

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER WAYNE MURRAY,
Petitioner/Appellant,
vs.

DORA SCHRIRO, et al.,
Respondent/Appellee.

Court of Appeals No. 08-99013
District Court No. 03-775-PHX-DGC

CAPITAL PUNISHMENT CASE

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. PREJUDICIAL PUBLICITY DENIED DUE PROCESS

The record shows massive prejudicial publicity from the Murrays' arrest through trial. The publicity contained prejudicial opinions and false statements about alleged killing sprees and other violent conduct that would never be admitted at trial. Many jurors read or heard the publicity before trial with two jurors even hearing the publicity on the way to the courthouse to serve as jurors in this very case.

In Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005), the Ninth Circuit pronounced a three factor test in evaluating prejudicial publicity:

(1) whether there was a 'barrage of inflammatory publicity immediately prior to trial, amounting to a huge . . . wave of public passion'; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial.

Id. at 1211 (citations omitted). All three factors exist in the present case.

The opening brief details the prejudicial newspaper and radio reports. There also were extensive television reports. E.R. Vol. IV, Part 1, Tab B, at 45:8-11. These broadcasts reached all areas of Mohave County with the exception of a few areas that were not sent jury summonses, State v. Murray, 184 Ariz. 9, 22, 906 P.2d 542, 555 (1995), so that any area not covered by the publicity also had no jurors at the trial. E.R. Vol. III, Part 2, Tab N, at 16:10-15.

The publicity reached the jurors. Nine out of 14 Grand Jury jurors were familiar with the case and the inflammatory newscasts. Id. Tab A, at 10. The prosecutor acknowledged, "[T]here has been extensive amount of publicity concerning this particular incident both in the local newspaper and on the radio." Mr. Murray's motion to remand to the Grand Jury to determine the level of pretrial publicity and bias was denied. E.R. Vol. II, Tab G.

At a change of venue hearing just weeks before trial, David Hawkins, the news director of KAAA and KZZZ radio stations in Kingman, Arizona (the County seat), presented

61 news scripts he had written for broadcast from the time of the arrest to trial. See ER 1715 of Robert Murray's excerpt of records. That averages about five individual radio broadcasts each month, more than one a week, which are then repeated throughout the day they are released. Immediately after the change of venue hearing, the press ran an inflammatory article showing the Murrays in handcuffs and jailhouse garb getting into a paddywagon to return from the hearing to jail. The print under the picture read, "At least eight law enforcement officers escorted the brothers into the courthouse and guarded the exit doors. Two officers armed with shotguns were seen perched on rooftops as the van made its way the short distance to the jail." E.R. Vol. I, Part I, Tab B, (exhibit E). This signaled to the public how terrible and dangerous the Murrays were since they already were in custody and yet maximum security was still necessary.

Even on the first day of trial, the radio ran broadcasts about the case that two jurors heard on their way to the court house. Both jurors served on the jury. See supplemental E.R., at 26. They were receiving,

before they arrived at the court house, information about the very case they were on their way to judge. E.R. Vol. IV, Part 1, Tab B, at 40:12-13; see also id. at 133:16-18. Another prospective juror testified about news media accounts one to two months before trial, showing the nonstop coverage of the case, as trial approached. Id. Tab A, at 80. Of the jurors questioned at voir dire, the judge noted about half of them had heard about the case. Supplemental E.R. at 24.

The barrage of publicity also was inflammatory. David Hawkins testified the community was angry about what happened to the victims. E.R. Vol. III, Part 2, Tab N, at 24. He also testified everyone was expressing the opinion the Murrays were guilty. Id. John Collier Freeman, an investigator, testified he had been to all parts of the County and most everyone he spoke with knew about the case and had a negative opinion about the defendants. Id.

Grasshopper Junction is unmarked with high desert and nothing else all around it. One driving along the highway would not know it from the next highway stop miles down

the road. However, the locals all know it as it was a well known landmark for Mohave County. E.R. Vol. II, Tab T, at 2. Several jurors testified about knowing Mr. Morrison or about going to Grasshopper Junction just to eat there. Juror Miller would drive there to eat the pie. E.R. Vol. IV, Part 1, Tab A, at 35. Juror Tyra knew the victims well. Id. at 45. Juror Moulder would eat there five years earlier than the trial (the prosecutor avowed Mr. Morrison owned Grasshopper Junction for the past 15 years). Id. at 57 and Id. at 55. Juror Alaria knew the victims. Id. at 62. Juror Jenks knew the victims. Id. at 77-79. Juror Williams would eat at Grasshopper Junction. Id. at 92. Juror Confer knew the victims. Id. at 99. Juror Way was a fellow Mason of Mr. Morrison. Id., Tab B at 108. Juror Burns also had Mason and Shriner affiliations. Id. at 123-124. Few were struck.

A prime example of the impact from the publicity is shown by Juror Evans who testified she read the papers at the outset and that thereafter, "[W]hen it's in the paper, I read it." Her jury questionnaire was blatant,

stating: "They're guilty, now pay." Her ability to be fair was "substantially impaired," yet, the judge denied the challenge for cause. Id. at 26-31. Accordingly, the Daniels court's first element is met as the publicity was literally nonstop and inflammatory.

The news accounts also contained inflammatory opinion from the police and from the Sheriff himself. As outlined in the opening brief, Detective Lent opined to the media that the Murrays "snuck up behind the house" and how loved Mr. Morrison was by the community. E.R. Vol. I, Part 1, Tab B, Exhibit E. The press ran several stories how the Murrays were wanted for armed robbery in Alabama and how the police thought the Murrays were killing people across the country even quoting the Sheriff. Id. ("[Sheriff Joe] Cook said officials also are looking into other, similar homicides in other states to see whether the crimes might be connected."). He identified California and New Mexico unsolved murders. There was not an iota of evidence supporting these inflammatory allegations.

The papers also showed several pictures of defendants in the courtroom wearing jailhouse attire. The morning after the change of venue hearing, the Daily Miner ran the article with the graphic picture of the Murrays, wearing handcuffs and jailhouse garb, and the many guards it allegedly took to guard the Murrays for the "short ride" to the jail, with more police on the roof tops with shot guns Id. Thus, the reports were sensational and inflammatory, thereby meeting the second Daniels element.

