

Thomas A. Gorman, Esq.
ABN. 011219
P.O. Box 1909
Sedona, Arizona, 86339-0001
(928) 863-0900
E-mail: lawyergorman@aol.com

Attorney for Petitioner

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

ROBERT STANLEY PAIGE,

Petitioner,

Case No. _____

vs.

DORA B. SCHRIRO, Director
of the Arizona Department of
Corrections,

**PETITION FOR WRIT OF
HABEAS CORPUS BY PERSON
IN STATE CUSTODY
PURSUANT TO 28 U.S.C. 2254**

Respondent,

and

TERRY GODDARD, Attorney
General of the State of Arizona,

(Non-Death Penalty Case)

Additional Respondent.

Petitioner, ROBERT STANLEY PAIGE, for his Petition for Writ of
Habeas Corpus, hereby alleges as follows:

A. JUDGMENT OF CONVICTION

1. The Yavapai County Superior Court entered the judgment of conviction being challenged.
2. The Yavapai County Superior Court case number was: CR-82002-0305.
3. On 12 February 2004, after 10 long, emotional days of trial, the jury advised the court that it was unable to reach a verdict. A note from the jury indicated that “[w]e are in a complete deadlock, have reviewed and discussed all information and see no resolve.” RT 2/12/04 p. 22. The trial court then declared a mistrial stating: “This has been a long and difficult trial. I know that you all worked very hard to reach a verdict and are disappointed that you weren’t able to reach a verdict in this case.” Id. At 22-23.

However, when the jury had begun to ask questions and it appeared that there may be a hung jury, plea negotiations were resumed. Eventually, after extensive negotiations, a plea was agreed upon. A change of plea hearing was held on 30 April 2004. A sentencing hearing was held on 15-16 July 2004. On 16 July 2004, after finding guilt, the trial court imposed a lengthy sentence. R.T. 7/16/04 at 54-56.

4. Mr. Paige was sentenced to an aggravated sentence of 15.0 years on count one and to the presumptive sentence of 5.0 years on count two, with count two to run consecutive to count one. Id. At 54-56.

In mitigation the court found: (a) a lack of any prior felony convictions; (b) Mr. Paige exhibited good character throughout his life prior to these offenses; (c) Mr. Paige has substantial support from family and friends; and (d) Mr. Paige's capacity to appreciate the wrongfulness of his conduct was significantly impaired by mental illness, but not so impaired as to constitute a defense to prosecution under A.R.S. 13-702 (D) (2). Id. At 55.

In aggravation the court found: (a) Mr. Paige had committed multiple completed acts of sexual intercourse, not just an attempt with a minor pursuant to A.R.S. 13-702 (C) (18); and (b) that the victim suffered physical and emotional harm pursuant to A.R.S. 13-702 (C) (9). Id. At 56-57.

The court also imposed special conditions regarding the sentencing: (a) Mr. Paige must register as a sex offender with the Sheriff pursuant to A.R.S. 13-3821; (b) Mr. Paige must submit to DNA testing for law enforcement purposes pursuant to A.R.S. 13-

281; and (c) Mr. Paige must submit to HIV testing pursuant to A.R.S. 13-3415. Id. At 57-58.

Mr. Paige was also ordered to pay restitution in the amount of \$6,640.96 to the victim's mother, Julia Hillsman; \$206.32 to the Victim Compensation Fund for Yavapai County; and \$300 to the Family Advocacy Unit. Id. At 58-59.

The remaining six counts in the indictment were dismissed on the state's motion. Id. At 59.

5. Count one was attempted sexual conduct with a minor and count two was sexual abuse with a minor, both class 3 felonies and dangerous crimes against children in the second degree. Id. At 54.
6. Mr. Paige originally pled not guilty. After a protracted and intense pre-trial and an emotional trial, which ended in a hung jury, Mr. Paige agreed to plead guilty to the two counts set forth above. R.T. 4/30/04.

In an addendum to the plea, Mr. Paige waived his right to have a jury determine any aggravating and/or mitigating factors pursuant to *Blakely v. Washington*, 124 S. Ct. 2531 (2004). R.T. 7/15/04 at 2-3.

7. The trial court entered the finding of guilt and imposed the sentence after a change of plea and sentencing hearing. Id.
8. Mr. Paige was questioned by the court during the change of plea hearing. R.T. 4/30/04 at 12-23. He was also briefly questioned at the start of the aggravation/mitigation hearing regarding the addendum to the written plea, which was required because of the United States Supreme Court decision *Blakely v. Washington*, 124 S. Ct. 2531 (2004), waiving Mr. Paige's right to a jury determination of aggravators and mitigators. RT 7/15/04 at 2-3.

Mr. Paige testified during the evidentiary hearing in the Post-Conviction Proceeding. R.T. 5/24/05 at 120-151.

B. APPEALS

There was no direct appeal to the Arizona Court of Appeals or a Petition of Review to the Arizona Supreme Court because, after the first jury trial, which hung, a plea was negotiated and accepted. In Arizona there is no right to appeal from a plea bargain; however, the defendant does have a right to a file a Petition for Post-Conviction Relief. Rule 32 of the Arizona Rules of Criminal Procedure.

C. FIRST STATE POST-CONVICTION PROCEEDINGS

A Notice of Post-Conviction was timely filed on 10 October 2004 in

the Yavapai County Superior Court. The Petition was filed on 22 December 2004. Hearings on the Petition were held on 24 May 2005 and 7 June 2005. The trial court denied the Post-Conviction on 5 August 2005.

