO THE FAMILY'S PENTECOSTAL BELIEF SYSTEM.

IN STRICKLAND V. WASHINGTON, 466 U.S. 668, 687 (1984), THIS COURT SET OUT A TWO-PART INQUIRY FOR SUCH INEFFECTIVE ASSISTANCE CLAIMS: FIRST, THE DEFENDANT MUST SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT. THIS REQUIRES SHOWING THAT COUNSEL MADE ERRORS SO SERIOUS THAT COUNSEL WAS NOT FUNCTIONING AS THE COUNSEL GUARANTEED TO THE DEFENDANT BY THE SIXTH AMENDMENT. SECOND, THE DEFENDANT MUST SHOW THAT THE DEFICIENT PERFORMANCE PREJUDICED THE DEFENSE. THIS REQUIRES SHOWING THAT COUNSEL'S ERRORS WERE SO SERIOUS AS TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL, A TRIAL WHOSE RESULT IS UNRELIABLE.

PETITIONER'S UNDERLYING CLAIM OF PROSECUTORIAL MISCONDUCT WAS NOT PRESERVED FOR APPEAL BECAUSE THE SELF-REPRESENTING DEFENDANT DID NOT PROPERLY OBJECT AT TRIAL TO THE PROSECUTOR'S UTILIZATION OF RELIGION. NEVERTHELESS, HAD PETITIONER'S APPELLATE COUNSEL RAISED THE ARGUMENT THAT THE PROSECUTOR'S CONDUCT WAS FUNDAMENTAL ERROR, THE DIRECT-APPEAL PANEL WOULD NECESSARILY HAVE APPLIED FUNDAMENTAL ERROR REVIEW. STATE V. THOMAS, 130 ARIZ. 432 (1981) (THE ADMISSION OF RELIGIOUS REFERENCES CONSTITUTE FUNDAMENTAL ERROR REQUIRING REVERSAL

AND A NEW TRIAL). TO DETERMINE WHETHER THERE WAS PRESUMED, THE COURT MUST EVALUATE WHETHER THERE WAS A REASONABLE PROBABILITY THAT PETITIONER'S ARGUMENT - THAT THE PROSECUTOR'S MISCONDUCT CONSTITUTED FUNDAMENTAL ERROR - WOULD HAVE WON THE DAY IN COURT ON DIRECT APPEAL. STATE V. THOMAS MAKES IT CLEAR, PETITIONER'S APPELLATE OUTCOME WOULD HAVE BEEN DIFFERENT. THOMAS MANDATES STRICT ADHERENCE TO KEEPING RELIGIOUS BELIEFS OUT OF THE COURTROOM IN THE CONTEXT OF A CRIMINAL PROCEEDING "WHERE THE QUESTION OF GUILT OR INNOCENCE IS BALANCED UPON THE CREDIBILITY OF THE PROSECUTING WITNESS." THOMAS ALSO HOLDS THAT ADMISSION OF RELIGIOUS INFORMATION FOR BOLSTERING WITNESS VERACITY IS FUNDAMENTAL ERROR REQUIRING REVERSAL OF A CONVICTION EVEN WITHOUT TRIAL OBJECTION.

FARINA V. SECRETARY, FLA. DEPT. OF CORR'S, MAKES HABEAS RELIEF POSSIBLE WHERE APPELLATE COUNSEL ABANDONS A MISCONDUCT CLAIM, WHICH WAS SUBJECT TO FUNDAMENTAL ERROR REVIEW, AND WOULD HAVE "WON THE DAY" IN STATE APPELLATE COURT. JUST LIKE FARINA, PETITIONER IS ENTITLED TO RELIEF.

3. IT WAS ERROR FOR STATE AND FEDERAL COURTS TO PRECLUDE PETITIONER'S SELF-REPRESENTATION VIOLATION FROM REVIEW.

THE PETITIONER WHO WAS ACTING AS HIS OWN ATTORNEY DURING TRIAL (PRO-SE), WAS PRECLUDED FROM AN IN-CHAMBERS CONFERENCE WHICH WENT UN-RECORDED. DURING TRIAL WHILE PETITIONER WAS

ORALLY ARGUING AN EVIDENCE ADMISSIBILITY ISSUE (APPENDIX H), THE TRIAL COURT ABRUPTLY HALTED THE OPEN-COURTROOM ARGUMENT AND MOVED THE DISCUSSION INTO CHAMBERS WITHOUT THE PETITIONER. THE STATE'S PROSECUTORS, PETITIONER'S ADVISORY COUNSEL, AND THE TRIAL JUDGE ALL WENT BEHIND CHAMBER DOORS WITHOUT PETITIONER AND CONTINUED ARGUMENTS. APPROXIMATELY THIRTY (30) MINUTES LATER, TRIAL COMMENCED. IT REMAINS UNKNOWN WHAT WAS DISCUSSED. ADVISORY COUNSEL'S AFFIDAVIT DOES ACKNOWLEDGE THE EVENT OCCURRED AND JUDGE RAYMOND P. LEE DID NOT WANT THE PETITIONER IN-CHAMBERS. (AFFIDAVIT INCLUDED WITH STATE POST-CONVICTION BRIEFS AND FEDERAL HABEAS PETITION).