The reports also were full of inadmissible allegations. The fact the Murrays were wanted in Alabama on a charge of tying up an elderly lady and robbing her house was not admissible and was not proffered as it was clearly prejudicial. Yet, the public was well aware of it from the repeated press reports. These prospective jurors heard the Murrays broke in, assaulted, and robbed an elderly lady by taking her household valuables in a pillow case in Alabama. They then heard that perpetrators (identified as the Murrays), broke in, assaulted, and robbed an elderly couple by taking their household valuables in a pillow case in Arizona. Copycat

crimes causing prejudice based on the news accounts of evidence that could not be presented at a fair judicial trial. News accounts that the Murrays were actual "suspects" in California and New Mexico heightened the readers' belief that authorities must have specific murders in mind to which the Murrays were being linked, if they were already classified as "suspects." Therefore, all three factors of Daniels are met.

In Irvin v. Dowd, 366 U.S. 717, 728 (1961), similar to the present case, the defendant submitted 46 exhibits of pretrial news reports that outlined, among other things, the modus operandi of prior burglaries which allowed the comparison to that of the burglary and murder with which defendant was charged. Id. at 725. The Court found such publicity of copycat crimes prejudicial, even though jurors responded to the trial court that they would follow the court's instructions. See id. at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so

many times admitted prejudice, such a statement of impartiality can be given little weight."). Thus, the enormity of the publicity and its effect clearly prejudiced Mr. Murray.

The State attempts to distinguish this case from Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1983), however, the allegedly distinguishing facts actually show the strikingly similarity to the present case. As in Coleman, the Sheriff made sensational and untruthful comments that he never retracted. Like Coleman, he stated they had conclusive evidence of guilt. He also opined about the egregiousness of the crime and how the Murrays were actual suspects in murders in California and New Mexico. Last, the State's argument that Mohave County's population of 95,000 is too large for there to be prejudice is unavailing as prejudice was found in Rideau v. Louisiana, 373 U.S. 723, 724 (1963) where Calcasieu Parish had a population of 150,000. Mr. Murray did not have a fair trial.

B. THE EXCLUSION OF CHRISTIANS VIOLATED THE SIXTH AMENDMENT, THE FAIR CROSS SECTION DOCTRINE, AND THE EQUAL PROTECTION CLAUSE

The State's brief concedes the Jury Commissioner automatically excused Christians who stated it was against their religion to judge others. E.R. Vol. III, Part 2, Tab S, at 41:19-25. In fact, the Commissioner specifically identified the excused denomination as Jehovah Witnesses or Seventh Day Adventists. Id. The State concedes there was no investigation of the jurors' ability to follow the law. Id. 42:24-25 to 43:1-4. The State argues automatically excusing those who say they have religious scruples against judging others does not violate the Constitution. However, the practice violates the Constitution in three independent ways. First, the automatic exclusion violated the sixth amendment right to an impartial jury. See generally Witherspoon v. Illinois, 391 U.S. 510 (1969). Second, it violated the Fair Cross-Section doctrine. Last, it violated the Equal Protection Clause.

1. Striking Jurors with Religious Scruples Against Judging Others Violated the Sixth Amendment

The State argues Mr. Murray did not cite Witherspoon below and, therefore, he waived this issue. The State is wrong. Mr. Murray cited and argued Witherspoon below. E.R. Vol. I, Part 2, Tab I, at 2-6. Witherspoon is merely a case that interprets the sixth amendment's guarantee of an impartial jury. Mr. Murray argued below that automatically excluding Christian jurors with no questioning of their ability to follow the law violated the sixth amendment. See E.R. Vol. I, part 2, tab F, at 16:5-15 & part 1, tab B, at 59. Citing the constitutional provision is what controls. The district court then cited Witherspoon's progeny, Lockhart v. McCree, 476 U.S. 162, 174 (1986), in response to the argument and Mr. Murray cited and argued both Lockhart and Witherspoon in his Traverse. Vol. I, part 2, tab I, at 2-6. Thus, the constitutional provision and Witherspoon itself were cited and argued and the issue is not precluded now on appeal.

Witherspoon is applicable to Arizona juries, irrespective of their pre-Ring role. See State v. Jones, 197 Ariz. 290, 302 (2000) ("The trial judge incorrectly stated that the Witherspoon/Wainwright standard does not apply because Arizona juries do not sentence defendants"); State v. Van Adams, 194 Ariz. 408, 417, 984 P.2d 16, 25 (1999) (holding Witherspoon applies in Arizona). When states voluntarily chose to create constitutional liberty interests, such as the application of Witherspoon to assure an impartial jury, state actors cannot thereafter violate those liberty interests without violating the constitution. See, e.g., Jackson v. Ylst, 921 F.2d 882, 886-87 (9th Cir. 1990) (state can create a constitutionally-protected interest by adopting policies that restrict official discretion). The State in the present case, does not claim otherwise. Therefore, Witherspoon's interpretation of the sixth amendment applies to this case and the facts show the State violated the Impartial Jury clause.

The Jury Commissioner testified she excluded those Christians (specifically identifying them as Jehovah

Witnesses or Seventh Day Adventists) who wrote they prefer not to serve because "a page out of their bible [states] that it is against their religious beliefs to sit in judgment of anyone." Vol. III, part 2, tab S at 41. In Witherspoon itself, the Supreme Court noted, "Only one venireman who admitted to 'a religious or conscientious scruple against the infliction of the death penalty in a proper case' was examined at any length." Id. at 515. That venireman stated she "would not like to be responsible" for deciding somebody should be put to death, for which the trial judge struck. The Supreme Court held that striking the juror because she has a religious scruple against being responsible for the punishment is unconstitutional as long as the juror is willing to apply the law, even if with some difficulty. Id. The Jury Commissioner excusing jurors simply because they state it is against their religion to judge others without determining whether the jurors would follow the law also is unconstitutional.

In the present case, one juror slipped through and was questioned by the trial judge. Juror McCall stated,

"[T]he Bible tells me not to judge no man, but at the same time it says to obey the laws of the land. So I have mixed emotions about that." The juror explained he would rather not have to judge, similar to the Witherspoon's venireman's stating she would prefer not being responsible. E.R. Vol. IV, Part 1, Tab A, at 81:18-22. The trial court inquired whether Juror McCall could follow the court's instructions. The juror promised to try. The trial judge dismissed Juror McCall even though he had already stated he could be fair and impartial. Id. at 80:17-20. This is like dismissing the juror in Witherspoon because she would not want to be responsible for the decision even though she too thought she could follow the law.