Mr. Paige requested additional time to file a Petition for Review, which was granted, in order to obtain transcripts from the evidentiary hearing held on 24 May 2005 and 7 June 2005. The Notice Filing of Petition for Review with the Arizona Court of Appeals, Division One, was filed on 4 October 2005. At the same time, Mr. Paige filed the Petition for Review. The Court of Appeals summarily denied the Petition for Review on 4 August 2006.

Mr. Paige then filed a Petition for Review to the Arizona Supreme Court on 25 August 2006. That request was summarily denied on November 21, 2006.

D. FEDERAL PROCEEDINGS

This is the first federal Petition for Writ of Habeas Corpus filed challenging this conviction.

E. PENDING PROCEEDINGS

There are no other appeals, petitions, applications, motions, or other actions pending regarding the conviction that is being challenged in this Petition.

F. REPRESENTATION

1. At the trial, change of plea and sentencing, Mr. Paige was represented by Bruce Griffen. Mr. Griffen was retained.
2. David Goldberg represented Mr. Paige on his first and only Petition for Post-Conviction Relief and in the Petitions for Review in the Arizona Appellate Court proceedings. Mr. Goldberg was retained.

G. OTHER SENTENCINGS

Mr. Paige has no other sentences to serve after the completion of the sentences challenged in these proceedings. Mr. Paige had no prior criminal convictions and has had none since his arrest and conviction in this pending action.

H. CLAIMS FOR RELIEF

The claims for relief are discussed in the attached Memorandum of Points and Authorities, which is incorporated herein. Mr. Paige is raising two separate claims for relief.

The first is a challenge to the voluntariness of his plea based on three factors: (1) Mr. Paige's reliance on the assurances made by the trial court regarding the sentence to be imposed; (2) Mr. Paige's mental condition based on the fact that he was over medicated with prescribed drugs during

the plea negotiations and during the change of plea hearing; and (3) Mr. Paige's absolute reliance on his lawyer, who provided erroneous advice. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Hill v. Lockhart*, 474 U.S. 52 (1985).

The second is a challenge to the competency/effectiveness of Mr. Griffen, Mr. Paige's defense counsel, during the plea negotiations, plea hearing and the sentencing. *Strickland v. Washington*, 466 U.S. 688 (1984); *Fontaine v. U.S.*, 411 U.S. 213 (1973); *Blackledge v. Allison*, 431 U.S. 63 (1973).

WHEREFORE, Mr. Paige, through his counsel, respectfully prays that this Court will grant him the relief to which he is entitled.

RESPECTFULLY SUBMITTED THIS 4th day of September 2007.

s/Thomas A. Gorman
Thomas A. Gorman
Attorney for Mr. Paige

TABLE OF CONTENTS

	Page
I. PROCEDURAL HISTORY AND RELEVANT FACTS	10
A. INTRODUCTION	10
B. PROCEDURAL HISTORY	11
C. RELEVANT FACTS	15
II. JURISDICTIONAL REQUIREMENTS	23
III. EXHAUSTION	26
IV. CLAIMS FOR RELIEF	28
A. MR. PAIGE’S PLEA WAS NOT VOLUNTARY	28
B. DEFENSE COUNSEL WAS INEFFECTIVE	36
V. REQUEST FOR AN EVIDENTIARY HEARING	41
VI. THE PRESUMPTION OF CORRECTNESS PURSUANT TO 28 U.S.C. 2254 (E) (1) DOES NOT APPLY TO THIS CASE	42
VII. THIS COURT SHOULD REQUIRE THE ARIZONA COURTS OR THE STATE TO TRANSFER THEIR FILES	44
VIII. CONCLUSION	46
IX. RELIEF REQUESTED	46

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF THE WRIT OF HABEAS CORPUS**

I. PROCEDURAL HISTORY AND RELEVANT FACTS

A. INTRODUCTION

This case is not the “normal” or usual case that is brought before this Court in a Writ for Habeas Corpus proceeding. Robert Stanley Paige, the Petitioner, is 54 years old. He was 52 years old when he accepted the plea and was sentenced. He has no prior felony convictions. He has had no criminal complaints or even serious problems since his incarceration. Obviously, Mr. Paige is not the “usual” criminal defendant. However, Mr. Paige does suffer from serious mental illness. R.T. 7/16/04 at 55; 5/24/05 at 9, 38, 56, 120, 121, 152; 6/7/05 at 11, 12, 21; See also, Rule 11 pleadings and mental health expert reports.

Prior to his arrest, Mr. Paige had been treated by several different mental health professionals. *Id.* In fact, he was arrested while he was an in-patient in a treatment facility in Maricopa County. R.T. 5/24/05 at 152-53; 6/7/05 at 11. Mr. Paige was prescribed and taking several different medications to relieve his anxiety and to keep him calm during the trial, during the original plea negotiations, and during the sentencing hearing. R.T. 5/24/05 at 121; 6/7/05 at 10, 14.

Mr. Paige entered his plea based upon his understanding that he would receive approximately 5 years on the first count and probation on the second count. R.T. 5/24/05 at 127, 131, 136, 145, 157. This understanding was based on the assurances he unconditionally believed had been made by the trial court. Id. The information he relied came from his counsel. R.T. 5/24/05 at 58, 65, 72, 80, 103, 125, 127, 157.

Mr. Paige was “shocked” when the sentence was imposed. Id. At 56, 85, 102, 104, 115, 131, 143, 144, 150, 152.

Under the circumstances of this case, the trial court, the state and the defense all failed to make the proper inquiries to determine whether Mr. Paige was in any condition to make a knowing, intelligent and voluntary decision as to whether he understood the plea offer and could make an informed decision as to whether to accept the plea offer.