IN ARIZONA, A DEFENDANT IS PROHIBITED FROM PRESENTING ARGUMENTS ON DIRECT APPEAL WHICH RELY ON EVIDENCE OUTSIDE THE TRIAL RECORD. *STATE V. CABRERA*, 114 ARIZ. 233 (1977) (POST-CONVICTION RELIEF UNDER ARIZONA'S CRIMINAL RULE 32.1 PROVIDES REMEDY FOR MATTERS WHICH DO NOT HAVE A SUFFICIENT RECORD TO PROVIDE APPELLATE REVIEW). WITHOUT SUFFICIENT RECORD, THIS ISSUE COULD NOT BE RAISED ON DIRECT APPEAL. FURTHERMORE, A MUCH LATER ISSUED MEMORANDUM DECISION FROM *STATE V. FRANTZ* DIRECTED FRANTZ TO RAISE HIS VIOLATION IN THE RULE 32 PROCEEDING AS WELL WITH REGARDS TO HIS SELF-REPRESENTATION VIOLATION. (APPENDIX G). WHEN THIS PETITIONER RAISED HIS VIOLATION IN ARIZONA'S RULE 32 PROCEEDINGS, THE COURT HELD THE VIOLATION ARGUMENT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL. (APPENDIX E), AND PRECLUDED PETITIONER'S CLAIM. RAISING THE VIOLATION THROUGH ARIZONA'S COURT OF APPEALS MET WITH THE SAME FATE. (APPENDIX D, I).

IN THE ARIZONA DISTRICT COURT AND TO THE NINTH CIRCUIT, THE PETITIONER ARGUED AN INCONSISTANT APPLICATION OF PROCEDURAL DEFAULT WAS BEING USED AGAINST THE PETITIONER TO HIS DETRIMENT. NEITHER COURT CONSIDERED THE MERITS OF PETITIONERS' SELF-REPRESENTATION VIOLATION.

WHERE A STATE COURT RELIES ON INADEQUATE PROCEDURAL BAR AND DOES NOT ADDRESS A CLAIM'S MERITS, "FEDERAL HABEAS REVIEW IS NOT SUBJECT TO THE DEFERENTIAL STANDARD THAT APPLIES UNDER AEDPA TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE COURT PROCEEDINGS. INSTEAD THE CLAIM IS REVIEWED DE NOVO." (ONE V. BELL, 556 U.S. 449 (2009)). AS SUCH, THE ARIZONA DISTRICT COURT SHOULD HAVE REVIEWED THIS CONSTITUTIONAL VIOLATION DE NOVO RATHER THAN AGREE WITH THE STATE'S ARGUMENT OF PRECLUSION. AT A MINIMUM THE NINTH CIRCUIT SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY ON THIS OBVIOUS CONSTITUTIONAL VIOLATION AND PROCEDURAL DEFAULT FINDING.

REASONS FOR GRANTING THE PETITION

THE PETITIONER COMPREHENDS HIS LIMITED ABILITY TO JUSTIFY CONSIDERATION BY THIS COURT. HOWEVER, THE PETITIONER ALSO RECOGNIZES LEGAL INCONSISTANCY. RULE 10 OF THIS COURT ESTABLISHES THAT WHERE CONFLICTING COURT OPINIONS EXIST, THERE ARE "COMPELLING REASONS" FOR THIS COURT TO GRANT REVIEW OF A PETITION SEEKING A WRIT OF CERTIORARI. THIS PETITIONER IS ENTANGLED IN SUCH INCONSISTANCY.

THE STATE OF ARIZONA, BY INCONSISTANTLY APPLYING A PROCEDURAL BAR DOCTRINE, HAS THWARTED MERIT REVIEW OF PETITIONER'S SELF-REPRESENTATION VIOLATION CLAIM. DIRECTING FRANTZ TO RAISE HIS FARETTA/MCKASHLE VIOLATION IN POST-CONVICTION (RULE 32) PROCEEDINGS AND THEN HOLD THIS PETITIONER SHOULD HAVE RAISED HIS VIOLATION ON DIRECT APPEAL IS DETRIMENTALLY INCONSISTANT. WHEN PRESENTED AS AN INCONSISTANT APPLICATION OF PROCEDURAL BAR, PETITIONER'S ARGUMENTS WERE STRAIGHTWAY IGNORED. AS SHOWN BY LATER EXAMPLE, IT SEEMS HIGHLY PROBABLE PETITIONER'S PRO-SE BRIEFS WERE NEVER ACTUALLY READ.