The trial court also sought assurances that Juror Brower did not have "any religious scruples" in judging other people. Id. at 87:25-88:1. Accordingly, the transcripts are undisputed the Jury Commissioner automatically struck those with religious scruples before they could come to the court house (and others were being weeded out by the trial judge for the same religious

scruples) without the State's ever being put to its burden of showing they were impaired from following their duty. See Gray v. Mississippi, 481 U.S. 648, 652 n.3 (1987) ("A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve."). After actual discourse, when the State offers its challenge for cause, "[i]t is then the trial judge's duty to determine whether the challenge is proper." Wainwright v. Witt, 469 U.S. 412, 423 (1985). In the present case, the State's excusing the jurors (even if it was one juror) before they ever got to the courthouse prejudiced Mr. Murray from having the prosecutor and the trial judge perform their respective constitutional duties before removing a juror for cause. The prospective jurors' mere lack of a belief in imposing punishment on religious grounds was a "broader basis" for exclusion than inability to follow the law and it violated the constitution.

While jurors who might have been able to follow the law despite their religious scruples were automatically

struck, most jurors were biased in favor of a conviction and not struck. For example, Juror Manderfield disagreed with the burden of proof and wished to apply a lower standard. E.R. Vol. IV, Part 1, Tab B, at 12-14. Juror Cochrum knew a witness, felt the system was too soft, and felt victims had too many rights. Id. at 40-43. Juror Azzolino felt that if a defendant did not testify, he probably was guilty. Id. at 92-96. The best he could do, following page after page of questioning by the trial judge in an effort to rehabilitate him, was to state he would "not necessarily" take this prejudicial view into account. Id. at 93:11-13. Juror Evans, who had been following the publicity in the case all along from arrest to trial, came right out and stated, "They're guilty, now pay." Id., Tab A, at 28:8-13. The Judge denied the challenge for cause. Juror Alaria thought criminals enjoyed too many rights. Id. at 64. Juror DiGiovanni was deemed very anti-criminal by the defense, but the judge would not allow counsel to voir dire her. Id. at 89. Juror Williams admitted he had a preconceived opinion because he read about it in the paper but the

trial court denied the challenge for cause. Id. at 95. Juror Manderfield felt that a defendant needed to get on the stand and explain what happened. Id., Tab B, at 14. Juror Bell thought that once a person was arrested, he was probably guilty and had at least one foot in the door. Id. at 25. Juror Harshman followed the newspaper and television stories and his daughter-in-law actually worked for the County Attorney prosecuting the case. The trial court denied the challenge for cause. Id. at 44-45 and 50.

The Constitution requires more than a biased juror who might not necessarily take his biased view into account. Mr. Murray was entitled to the chance of having competent jurors who would be less inclined to view someone accused of a crime as guilty, but who would follow the law. Jurors who will not prejudge is just who should be on the jury. In light of the foregoing, the dismissal of those with religious scruples with no colloquy to establish bias violated the sixth amendment right to an impartial jury.

2. The State Violated the Fair Cross-Section Doctrine

The State, without citation to legal authority, argues the excluded Christians were merely a group defined by shared religious beliefs against sitting in judgment of others, which fails to satisfy Duren v. Missouri, 439 U.S. 357 (1979)'s distinctive group requirement of Fair Cross-Section analysis. Yet, the Jury Commissioner identified the denomination as Jehovah Witnesses or Seventh Day Adventists. E.R. Vol. III, Part 2, Tab S, at 41. The law holds groups defined by religious beliefs are indeed "distinctive groups." United States v. Gelb, 881 F.2d 1155, 1161 (2nd Cir. 1989) (Jews are a distinctive group); United States v. Schlesinger, 360 F. Supp. 3d 512, 527 (E.D.N.Y. 2005) (same); see also United States v. Raskiewicz, 169 F.3d 459, 463 (7th Cir. 1999) ("Religious faith has been held to suffice."). Accordingly, Jehovah Witnesses, Seventh Day Adventists, and other such Christian faiths are distinctive groups. See Torcaso v. Watkins, 367 U.S. 488 (1961) (discussing the now unconstitutional practice of discrimination among

Christian denominations against one another in early American history).

The second Duren element of the proportion excluded also is met. The Jury Commissioner's testimony itself shows she viewed these jurors as philosophically impaired from serving. She excluded all such Christians who so identified themselves as Jehovah Witnesses or Seven Day Adventists. Vol. III, part 2, tab S, at 41. Therefore, the deviation between those in the community and those who served on the jury was 100%. United States v. Potter, 552 F.2d 901, 906 (9th Cir. 1977). ("[A] small deviation may destroy the presence of a fair cross-section than would be the case with a group which is less clearly defined."). Thus, Mr. Murray meets the second element of showing disproportionate representation as none were represented.

Last, there can be no cavil there was systematic exclusion of these Christians as all were automatically excluded with no colloquy at all. The automatic exclusion was a systematic exclusion. Mr. Murray has met

all three Duren elements. This jury was not a fair cross-section of the community.

3. The Exclusions Violated Equal Protection

Even stronger is Mr. Murray's Equal Protection argument. The State argues Mr. Murray cannot meet the first of the three elements of an Equal Protection violation as set forth in Castaneda v. Partida, 430 U.S. 482, 494-95 (1977), because there is no identifiable, distinct class. However, case law is clear that the government cannot discriminate against those who would serve on a jury on the basis of religion or no religion. See, e.g., Schowgurow v. State, 240 Md. 121, 124, 213 A.2d 475 (1965) (striking down requirement jurors must believe in God as discriminatory irrespective of the numbers of actual atheist who might ever be struck); see Torcaso v. Watkins, 367 U.S. 488 (1961) (striking down religious requirements in being a notary); Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005) ("the court has adopted a broad definition of 'religion'"). Mr. Justice Hugo Black's lengthy discussion in Torcaso of the history of Christian denominations' discriminating against one

another in America shows Christian denominations are distinct classes. Id. at 490. The Jury Commissioner might have been a Christian too, but she arbitrarily excused those Christians whose beliefs disfavored judging others. Thus, this group (composed of Jehovah Witnesses and Seventh Day Adventists) is an identifiable and distinct class.