Mr. Paige was denied his right to effective assistance of counsel, due process, and equal protection of the law. United States Constitution, Amendments 5, 6, 8 and 14; Arizona Constitution, Article 2, Sections 15 and 24; *Strickland v. Washington*, 466 U.S. 668 (1984); *Boykin v. Alabama*, 395 U.S. 238 (1969).

B. PROCEDURAL HISTORY

An indictment was issued on 6 June 2002, alleging that Robert

Stanley Paige, on or about 23 April to 23 May 2002, was sexually involved with a minor, C.B., by Yavapai County. Mr. Paige was charged with 8 counts of dangerous crimes against children in the first degree. See indictment.

The mother of the victim, Julia Hillsman, reported the alleged misconduct. See pre-sentence report. Within four days of Mr. Paige's indictment being filed and his arrest a request for a Rule 11 examination was filed. A competency examination pursuant to Rule 11 of the Arizona Rules of Criminal Procedure was required because Mr. Paige had had a mental breakdown and was prescribed and taking psychotropic drugs. This occurred in spring 2002. R.T. 7/15/04 at 63, 68, 69, 72, 72; 5/24/05 at 152; 6/7/05 at 11. At the time of his arrest, Mr. Paige had been admitted into a treatment center in Maricopa County. Id.

Mr. Paige originally pled not-guilty. Numerous plea offers were suggested by the state and rejected by Mr. Paige. The primary consideration in rejecting these plea offers was that Mr. Paige was seriously mentally ill and he, and his family, wanted to make sure that he could receive mental health treatment, medications, and be able to function. R.T. 5/24/05 at 124-26, 155. Neither Mr. Paige nor his supporters believed that life imprisonment was the answer in this case. Id.

Mr. Paige was, at the time of the arrest and pre-trial proceedings, 52 years old. R.T. 4/30/04 at 12. Therefore, since a plea offer was not forthcoming which resulted in approximately five years and probation, in order for Mr. Paige to get treatment, and after an extensive and protracted pre-trial period, which involved, in addition to the usual motion work, serious mental health evaluations, supplemental disclosure and continuing plea negotiations, Mr. Paige went to trial before a jury.

The jury trial began on 14 January 2004. Mr. Paige's defense was guilty but insane. After 10 long and emotional days of trial, which took over a month, the trial court declared that the jury was hung on 12 February 2004. R.T. 2/12/04 at 22-23. Plea negotiations resumed. R.T. 5/24/05 at 66. Mr. Paige again refused to consider entering a plea with any extensive prison time. He felt there was no benefit in him serving the rest of his life in prison, with little, if any, mental health treatment. The only realistic plea offer, in Mr. Paige's mind, was one that would result in a short prison term followed by probation. Id. At 69, 124-26, 155. For this reason, Mr. Paige rejected all of the pre-trial and post-trial plea offers that would have the potential for a sentence of greater than approximately five years. Id.

Judges Mackey, and later Judge Kiger, participated in the plea negotiations, usually in off of the record conferences. The judges indicated

that they would work with Mr. Paige and an “appropriate” sentence would be imposed. Id. At 12, 17, 20, 23, 25, 26, 27, 64, 65, 75, 83, 111; 6/7/05 at 35. Based on these assurances, which were conveyed to Mr. Paige by his attorney, Mr. Paige entered into the final plea offer: He believed that he would receive between 2.5 and 7.5 years on the first count followed by lifetime probation on the second count. Even though he was told that this was the minimum, that there were no “guarantees”, and that the trial court had the “discretion” to sentence him to the maximum, Mr. Paige was repeatedly told that the trial judge had “promised” (off of the record) that he would impose a 5 year sentence on count one and probation on count two. R.T. 5/24/05 at 76, 77, 80, 81, 82, 103, 127, 145, 151, 157. Mr. Paige was told that the language regarding possible sentences was merely a formality and generic. Id.

During the plea hearing the court addressed concerns that the victim’s mother expressed. R.T. 4/30/04 at 5-11. The victim’s mother originally wanted to make sure that life-time probation was going to be ordered. Once she was informed that may not mean exactly what she thought it meant the victim’s mother then expressed a desire for a lengthy prison term. Id.; 6/7/05 at 48-49, 56, 62, 67-68.

During the plea, when being addressed by the trial court, Mr. Paige started to inquire about certain “intentions” that he had been promised, but was quickly interrupted by his counsel to, basically, follow the script or else his counsel would not continue to represent him and the plea would not be accepted. R.T. 7/16/04 at 55-56; 5/24/05 at 130, 135, 136, 139.

After all was said and done, Mr. Paige was ordered to serve 5.0 years on the first count and 15.0 years on the second count, to run consecutively. R.T. 7/16/04 p. 54-56. He was shocked!

C. RELEVANT FACTS

A quick review of the pre-sentence report and the trial/plea transcripts reveal that this is not the usual criminal case. This case does not involve a young male. This case does not involve gang related matters. This case does not involve illegal drugs or alcohol. Instead, this case involves serious mental health issues, a 52 year old man with no prior criminal record, and proscribed psychotropic drugs.

With that introduction, the facts are:

From the beginning of this criminal case, Mr. Paige, who at the time was 52 years old, would have rather been committed to the state hospital than to plead guilty to anything that would result in his spending the remainder of his life in prison. Mr. Paige suffered from serious mental

illness and had pled guilty but insane. R.T. 5/24/05 at 9, 38, 53-56, 93-94, 123, 125, 155. As a result, he rejected several offers before and after his trial that would have the potential for a sentence of greater than five years incarceration. Id. at 53-54, 120-26.