THE STATE OF ARIZONA AND THE FEDERAL COURT'S HELD PETITIONER'S APPELLATE COUNSEL WAS "EFFECTIVE" EVEN THOUGH COUNSEL ABANDONED REVIEWABLE AND REVERSIBLE CLAIM OF MISCONDUCT WHEN THE PROSECUTOR UTILIZED RELIGION TO BOLSTER WITNESS VERACITY. THOSE STATE AND FEDERAL HOLDINGS FOR THIS PETITIONER DIRECTLY CONFLICT WITH THE ELEVENTH CIRCUIT'S HOLDING IN FARINA. FARINA HELD APPELLATE COUNSEL WAS INEFFECTIVE FOR ABANDONING THE EXACT ISSUE THIS

PETITIONER USED TO SUPPORT HIS APPELLATE COUNSEL WAS INEFFECTIVE. FARINA FOUND INEFFECTIVENESS WHERE: 1) STATE LAW ALREADY EXISTED WHICH MANDATED FUNDAMENTAL ERROR REVIEW OF AN ISSUE; 2) WHERE PRESENTATION WOULD HAVE "WON THE DAY" ON DIRECT APPEAL; AND, 3) "THE ISSUE OF PROSECUTORIAL MISCONDUCT WAS SUBSTANTIAL, POTENTIALLY MERITORIOUS, AND SO OBVIOUS ON THE RECORD." FARINA'S HOLDING IS CONTRARY TO THIS PETITIONER'S NINTH CIRCUIT DECISION.

AS STATED ABOVE, IT SEEMS HIGHLY POSSIBLE PETITIONER'S PRO-SE BRIEFS WERE NEVER ACTUALLY READ. FOR EXAMPLE, WHEN CONSIDERING THE INJECTION OF RELIGIOUS BELIEFS, THE DISTRICT COURT WROTE: "PETITIONER HAS NOT CITED TO THE PORTIONS OF THE TRIAL RECORD SO THE COURT CAN EVALUATE PETITIONER'S ASSERTIONS IN THE CONTEXT OF THE TRIAL ISSUES." (APPENDIX C, AT 35). PETITIONER'S STATE BRIEFS AND SEPARATELY FILED MEMORANDUM OF LAW IN SUPPORT OF HIS HABEAS PETITION (DOC. #2), CONTRADICT THIS STATEMENT. IF PETITIONER'S BRIEFS ARE NOT READ, ACQUIRING RELIEF IS IMPOSSIBLE. BY FURTHER EXAMPLE, THE DISTRICT COURT STATED "PETITIONER'S FAILURE TO OBJECT ALONE MAKES HIS APPELLATE COUNSEL'S DECISION NOT TO BRIEF THIS ISSUE [REGARDING RELIGION] OBJECTIVELY REASONABLE." (APPENDIX C AT 35). THIS LIKEWISE IGNORES THE HOLDINGS OF THOMAS AND FARINA, WHICH PETITIONER BROUGHT TO THE COURT'S ATTENTION.

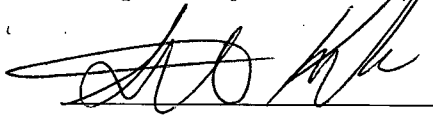
AS BRIEFED, THIS PETITIONER HAS SHOWN ALL LOWER COURT DETERMINATIONS CONFLICT WITH THE ELEVENTH CIRCUIT'S HOLDING REGARDING APPELLATE COUNSEL'S EFFECTIVENESS. FURTHER, THIS PETITIONER HAS SHOWN HIS SELF-REPRESENTATION RIGHTS AND RIGHT TO COUNSEL HAVE BEEN DETERMINED IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN FARETTA, McKASKLE AND CRONIC.

CONCLUSION

PETITIONER REQUESTS THIS COURT GRANT HIS PETITION FOR CERTIORARI, FINDING THAT HIS SELF-REPRESENTATION/RIGHT TO COUNSEL RIGHTS WERE VIOLATED OR THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. OR, TO VACATE THE JUDGMENT OF THE COURT OF APPEALS AND REMAND THE CASE FOR FURTHER CONSIDERATION REGARDING ENTITLEMENT TO A COA.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date:

May 23, 2018