This case meets all elements of an Equal Protection Violation. The deviation was substantial because all such Christians were excused and those who made it into the court house were excused by the judge even though they indicated they intended to follow their oaths. The deviation is 100%. Last, the disparity was created solely as the result of intentional practices that were aimed at this specific protected classification. The State excused these jurors not because of an inconvenience, such as child care, but only because of their religion, a class based characteristic. Indeed, the prosecutor asked the Jury Commissioner whether she purposefully excluded any religion denominations only to hear her state she indeed did automatically exclude

Jehovah Witnesses or Seventh Day Adventists on religious grounds. Vol. III, Part 2, Tab S, at 41.

This case is governed by Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972). In Alexander, the jury commissioner was able to see from what was marked on the returns which potential jurors were Negro. There was no evidence of any intentional elimination of such jurors, but, there was a substantial deviation between those selected compared to the Negro population. The Court held the deviation alone created a prima facie case of discrimination shifting the burden to the State to show discrimination was not a factor. Id. at 631-32 ("Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action * * *.").

The Alexander Court held the jury commissioner's testimony that race was never taken into consideration was not dispositive:

The Court has squarely held, however, that affirmations of good faith in making individual selections are

insufficient to dispel a prima facie case of systematic exclusion. 'The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.' Hernandez v. Texas, 347 U.S., at 482.

Id. at 632 (internal citations omitted). Whereas in Alexander there was no evidence of intentional exclusion and the case depended on shifting burdens and rebutting a prima facie case, in the present case, the jury commissioner openly admitted she excused jurors because of their religious beliefs. The State cannot and has not tried to rebut the evidence. Therefore, the State violated the Equal Protection clause.

C. THE STATE VIOLATED BATSON

The State argues the prosecutor's proffered reasons for striking the two Hispanic jurors, Ms. Pethers (nee, Garcia) and Mr. Alvarado, were race neutral and plausible. However, the State discusses only the prosecutor's second set of explanations for why he struck Ms. Pethers while it ignores the prosecutor's initial denials and explanations. The state courts and district court committed the same error and unreasonably found the

facts. The State also provides a limited juror comparison analysis that is rebutted by the record.

The prosecutor initially explained the reason for striking Ms. Pethers by stating, "I don't believe that she is a Hispanic. * * * I don't recall if she appeared to talk Hispanic to me." E.R. Vol. IV, Part 1, Tab C, at 20-21. The State's belief that a juror had to "talk Hispanic" for Batson to apply is clearly erroneous. Batson applies to the purposeful striking of Hispanics even if the prosecutor can argue that they "talk white." Moreover, defense counsel pointed out the juror identified herself as Hispanic on the jury questionnaire and that she had stated "Garcia" was her maiden name. Id. at 21. Prosecutor read the jury questionnaire.

The prosecutor then stated being named "Garcia" did not make the juror Hispanic, "as opposed to Spanish." Id. The prosecutor's attempt to argue the name "Garcia" sounded to him like Spanish, instead of Hispanic was specious. Arguing the juror bears a Spanish name, of unknown origin, in the present case so that the strike was race neutral and not geared toward Hispanics, is like

the prosecutor's arguing in Kesser v. Cambra, 465 F.3d 351, 357 (9th Cir. 2006), that a brown skinned woman he struck was "of unknown origin" and, therefore, the strike was not geared at Native Americans. The Ninth Circuit rejected this argument as facially unpersuasive. Id.

The prosecutor then retreated from his position of not allegedly believing Ms. Pethers was Hispanic, that she did not indicate she was Hispanic, that she did not "talk Hispanic," that she was Spanish, not Hispanic, and that he apparently was completely unfamiliar with her. Instead, he suddenly revealed he actually was well acquainted with her because his office had prosecuted her mother and uncle for alleged drug violations. The prosecutor's statement that he in reality knew not just who she was, but also who her mother was, and who her uncle was, and "the people around them," shows he knew about her and her family background all along. His earlier denials of not knowing her were not credible which makes his subsequent "race neutral" explanations dubious.

The prosecutor followed the above denials by then making a series of inconsistent "race neutral" statements to justify his strike of this Hispanic juror, by (1) stating there was a major drug investigation into Mrs. Garcia, but he then hedges that with, "If I understand [correctly]," (2) stating the defendants went to jail for a time, but then hedges that with he is not sure about Mrs. Garcia, (3) stating and basically agreeing the charges against Mrs. Garcia actually were dismissed, (4) then switching to claiming there was a negotiated deal, and (5) he then backs off of that too, by saying he is not positive or sure even about that. Id. at 21-22. The statement shows the prosecutor had little information on the prosecution, appeared to be embellishing what happened, followed by then quickly and repeatedly backing off his representations implying he was not sure what happened. The prosecutor was fishing for an excuse for having struck her. Moreover, by freely talking about Mrs. Garcia by name, he was acknowledging he knew all along that Juror Pethers was a Garcia, just as she identified herself on her questionnaire. The defendants

responded to the prosecutor's contradictory soliloquy by noting it was not persuasive and was contrary to the record. See Supplemental E.R., at 22-23.

Moreover, after the lawyers had passed the panel for cause, the prosecutor requested a break to prepare peremptory strikes and noted the judge did not "have to be there for it, unless we get into a Batson problem." Id. at 17:7-10 (filed on 4-15-10). The prosecutor's suggestion of a possible Batson issue implies he already planned on striking the Hispanic jurors. If there were no Hispanics on the jury, he never would have thought about Batson. It also shows that if he had Batson in mind, then he also would have been mindful whether striking a particular juror might draw a Batson challenge and he would have reviewed the jury questionnaires and known who was and was not Hispanic. Indeed, he asked for the adjournment to review the information on those he considered striking.

At this third stage of the inquiry, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett

v. Elem, 514 U.S. 765, 768 (1995) (per curiam). No where in the state court's opinion, the district court's opinion, or the State's brief is there any discussion of the prosecutor's contradictory statements. The state courts unreasonably found the facts. The explanations were implausible and pretexts.