On 12 February 2004 the trial court declared a mistrial after the jury was unable to reach a verdict following a trial which took a month to complete. R.T. 2/12/04 at 22-23. A second jury trial was scheduled to begin on 7 April 2004. Following the mistrial the parties engaged in additional, time-consuming, frantic oral and written plea negotiations both on and off the record with the trial judge, Judge David Mackey candidly admitted that he often held off of the record discussions with counsel. R.T. 5/24/05 at 14, 15, 16, 17, 19, 23, 24, 25, 26, 27, 32, 40, 45. In fact, if the defendant was not present, he admitted, that there would be no court reporter. Id. At 8. Judge Mackey also admitted that he considered this a complex case – a case which required a lot of judicial and other resources. Id. At 10. A case which involved serious mental health issues. Id. At 9, 38, 39.

It is also important to note that Judge Mackey, prior to being elected to the bench, worked in the Yavapai County Attorney's Office. Id at 34, 35. His caseload was 90 % child molestation cases. Id. In fact, the paralegal

assigned to work with prosecutor Mackey worked on this case with prosecutor Thurston. Id at 35.

During the post-trial negotiations, which actually started during the jury's deliberations because of the jury's insightful questions, Id. At 66, Judge Mackey indicated to defense counsel several times, but not in Mr. Paige's presence, that if Mr. Paige entered the plea agreement the appropriate sentence would be prison between 2.5 and 7.5 years on the first count followed by lifetime probation on the second count. Id. At 67-83. Judge Mackey, according to Mr. Griffen, invited the dialogue. Id. At 64.

Finally, at the eleventh hour, Mr. Paige agreed and signed the plea offer. Id. At 80, 83, 96, 97, 99, 103, 125, 126, 127, 133. Mr. Griffen testified that there was no way that Mr. Paige would have accepted the plea except for the fact the he, defense counsel, convinced Mr. Paige that the Judge had told him, counsel, that he, the court, would impose a 5 year sentence on count one and probation on count two. Counsel explained to Mr. Paige that the judge had discretion and that the wording in the plea, allowing much greater sentences, was generic and included for formality reasons. Id. At 147.

1. The defendant refused to accept any plea if it was for more than 7.5 years. Id. At 54.

2. The defendant totally relied on defense counsel. Id. At 58.
3. The defendant would not make decisions on his own. Id. At 59.
4. Defense counsel relied on the judge and told the defendant that to rely on his (counsel's) understanding of the judge's representation. Id. At 72.
5. The language in the plea was "generic". Id. At 74.
6. Counsel strongly recommended that the defendant accept the plea. Id. At 80.
7. The defendant would not have accepted the plea except for the fact that counsel said to. Id. At 80.
8. Counsel believed and trusted the judge. Id. At 81-82, 97.
9. Defendant believed counsel. Id. At 96.
10. Counsel was "absolutely convinced" that he had an agreement regarding the sentencing and expressed that to the defendant. Id. At 102.
11. The defendant relied on counsel's beliefs. Id. At 103.
12. The process allowed for the judge to have discretion. The participants (counsel and court) were not antagonistic. Id. At 111-112.

Even though the off of the record discussions were never transcribed

in order to preserve them and to make them available for review and even though Judge Mackey testified he did not recall the specifics (Id. At 7, 12, 13, 15, 17, 18, 23, 26, 27, 32, 44), it is without dispute that defense counsel advised his client that Judge Mackey had stated on several questions during non-transcribed conversations what the sentence would be. Id.

Q.: And you stated there in Paragraph A everything Judge Mackey indicated, both directly and indirectly conveyed that under such a plea configuration, a probationary disposition would occur?

B. Yeah. He was ---that's my opinion, and it's based on the dialogue, the words he chose, the way he emphasized it, the effort he put towards the State to make that plea that would give probation availability, and I wouldn't have conveyed it that way if that's not exactly the way it was expressed and the way that I took it.

Q.: Is there anything specific that you can remember at this point in time that Judge Mackey would have said off the record that led you to this belief?

A.: Again, and I referenced it earlier, but the constant theme was, why isn't that a fair disposition? Why isn't a count two, some prison followed by probation available deal where I can give him up to the maximum term in the first count, year in the county jail on the second count with consecutive probation? Why isn't that fair? Why isn't that enough? Why isn't that an offer that the State can't make in this case? We made in other cases. Why can't we do it here?

Id. At 73-74.

And, as indicated above, defense counsel sincerely believes that the defendant would not have accepted this plea offer if it was not for counsel's representations:

Q.: Did you tell him, in discussing this with Judge Mackey, that every indi-every indication was, he was going to wind up somewhere between five and seven and a half followed by lifetime?

A.: Yeah. I believe that. I told him that, and I'm telling you right now, but for that representation, he wouldn't have done it. I made that representation to every family member of Rob Paige that I talked to, and he knows that.

Id. At 80.

Another important element or fact to be considered can be gleaned from the transcript of the change of plea hearing held on 30 April 2004. The judge, as usual, asked Mr. Paige whether any promises were made to get him to plead guilty. Mr. Paige, obviously, was confused by this question because he believed that he had been promised 5 years in prison followed by probation. Mr. Paige, therefore, started to ask the Judge and Mr. Griffen about this:

Q.: Is this the complete agreement with respect to what's going to happen to you?

A.: I assume so. There was some intentions that weren't-

4/30/04 at 13.

Mr. Griffen then jumped in and whispered to the defendant that if he, the defendant, did not answer “right” he would not continue to represent him. RT 5/24/05 at 135, 139, 148. Then the following occurred on the record:

Q.: That plea agreement sets forth all the agreements that you have about what’s going to happen to you?