A comparison of nonstruck white jurors also shows the explanation was pretextual. Miller-El v. Dretke, 545 U.S. 231, 239 (2005). Ms. Pethers testified her mother's case was quickly dismissed and it would have no affect on her ability to be fair. E.R. Vol. IV, Part 1, Tab C, at 80-81. The prosecutor asked no questions at all. At the same time, Tina Marie Bonsang, who is white, stated that her brother-in-law was even then actively being prosecuted by the County Attorney for driving under the influence (DUI) and one of Roger Murray's defense attorneys was representing the brother-in-law on that charge. Id. Tab A, at 46-47, 51. It was not just one DUI, but a series of them. Id. Ms. Bonsang served as a juror. Id. Tab C, at 26.

The State argues Juror Bonsang would be less likely to be biased than Juror Pethers because Ms. Bonsang's brother's offense was a series of DUIs, whereas Ms. Pether's mother faced a major drug charge. According to the State, that difference would make Ms. Pethers biased, but not Ms. Bonsang. The State's argument is specious. The charges in Mrs. Garcia's case were dismissed. In contrast, a series of drunk driving offenses results in a long sentence. Ariz. Rev. Stat. §§ 28-1381 to -1384. If there were going to be a bias, the more serious one is with Ms. Bonsang where there is certain jail time, not with Ms. Pethers where the system worked and the charges quickly dismissed.

The cases cited by the State and district court that justify the dismissal of jurors with relatives who have been convicted do not apply to Ms. Pethers as there was no conviction. They do apply to Ms. Bonsang. Moreover, Ms. Bonsang's bias would be exacerbated by the fact the same defense attorney who was representing Bonsang's relative on his latest DUI also was representing the current defendant. A prosecutor would fear Juror Bonsang

might not want to upset her brother-in-law's lawyer by voting to convict the lawyer's current client. Yet, the prosecutor did not strike her.

Another juror, Mr. Ellis had a son-in-law who actually was convicted of drug charges. Vol. IV, Part 1, Tab B, at 29. After arguing a prosecution for drugs would more likely bias a juror compared to a series of DUI prosecutions, the State then argues Juror Ellis however would not be biased like Ms. Pethers, because he said he would not be. The State ignores that Ms. Pethers also stated she would not be biased and the Garcia case already was dismissed. It could not hearten Mr. Ellis's concern for his daughter's family to think his daughter's husband could be jail bound. The State borrows the district court's claim that Mr. Ellis and Ms. Pethers were not similarly situated because Mr. Ellis said his son-in-law got off "too easy." Yet, the record shows Ms. Pethers never said anything different. Why assume a Hispanic woman would feel different from the white male juror.

The district court cited case law justifying the dismissing of a juror whose relative was convicted, even though Mrs. Garcia was not convicted, but the district court did not apply that case law to Mr. Ellis where there was a conviction. The cited case law supports Mr. Murray's position that the State's explanation was not credible and it applied different standards to who to strike, that were race based.

The State's arguing that, Ellis's relative was convicted for drugs, but Ellis said he could be fair and that Bonsang's relative was convicted of a series of DUIs, but drugs are worse than alcohol, attempts to split fine hairs on whether the jurors are similarly situated. The Supreme Court has held, "A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters." Miller-El v. Dretke, 545 U.S. at 247 n.6. The most that can be inferred from the distinction the State argues is that Hispanics who have relatives allegedly into drugs or alcohol abuse are more biased

than non-Hispanics with relatives into drugs or alcohol abuse.

"If a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [non-minority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El, 545 U.S. at 241. The prosecutor's claim of not knowing the juror was Hispanic was disingenuous to begin with, he followed it with a series of contradictory allegations, and, finally, he offered a reason that actually applied with greater force to white jurors who he did not strike. Therefore, the reasons were pretextual for striking Juror Pethers.

The same analysis applies to the peremptory strike used against the only other Hispanic, Mr. Alvarado. The prosecutor stated he struck Mr. Alvarado because Mr. Alvarado was "too nice" and "you couldn't get him to disagree with you" and "He is just indecisive" which would interfere with Mr. Alvarado's ability to disagree with or hurt anybody. Supplemental E.R., at 22. A review

of the voir dire transcript shows the proffered reason is pretextual. For example, the prosecutor felt his case was so strong, his only offer to defendants was first degree murder (a.k.a., the death penalty). If the prosecutor really thought Mr. Alvarado was not one to disagree, the prosecutor would have wanted Mr. Alvarado on the jury as he would be less likely, in the face of such evidence, to hold out for an acquittal.

In Snyder v. Louisiana, 552 U.S. 472 (2008), the prosecutor argued he struck a black juror because the juror had a busy schedule which might make him rush to vote for a lesser included offense just to avoid the penalty phase. The Supreme Court held the prosecutor's logic was "highly speculative." The Court concluded that if the juror wanted to rush to decision, he would be more inclined to agree with those wanting a first degree murder verdict. The same is true in the present case. If Mr. Alvarado was not one to disagree, he would go with the crowd and vote in favor of what the State (and the district court) assessed as overwhelming evidence of guilt. Also, there was no lesser included offense in

this case, so the only other option besides first degree murder was acquittal, which would mean having to be even more of a strong headed, disagreeable person.

The Snyder Court also noted there were a number of white jurors who also had busy schedules whom the prosecutor did not strike which was strong circumstantial evidence of racial involvement in striking the minority juror. In the present case, comparative analysis of who was struck and what they said in voir dire and who was not struck and what they said is revealing. Jurors Nelson and Anderson both stated on their jury questionnaires that they would have a hard time judging the guilt or innocence of a defendant. Vol. IV, part 1, tab B at 68; id. at 141. Although these jurors to varying degrees backed off from their questionnaire answers on examination, if the prosecutor was concerned that a juror might be "indecisive" in reaching a verdict, he had written evidence with these jurors. They both served on the jury.

The voir dire of Juror Nelson is telling. When asked whether she could sit in judgment and make a decision,

she testified, "Well, I would hope I'd be able to make a decision, yes." Id. at 69. She then agreed she might be swayed by others to change her mind on guilt or innocence, even if she had decided to vote otherwise. Id. The prosecutor did not strike her even though her answers suggested that she could be indecisive, that she might not want to be too disagreeable with other jurors, and that sitting in judgment of others was, at least to some extent, challenging.

In contrast, the Hispanic juror, Mr. Alvarado never suggested he would hesitate to pass judgment. To the contrary, he testified he had read about the murder in the paper which he thought was, as he described it, "execution style." Id. tab A at 71. He also testified he believed criminals are treated too soft. Id. at 74. He even knew the County Attorney and used to cut his hair for years when he had a barber shop in Phoenix. Id. at 73:17-25. He testified decisively that he would listen carefully and render a verdict based on the evidence. Id. at 73. Between the choices, a prosecutor would want to keep the juror who had read the inflammatory

publicity, who had had an ongoing and thus successful financial relationship with the County Attorney, who thought the system was too easy on criminals, and who promised to go with the evidence compared to jurors who stated in writing that it might be a challenge to judge others.

The prosecutor's concern about whether Mr. Alvarado might be unwilling to disagree with others is further shown to be a pretext when compared to Juror Bonsang who had to pick up her children each day by 6:00 p.m. in Lake Havasu. Id. at 48. It was a one hour drive from Kingman to Lake Havasu and court was scheduled to let out at 5:00 p.m., making it a close call on whether she would get to Lake Havasu on time. Id. Juror Bonsang, who was unable to stay late and debate issues, would be more apt to agree with other jurors to quickly reach a verdict, compared to Mr. Alvarado who was unemployed. Id. at 71. Last, the prosecutor's assessment that Mr. Alvarado was "too nice," and that he would not want to hurt anyone, actually expresses the historical and stereotypical voir

dire premise that minorities resist the harshness of criminal law.

The proffered reason for this strike is implausible when looking at the reason in light of the record (prosecutor claims juror too agreeable when evidence is allegedly overwhelming), in light of the historical context for such assertions (Hispanic too nice and thus not amenable to law and order arguments), and in light of the prosecutor's not striking other jurors who better fit the prosecutor's concern (non-Hispanic jurors not struck despite evidencing indecisiveness). The evidence of pretext in striking one juror is to be considered in assessing the reason the prosecutor struck the other juror. Thus, the pretext for striking Ms. Pethers is weighed against the State in striking Mr. Alvarado, and vice-a-versa. The Snyder court concluded once the proffered reason for striking a juror was not logical, the reasons had to be deemed pretextual, which created the proof by inference that the striking of the juror was based on discrimination. The same is true in the present case. The State's reasons were not logical and therefore

are deemed pretextual, which creates the proof by inference of discrimination.

D. THE TRIAL COURT VIOLATED DUE PROCESS BY DENYING AN INSPECTION OF THE CRIME SCENE

Mr. Murray will rely on his arguments set forth in his opening brief as he respectfully submits the State's brief did not facially rebut those arguments.

E. THE FAILURE TO INSTRUCT THE JURY ON INTOXICATION VIOLATED DUE PROCESS

Mr. Murray will rely on his arguments set forth in his opening brief as he respectfully submits the State's brief did not facially rebut those arguments.

F. THE FAILURE TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE VIOLATED DUE PROCESS

Mr. Murray will rely on his arguments set forth in his opening brief as he respectfully submits the State's brief did not facially rebut those arguments.

G. THE STATE COURTS' FAILURE TO DEEM MITIGATION APPLICABLE UNLESS IT CAUSED THE OFFENSE VIOLATED EDDINGS v. OKLAHOMA AND DUE PROCESS

The trial court found Mr. Murray's dysfunctional childhood was not a statutory mitigating factor because the crime did not occur by "impulse." E.R. Vol. V, Part

2, Tab H, at 91-92. The court also concluded such evidence as independent mitigation could not outweigh the aggravating factors. Id. at 96. Mr. Murray argued on direct appeal that the trial court's foregoing analysis and conclusion violated Eddings v. Oklahoma, 455 U.S. 104 (1982) in that it failed to properly consider or weigh the mitigating evidence of Mr. Murray's childhood because it did not cause the crime. E.R. Vol. VI, Tab A, at 54. The Arizona Supreme Court too rejected the mitigation evidence because Mr. Murray "fail[ed] to show how this background impacted his behavior at Grasshopper Junction." State v. Murray, 184 Ariz. 9, 44, 906 P.2d 542, 577 (1995). The court held, "Family background is a mitigating circumstance only if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control." Id. The State's argument that Mr. Murray did not raise the Eddings issue on appeal is simply incorrect.

The State's argument that the Eddings issue was not presented to the district court also is incorrect. See, e.g., Traverse E.R. Vol. I, part 2, tab F, at 30-31

(extensively arguing Eddings issue). Indeed, the district court ruled on the issue, although it held the issue was precluded because it was the Arizona Supreme Court that allegedly committed the Eddings error, and that Mr. Murray therefore had to present the Eddings error in a motion for reconsideration, which did not occur. Mr. Murray agrees that if a state supreme court commits the error, a motion for reconsideration is the correct procedure. In this case, however, Mr. Murray's state appellant's brief makes clear it was the trial court that committed the Eddings error: the appellate court merely affirmed the trial court. Therefore, the issue was presented and affirmed and no motion for reconsideration is necessary.

A motion for reconsideration is necessary in cases like Styers v. Schriro, 547 F.3d 1026 (9th Cir. 2008) in which the Arizona Supreme Court invalidated an aggravating factor, but then did not reweigh the aggravating and mitigating circumstances. Clearly, the state supreme court committed the error of not reweighing, not the state trial court. The Ninth Circuit

ruled the reweighing error issue was not precluded because a motion for reconsideration addressed the appellate court's error. Id. at 1034. The Ninth Circuit then held the Arizona Supreme Court's ruling that mitigation is only weighed when it causes the crime was unconstitutional. The district court, in the present case, misconstrues Styers as holding a motion for reconsideration must be filed to preserve an argument that mitigation evidence was not considered because it did not cause the crime. However, the Styers holding on this point clearly does not apply when the state supreme court merely affirmed the trial court's legal error. Therefore, this issue was presented on direct appeal, affirmed, and is not precluded.

In Styers, the Ninth Circuit granted relief because the Arizona Supreme Court held the mitigation factor of post-traumatic stress disorder would not be considered in balancing, since it was not a cause of the crime. The ruling was in direct contradiction to Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) and its progeny. Styers, 547 F.3d at 1035 ("[T]he Arizona Supreme Court

appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body. Smith v. Texas, 543 U.S. 37, 45 (2004) (citing Eddings * * *)."). The Arizona Supreme Court in the case sub judice, made the same ruling in affirming the trial court's view that the mitigation was unavailing and that there was no impulse at the crime scene. The application of mitigating evidence is unconstitutional.