A.: (Nodding)

Q.: Yes?

A.: Yes

4/30/04 at 14. See also, RT 5/24/05 at 138-139.

Another factor that was discussed is crucial to this review: Mr. Paige’s mental illness and the medications that he was professionally proscribed and regularly taking.

Mr. Paige was treated by several different mental health professionals and was taking the following prescribed medications during the 2 years following his initial mental break down: Paxil-30 mg. per day and Ativan/Lorazepam (an anti-anxiety medication) as needed in ½ mg. doses not to exceed 5 mg. per month. He was also prescribed Remeren. R.T. 6/7/05. At 14.

Ordinarily Mr. Paige took no more than ½ mg. when taking the Lorazepam, which would not significantly affect Mr. Paige’s thought

processes or ability to make independent decisions. However, he would not have driven a vehicle even after taking that amount of medication. Additionally, he had never taken more than 1 mg. within a 24 hour period. See exhibits to PCR.

Nevertheless, on the day of the change of plea, 30 April 2004, Mr. Paige was extremely nervous, and believed that the sentence was “locked up”, RT 5/24/05 at 135-136, so he took two pills before going to the hearing. Id. He took a third pill at the hearing. Id. At 137. He testified that he was unconscious for much of the time. In fact, his counsel had to wake him up at the defense table to sign the plea. Id. At 138.

Dr. Julia Ann Williams, M.D., testified that two of the medications, Paxil and Remeren were antidepressants and the third, Ativan, was an anti-anxiety medication. RT 6/7/05 at 14. Dr. Williams explained that these medications helped Mr. Paige approve over time, however, he became passive and relied on others. Id. At 16. Dr. Williams, who attended the change of plea, testified that Mr. Paige was very anxious at the time. Id. At 17. She further explained that the amount of Antivan/Lorazepam that Mr. Paige took that day was 3 times the normal dosage. Id. At 18. This amount would have made Mr. Paige sleepy and confused, but would have calmed his

anxiety. *Id.* At 19. It also would have had the affect of making Mr. Paige agreeable and passive. *Id.* At 20.

II. JURISDICTIONAL REQUIREMENTS

Mr. Paige is presently incarcerated in the Arizona State Department of Corrections serving a sentence of 20 years. A state prisoner “whose claim was adjudicated on the merits in state court is not entitled to relief in federal court unless he meets the requirements set forth in 28 U.S.C. 2254 (d).” *Price v. Vincent*, 123 S. Ct. 1848, 1852 (2003). A state prisoner is entitled to federal relief when “he can demonstrate that the state court’s adjudication of his 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 of the evidence presented in the state court proceeding. *Id.* (quoting 28 U.S.C. 2254 (d) (1), 1994 ed. Supp. II.)

A state court’s decision “is contrary to ...clearly established federal law”,... “if the state court applies a rule that contradicts the governing law set forth” in a controlling Supreme Court case, or “if the state court confronts facts that are materially indistinguishable from a relevant Supreme

Court precedent and arrives at a result opposite” to the holding. *Williams v. Taylor*, 529 U.S. 362, 405, 412-413 (2000) (Justice O’Connor).

As for “unreasonable application”, a federal court may grant relief “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the petitioner’s case.” *Id.*; *Ramdass v. Angelone*, 530 U.S.156 (2000); *Busch v. Woodford*, No. 06-16154 (9th Cir. filed 8/29/07). When a claim falls under the “unreasonable application” clause, the state court’s application of the Supreme Court precedent must be “objectively unreasonable,” not just incorrect. *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Under *Williams v. Taylor*, 529 U.S. 420 (2000), the emphasis of the federal court’s inquiry is on the nature and quality of the state court decision.

In this case, both of the claims raised were decided on their merits and not on procedural grounds. The trial court issued an opinion identifying and articulating the legal principles governing these claims and explaining the reasons for the denial of the claims. However, Mr. Paige contends that he did not receive a full and fair hearing, that the PCR court misunderstood the governing legal principles and incorrectly and unreasonably determined that the governing precedent did not apply or that the PCR court unreasonably applied the law.

Mr. Paige is raising fundamental federal constitutional and statutory claims. Mr. Paige contends his constitutional rights have been violated. These violations have resulted in his unconstitutional incarceration and a miscarriage of justice.

External factors occurred and exist in this case which prohibited Mr. Paige from receiving a corrective review process that comports with due process. The prosecutor and the trial court were noticed as defense witnesses at the Rule 32 hearing. Therefore, defense counsel requested that they recuse themselves. The trial judge was removed and he testified at the hearing. However, even though the defense had requested a “neutral” court, the matter was re-assigned in Yavapai County; therefore, a colleague of the judge’s presided. The prosecutor was not removed. Mr. Thurston represented the state during the post-conviction just as he had in the trial and plea negotiations.

There is irreparable injury because of the failure to provide an adequate, constitutional review process to Mr. Paige that meets due process requirements. Arizona post-conviction proceedings are critical. *Isley v. ADOC*, 2004 WL 2050123 (9th Cir. 2004); *Murray v. Giarratano*, 492 U.S. 1 (1989). They are the only available avenue of review for a defendant after a change of plea. Arizona Rules of Criminal Procedure, Rule 32.