H. THE FRACTURED RELATIONSHIP VIOLATED THE RIGHT TO COUNSEL

The state courts ruled Mr. Murray's fractured relationship argument was precluded by not being raised on direct appeal. However, this state procedural rule is not an independent and adequate bar to federal review because it was not firmly established at the time of the appeal that such claims were to be brought on direct appeal. Relying on a superceded district court order, the State argues Mr. Murray waived his "independent and adequate bar" argument in the district court. The State is incorrect. Initially, the district court inexplicably

did rule that Mr. Murray first argued the independent and adequate bar issue in his motion for an evidentiary hearing and "because Petitioner did not include that argument in the Traverse, it is waived and will not be reviewed by the Court." E.R. Vol. I, Part 2, Tab H at 17:24-28. Mr. Murray quickly filed a motion for reconsideration showing that his Traverse devoted five pages of argument to the issue. Why the district court thought the argument was not in the Traverse is unknown. In any case, the district court reversed itself and reviewed the issue on the merits. Id. Tab J, at 4. Thus, it was presented below. The district court did not apply the law governing "independent and adequate" jurisprudence and ruled the fractured relationship issue was precluded.

Whether a state rule is an independent and adequate bar to federal review is a federal question for the federal courts. Lee v. Kemma, 534 U.S. 362, 375 (2002). To be "adequate," the procedural rule must be firmly established and consistently applied by the state court at the time it is being applied to the case sub judice.

Johnson v. Mississippi, 486 U.S. 578, 587 (1988). If the rule or law is applied inconsistently, then the respect owed to the state court is eliminated and, in such circumstances, a federal court may reach the underlying federal issue without improperly impinging upon the State's adjudicatory authority. Wainwright v. Sykes, 433 U.S. 72, 85-86 (1977); Lee, 534 U.S. at 375-76.

The consistency with which a rule is applied concerns three factors: (1) whether application of the procedural rule is "unmistakable"; (2) whether the state supreme court did not address the merits of the claim; and (3) whether judicial application of the procedural rule is consistent in similar instances. Docter v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996); see also Wainwright 433 U.S. at 85-86. A failure of any of these factors renders the procedural rule inadequate to bar habeas review. Docter, 96 F.3d at 683-84. In this case, the State's preclusion argument fails because of the first and third factors as (1) application of a procedural bar was not unmistakable and (2) similar ineffective assistance of counsel ("IAC") claims typically were presented via

postconviction relief ("PCR") petitions, leading a lawyer to believe the same would be true for analogous fractured relationship claims.

In 1994, when Mr. Murray was filing his opening appellate brief, even state procedural bars of IAC claims were not adequate. In Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001), the Ninth Circuit held that how to present an ineffective assistance of counsel claim was "'so unclear that it d[id] not provide the habeas petitioner with a fair opportunity to seek relief in state court.'" Id. at 1202 (quoting Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996)). Subsequently, the Arizona Supreme Court, in State v. Spreitz, 202 Ariz. 1, 2-3, 39 P.3d 525, 526-27 (2002), conceded its "rule 32 waters" on this point were "murky" and therefore clarified that PCR petitions were the correct vehicle to use. Cases already in existence at the time of Mr. Murray's appeal, however, also showed such claims were to be presented by PCR petition and not direct appeal. See e.g., State v. Valdez, 160 Ariz. 9, 14-15, 770 P.2d 313, 318-19 (1989).

The district court erroneously rejected Mr. Murray's independent and adequate bar argument by relying on three cases in which fractured relationship claims were directly appealed. Not only do none of those three cases hold that direct appeal was the required procedure, but two of those cases came long after Mr. Murray filed his opening brief to the Arizona Supreme Court in 1994 and thus they could not serve to show what was an independent and adequate bar. The district court legally erred in relying on those subsequent cases. Johnson, 486 U.S. at 587 (question is, was rule "firmly established" when petitioner allegedly violated it). The Spreitz court cites to a multitude of cases where IAC claims were addressed on direct appeal. Spreitz, 202 Ariz. at 2-3, 39 P.2d at 526-27. The court made clear that that did not mean presenting an IAC claim on direct appeal was firmly established as unmistakable application. Id.

Mr. Murray could not raise any issue on direct appeal outside of the trial record. State v. Pearson, 98 Ariz. 133, 137 (1965) ("assignments of error based on the conduct or remarks of a trial judge will not be reviewed

on appeal where they are not properly supported by the record"); State v. Lindsay, 5 Ariz. App. 516, 518 (App. 1967) ("The record before this Court is very meager, and it has been stated repeatedly that the appellate court will consider and review only those matters which appear in the record before it and will not consider those matters not properly supported by the record"). The PCR rule's purpose is to establish proceedings to determine the facts which underlie the petitioner's claim for relief when such facts are not otherwise fully available in the trial record. When an issue needs evidentiary development, the PCR rule is the obvious procedure. PCR counsel submitted several affidavits to develop the claim, which evidence could not have been submitted on direct appeal. E.R. Vol. VI, Tab E, Exhibits 1-5. A lawyer needing evidentiary development, thus, must file a PCR petition. Indeed, IAC claims and fractured relationship claims both are sixth amendment right to counsel claims. State v. Torres, 208 Ariz. 340, 342, 93 P.2d 1056, 1058 (2004) ("[W]hen there is a complete breakdown in communication or an irreconcilable conflict

between a defendant and his appointed counsel, that defendant's sixth amendment right to counsel has been violated)."

It was only in Torres in 2004 that the Arizona Supreme Court established the definitive and unmistakable procedure for presenting fractured relationship claims and it fully agreed such claims need evidentiary development, although it adopted a new path of postconviction evidentiary remand. Id. at 344, 93 P.3d at 1062. Torres held that when a trial court does not hold a hearing on a fractured relationship claim, the appellate court must remand to the trial court for a postconviction evidentiary hearing. Id. The postconviction evidentiary hearing is conducted by the trial court just like a PCR hearing would be, but it is not yet in the postconviction relief posture because the direct appeal is not yet final. Clearly, Mr. Murray and his counsel were correct all along that a fractured relationship claim needs evidentiary development by the trial court, postconviction. Prior to Torres, this would be a PCR petition.