III. EXHAUSTION

Before a federal court may review a petitioner's claims on the merits a petitioner must present in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement". *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509, 520 (1982). To properly exhaust state remedies a petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). A petitioner must also seek discretionary review with a state's highest court where such review "is part of the [state's] ordinary appellate review procedure[.]" *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

A claim is "fairly presented" if the petitioner has described the operative facts and the legal theories on which the federal habeas claims are based. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Conner*, 404 U.S. 270, 277-78 (1971); 28 U.S.C. 2254 (b) (1) (A). Resolving whether a petitioner has fairly presented his claim(s) for federal review is an intrinsically federal issue which must be determined by the federal court. *Wylde v. Hundley*, 69 F.3d 247, 251 (8th Cir. 1995), *cert. den.* 517 U.S. 1172 (1996); *Harris v. Champion*, 15 F.3d 1538, 1556 (10th Cir. 1994).

To properly exhaust, a petitioner must present the operative facts and the asserted constitutional principle and United States Supreme Court law. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). However, if the state court *sua sponte* reaches the merits of the federal claim the claim will not be procedurally barred. See, *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). The federal courts will also consider claims exhausted or not procedurally defaulted if cause and prejudice or a fundamental miscarriage of justice can be established. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman v. Thompson*, 501 U.S. 722, 753, n. 1 (1991); *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

Cause usually involves some external factor that impedes the petitioner from complying with the state rules. *Coleman, supra* at 753. Prejudice is actual harm resulting from the alleged constitutional error. *Sawyer*, 505 U.S. at 339.

The fundamental miscarriage of justice exception must be shown by clear and convincing evidence. *Id.* This exception is commonly referred to as the “actual innocence” exception. However, the actual innocence of the crime exception encompasses a slightly different standard. A petitioner must show that the constitutional violation has probably resulted in the conviction of someone actually innocent. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

In this case, Mr. Paige raised the issue of whether his plea was voluntary, intelligent and knowingly made pursuant to *Boykin v. Alabama*, 359 U.S. 238, 242 (1969), in his Post-Conviction pleadings and in his Petitions for Review to both the Arizona Court of Appeals and the Arizona Supreme Court. He also relied on and referred the Arizona courts to *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), to explain that the standard is not merely looking at whether the defendant received a benefit from the plea bargain, but whether the choice to plead guilty is based upon a voluntary and intelligent choice among alternative courses of action.

Mr. Paige also raised as a separate and independent issue in the Post-Conviction proceedings a claim of ineffective assistant of counsel relying on *Strickland v. Washington*, 466 U.S. 688 (1984). This issue was re-raised in the Petitions for Review to both appellate courts.

The Post-Conviction pleadings, exhibits, transcripts and all other relevant materials were made part of the appellate courts files; therefore, both of the claims have been fairly presented to the state appellate court and are exhausted.

IV. CLAIMS FOR RELIEF

A. MR. PAIGE'S PLEA WAS NOT VOLUNTARY

1. INTRODUCTION

Mr. Paige filed his petition for post conviction relief relying on both Arizona and United States Supreme Court law. Mr. Paige reminded the Arizona courts that the Rules of Criminal Procedure provide that a trial court has the discretion to allow a defendant to withdraw a plea of guilty when necessary to correct a manifest injustice. See Rules of Criminal Procedure, Rule 17.5. The Arizona courts have also opined that a trial court's discretion should be liberally exercised in favor of permitting withdrawal of a plea where there is any showing that justice will be served. *State v. Gibbs*, 6 Ariz. App. 600, 602, 435 P.2d 729 (1967). Any doubts should be in favor of withdrawing the plea. *State v. Wilson*, 95 Ariz. 372, 373, 390 P.2d 903 (1964). And, in the interests of justice, a trial court has the discretion to set aside a plea, even if the sentence imposed was provided for in the plea. *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990).

The Arizona rules and case law expressly rely on well established United States Supreme Court law. See, *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Moreover, Mr. Paige provided both *Boykin* and *Hill* as support for his contention in the petition and in the request for appellate review. Therefore, both the state and the courts were aware of the United States Supreme Court law and, presumably (since the courts are presumed to know the law) relied on it, even though

their conclusions were contrary to and unreasonable under the United States Supreme Court law and even though the appellate courts issued summary denials.

Mr. Paige's Petition for Review to the Arizona Court of Appeals and to the Arizona Supreme Court incorporated the Petition for Post-Conviction Relief pleadings and both referred to *Boykin* and *Hill*; therefore, this issue is exhausted and this issue has been fairly presented to the state courts. However, this issue did not receive a full and fair hearing by the state courts; therefore, this Court should find this issue exhausted, schedule an evidentiary hearing and refuse to presume that the state findings are correct.

2. SUMMARY OF THE ISSUE

Mr. Paige did not want to enter a plea that would place him in prison for life. He rejected numerous pleas, both before, during and after the first trial, which resulted in a hung jury. Mr. Paige refused to even consider any plea that would impose more than 7.5 years: no double digits!

Three factors convinced Mr. Paige to accept the plea offer and not proceed to a second trial. The first was his medicated state of mind (his defense was guilty but insane and he was being medicated with three different psychotropic drugs). The second was his belief that the Judge had agreed to impose a sentence of 5 years on count one and that he would

receive life time probation on count two. And, the third was that he completely trusted and relied on his counsel's avowals.

Mr. Paige anguished over signing the plea because of the language that was included discussing the possibility of prison time on both counts. However, he was re-assured on numerous occasions that the language was a formality; that the language was merely generic; and that the court had advised counsel what sentence would be imposed. Counsel further convinced Mr. Paige that the sentence was "locked up".

When Mr. Paige attempted to inquire about the judge's questions, in his confused state, he was stopped and reminded that he had to answer the questions "right" or the deal would be withdrawn. The trial court failed to make any further inquiry regarding Mr. Paige's concerns, what he meant by other certain "intentions", or what counsel had conferred with Mr. Paige about, which clearly prevented Mr. Paige from continuing with his request for an explanation.

Mr. Paige was 52 years old. Mr. Paige had never been in the criminal system before. Mr. Paige was heavily medicated. Mr. Paige was anxious, scared, and overwhelmed. Mr. Paige suffered from serious mental illness.

The record reflects that the prosecutor, the defense and the court all wanted to resolve this case. The record reflects that a deal was made, but

only after extensive, pro-longed negotiations. The record also reflects that the victim's family was originally only concerned about whether Mr. Paige would receive life time probation, not a long prison sentence. However, after the victim's family was educated about probation, they then wanted assurances of a long prison sentence.

Yavapai County elects their judges. Yavapai County is a small county.

Prior to the post-conviction hearings, defense counsel requested that the prosecutor recuse himself since he had been a participant and that the case be transferred to a neutral court. Judge Mackey testified; therefore, the case was transferred to another Yavapai County Superior Court. However, that did not necessarily make it a "neutral" court. The prosecutor remained on the case.

Petition for Post-Conviction Relief claims are decided by a preponderance of the evidence. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In this case, the trial court denied relief because it relied upon a more stringent burden of proof (substantial evidence). Therefore, well established United States Supreme Court law was incorrectly applied and the decision in this case is contrary to the governing principles. Additionally, the governing principles were unreasonably applied.

3. THE LEGAL ARGUMENT

A plea resting in any part upon an improper inducement or promise is involuntary and void. Due process requires that any ambiguity be construed against the government. *Brown v. Pool*, 337 F.3d 1155, 1159-60 (9th Cir. 2003); *U.S. v. Nyhuis*, 8 F.3d 731, 741-2 (11th Cir. 1993) (courts will not permit government to prevail on formalistic, literal interpretation of plea language.)

Due Process also requires that a plea be reviewed in light of a defendant's reasonable understanding of the agreement. *U.S. v. Baker*, 25 F.3d 1452, 1459 (9th Cir. 1994); *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 168 (2d Cir. 2000) (judge's oral communication was ambiguous and youthful offender would not have understood); *U.S. v. Greenwood*, 812 F.2d 632, 635-36 (10th Cir. 1987) (defendant reasonably understood prosecutor's promise).

It is fundamental that a plea induced by extra-judicial promises or threats automatically deprives such a plea of any character of a voluntary act. *CF. U.S. v. Cortez*, 973 F.2d 764 (9th Cir. 1992) (district court's misrepresentations upon which defendant relied rendered plea involuntary.)

The test for determining whether a plea is valid is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)

(quoting *Alford*, 400 U.S. at 31); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). “[T]he record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and knowingly.” *Brady v. United States*, 397 U.S. 642, 747 n.4 (1970). A guilty plea is coerced where a defendant is “induced by promises or threats which deprive [the plea] of the nature of a voluntary act.” *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986). To determine the voluntariness of the plea, courts look to the totality of the circumstances, examining both the defendant’s “subjective state of mind” and the “constitutional acceptability of the external forces inducing the guilty plea.” *Id.*

In this case, the testimony at the post conviction hearing, even with that hearing being held in Yavapai County and with the same prosecutor representing the state, supports that judicial inferences and comments affected Mr. Paige’s decision to accept this plea.

Mr. Paige’s legally prescribed medications, which he had taken more of than was prescribed at the time of the hearing, added to Mr. Paige’s inability to comprehend what was being said, interfered with his ability to think and make decisions and prevented him from realizing that he did not fully understand the plea and the discretion that the trial court had in the imposition of a sentence.

Mr. Paige was represented by a retained lawyer with over 25 years of experience. Mr. Paige, rightfully, relied on his counsel's advice. His counsel erroneously believed that the trial court was committed to imposing a sentence of 5 years on count one and life time probation on count two; therefore, counsel erroneously advised Mr. Paige and misled Mr. Paige.

A criminal defendant who has not received reasonably effective advice from his counsel cannot be bound by a guilty plea since his plea is not voluntary. *U.S. v. Ruiz*, 241 F.3d 1157, 1165 (9th Cir. 2001). “[D]efendants cannot be left to the mercies of incompetent counsel, and [] judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.” *McMan v. Richardson*, 397 U.S. 759, 771 (1970).

Judge Mackey's statements to counsel during closed door negotiations reasonably led counsel to believe that the court was indicating it would sentence Mr. Paige to lifetime probation on the second count. Notwithstanding statements during the change of plea hearing, the PCR record supports concluding that Judge Mackey inappropriately led defense counsel to believe he would grant Mr. Paige probation and not a lengthy prison term.

While a “good faith representation of counsel” regarding a projected estimate of the sentence lighter than actually imposed under a plea agreement will generally not invalidate a guilty plea, purposeful misleading and inaccurate statements by counsel mandate withdrawal of the plea. *Dickerson v. Vaughn*, 90 F.3d 87, 96 (3rd Cir. 1996); *State v. Williams*, 107 Ariz. 421, 489 P.2d 231 (1971).

In this case, there is no prejudice to the state by allowing Mr. Paige to withdraw his plea. The state is free to reinstate the original charges. *Ricketts v. Adamson*, 483 U.S. 1, 9-12 (1987). The state would have been allowed to revoke the plea if Mr. Paige had breached any condition, even after he had been sentenced. *Id.*

If Mr. Paige demonstrates that the government breached the agreement, this Court may allow Mr. Paige to withdraw his plea, alter the sentence, or order specific performance of the agreement. *U.S. v. Carrero*, 77 F.3d 11, 11-12 (1st Cir. 1996). This Court may also remand the case to the state to devise the proper remedy. *Santobello v. N.Y.*, 404 U.S. 257, 262-63 (1971).