The Torres court went to lengths to show how the new procedure was similar to IAC claims and it counseled courts not to confuse the two. Id. at 345, 93 P.3d at 1061. The court noted the "quality of counsel" factor normally should not be considered at the fractured relationship hearing because the claim "generally relates more to a claim of ineffective assistance of counsel which we have since concluded must be raised in a rule 32 proceeding." Id.; see also State v. Henry, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997) (finding that a disagreement over tactical decisions is more properly analyzed in a PCR proceeding). The Torres and Henry cases demonstrate the fine line between the claims. The Torres court also counseled trial courts to avoid combining fractured relationship claims and IAC claims into one hearing as is done in some jurisdictions. Torres, 208 Ariz. at 345, 93 P.3d at 1061. Accordingly, there was no independent and adequate bar at the time of the direct appeal.

The State's brief devotes two sentences to the merits of the claim by arguing the only conflict Mr. Murray

alleges is that his counsel slept through trial. However, Mr. Murray's opening brief detailed not only how Mr. Dickey would fall asleep at the jail, but also how Mr. Dickey did nothing on the case until a month before trial. He showed a complete lack of interest in the case. The more Mr. Murray complained, the less Mr. Dickey responded. After attending a leading seminar on how to defend capital cases, counsel suddenly awoke and admitted to the court he had not prepared the case.

The trial court refused to appoint a death penalty qualified attorney as cocounsel and instead appointed fellow Deputy Public Defender Gerald Gavin who had received his law license six months earlier. Mr. Dickey allowed Mr. Gavin to conduct voir dire where his inexperience showed through. For example, when neither the court, nor the prosecutor had further questions for Juror McCall, Mr. Gavin raised the issue of the juror's religious scruples resulting in the court's dismissing the juror for cause. Vol. IV, Part 1, Tab A, at 81. Conversely, Juror Adams reported his mother was mugged. Not only did the present case concern attacking elderly

persons, but the press had been reporting the Murrays were wanted in Alabama for mugging an elderly lady and Mr. Adams admitted hearing news reports about the case on the way to the court house. Mr. Gavin never thought to challenge for cause and Mr. Adams sat on the jury. Id., Tab B, at 136.

The appointment of a second lawyer did not resolve the conflict or help in any way to prepare the case. For example, in February 1992, Mr. Dickey stated he still needed to interview many witnesses including critical eye witnesses. E.R. Vol. III, Part 1, Tab J, at 3. He repeated the point in April. Id. Part 2, Tab L, at 17-18. By the time of trial in May, counsel still had not interviewed them and never called them to testify even though their testimony would have identified others. The ongoing inactivity meant counsel went to trial without experts, without the critical eye witness, without even a story of what happened.

After his conviction and before sentencing, Mr. Murray asked the Court to fire his attorneys stating there was a conflict. E.R. Vol. V, Part 1, Tab C at 21;

see also E.R. Vol. VI, Part 1, Tab E, (several affidavits outlining the irreconcilable conflict). As a consequence of this conflict, Mr. Dickey never undertook mitigation for the sentencing hearing to learn about his client which ruined Mr. Murray's chance to avoid the death penalty. Mr. Dickey's never trying to resolve the conflict meant he never learned Mr. Murray was repeatedly sexually abused and sodomized by an uncle when Mr. Murray was only 8 years old. E.R. Vol. I, Part 1, Tab D. Instead of nurturing a relationship and discovering his client's brutal past, Mr. Dickey put on the "nice boy" defense to convince the sentencer that Mr. Murray is "kind to animals and doesn't commit crimes with his family looking." Ainsworth v. Woodford, 268 F.3d 868, 874 (9th Cir. 2004) (reversing for ineffective assistance of counsel in not showing defendant's disturbing childhood); see also Williams v. Taylor, 529 U.S. 362 (2000) (same).

Mr. Murray himself never would have thought to talk about what he kept hidden, covered by anger. Young boys who are raped become violent menaces to society, despite

themselves. During federal habeas proceedings, Mr. Murray retained Dr. David Lisak. A cursory google search of Dr. Lisak reveals he is the authority on how boys who are sexually abused grow up to be violent men.¹ The district court refused to fund Dr. Lisak's services. Dr. Lisak opines that trial counsel must identify the existence of the abuse issue and then seek professional services. E.R. Vol. I, Part 1, Tab D. Mr. Dickey never could do that because of the fractured relationship. Yet, this evidence would have been powerful mitigation. In light of the foregoing, the fractured relationship denied Mr. Murray assistance of counsel.

The evidence shows Mr. Murray has not sought to change his appellate counsel, his PCR counsel, or his habeas counsel. He is completely compliant in all requests. His conflict was only with trial counsel. The fractured relationship deserved an evidentiary hearing that he did not get. In light of the foregoing, this

¹ See, e.g., [Dr.Lisak,](http://www.umb.edu/academics/cla/dept/psychology/faculty/lisak.html)
[http://www.umb.edu/academics/cla/dept/psychology/facult](http://www.umb.edu/academics/cla/dept/psychology/faculty/lisak.html)
[y/lisak.html](http://www.umb.edu/academics/cla/dept/psychology/faculty/lisak.html)

court should remand this claim to the district court for a Torres hearing.

I. THERE WAS NO FAIR HEARING ON THE SLEEPING LAWYER SIXTH AMENDMENT VIOLATION

Mr. Murray will rely on his arguments set forth in his opening brief, as he respectfully submits the State's brief did not rebut those arguments.

J. COUNSEL WAS INEFFECTIVE IN NOT CALLING AN EYE WITNESS

The State's brief ignores Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999) and the facts detailed in Mr. Murray's brief outlining the prejudice of counsel's not calling the eye witness and his wife. Mr. Murray will rely on his arguments set forth in his opening brief, as he respectfully submits the State's brief did not rebut those arguments.

K. ROBERT MURRAY'S CLAIMS

Roger Murray incorporates by reference any and all claims made in Robert Murray's appeal.

CONCLUSION

WHEREFORE, for all the reasons noted herein, Murray respectfully requests that this Court reverse the district court.

CERTIFICATE OF COMPLIANCE

Certificate of Compliance to Fed. R. App. 32(a)(7) and Circuit Rule 32-1 for case number 08-99013.

I certify that this brief is being filed in a capital case pursuant to the type-volume limitation set forth at Circuit Rule 32-4 and is proportionately spaced, has a typeface of 14 points or more and contains 9732 words.

April 15, 2010
Date

s/
John E. Charland

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/
John E. Charland