B. DEFENSE COUNSEL WAS INEFFECTIVE

1. INTRODUCTION

Mr. Paige relied on well established United States Supreme Court law

in his state pleadings. *Strickland v. Washington*, 466 U.S. 688 (1984); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Blackledge v. Allison*, 431 U.S. 63 (1977). Mr. Paige also raised this argument in the appellate courts; therefore, this claim is exhausted. However, Mr. Paige contends that he did not receive a full and fair hearing in the state courts; therefore, this Court should schedule an evidentiary hearing and refuse to presume that the state findings are correct.

2. SUMMARY OF THE ARGUMENT

Mr. Paige did not receive reasonably effective advice from Mr. Griffen when he was deciding whether to accept the plea offer. Mr. Paige relied on the assurances that Mr. Griffen made to him regarding Mr. Griffen's understanding of the court's agreement to impose a sentence of 5 years on count one and life time probation on count two. Based on these assurances Mr. Paige agreed to accept the plea offer.

Mr. Paige intellectually knew, and inquired about, the language in the plea that referred to the court's discretion in sentencing and the possibility of lengthy sentences. However, he was re-assured that the language was merely a formality, the plea needed to indicate the court had discretion, and that the language was generic.

3. THE LEGAL ARGUMENT

Ineffective assistance of counsel is very well established and understood. *Strickland v. Washington*, 466 U.S. 688 (1984). It is well known that two prongs exist: the first that counsel was deficient in his/her performance and the second that a defendant suffered prejudice. *Id.* To show deficiency a petitioner must demonstrate that the defense attorney's representation "fell below an objective standard of reasonableness". *Id.* To show prejudice the petitioner must demonstrate that because of counsel's deficient performance that there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* In a guilty-plea case, like this one, "in order to satisfy the 'prejudice' requirement the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

"A defendant who has detrimentally relied on erroneous legal advice has been prejudiced because the plea could not have been knowing and voluntary and thus has not made an informed decision." *State v. Ysea*, 191 Ariz. 372, 377, 956 P.2d 499, 504 (1998).

Although a defendant "may not ordinarily repudiate statements made to the sentencing judge" when the plea is entered, a guilty plea should not be

“uniformly invulnerable to subsequent challenge....” *Fontaine v. U.S.*, 411 U.S. 213, 215 (1973). A defendant is not foreclosed by statements made to the judge at the change of plea if he offers a reasonable explanation regarding the off the record statements. *Edwards v. Garrison*, 529 F.2d 1374, 1377 (4th Cir. 1975).

In *Blackledge v. Allison*, 431 U.S. 63, 74 (1973), cited by both the defense and the state in the state proceedings, the United States Supreme Court held that notwithstanding the defendant’s statement during the plea proceeding that his lawyer had made no promises to him regarding the sentence to influence his guilty plea, he was entitled to an evidentiary hearing to “determine whether the defendant’s representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentations by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.” *Id.* See also, *Busch v. Woodford*, No. 06-16154 (9th Cir. Filed 8/29/07).

The record in this case is overwhelming. The testimony of the trial judge, defense counsel and the defendant clearly demonstrate constitutional insufficiencies. There is no question that Mr. Paige totally relied on his defense counsel and believed that, no matter what was written or said, he was to receive a 5 year sentence with probation.

Under the totality of the circumstances, it is evident that a miscarriage of justice has occurred in this case. *Lindstadt v. Keane*, 239 F.3d 191 (2d. Cir. 2001).

The evidence in the record indicates that (1) Judge Mackey did indicate to defense counsel that he would impose probation on the second count; (2) that Mr. Griffen trusted the judge; (3) that Mr. Griffen had never seen a judge go back on his word of what he would do in 25 years of practice (R.T. 5/24/05 at 72-74, 80-81, 147-48, 155-56, 159); and (4) that Mr. Griffen strongly urged Mr. Paige to accept the plea based on these assurances.

The record reflects that Mr. Griffen used his position of influence and greatly understated Mr. Paige's risk under the plea agreement and what sentence he would receive or could receive. Mr. Griffen failed to explain that Mr. Paige faced the possibility of receiving up to 22 years in prison under the plea agreement or that it was even a possibility.

The trial court misapplied the law regarding ineffective assistance of counsel by failing to follow the United States Supreme Court's contrary admonitions that forbid a defense lawyer from exerting undue influence and making unrealistic projections about the outcome of a guilty plea to induce their client's to waive their rights and plead guilty. The trial court misapplied

the standard of review. Instead of using a preponderance of the evidence standard, the trial court used a clear and convincing evidence standard. And, the trial court relied on one statement Mr. Griffen made that he had told his client that there were no “guarantees” regarding the sentence and overlooked the overwhelming evidence that Mr. Griffen had clearly told his client what the sentence would be.

V. REQUEST FOR AN EVIDENTIARY HEARING

A petitioner is entitled to an evidentiary hearing under 28 U.S.C. 2254 (e) (2) when the federal claims for relief were fairly presented to the state courts which denied the petitioner a full and fair hearing on the merits of those issues. *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000).

In this case defense counsel diligently tried to obtain a full and fair hearing. *Id.* Nevertheless, the hearing provided by Arizona was not a fair and full hearing because the prosecutor involved in the original plea negotiations and off of the record discussions refused to allow another prosecutor to participate in the post-conviction proceeding. Instead the prosecutor, Mr. Thurston, remained on the case and, even though he did not take the stand and be placed under oath, conveniently was able to testify through his questioning and posture in the courtroom. In fact, while cross-examining the defense counsel, Mr. Thurston angrily commented: “[m]y memory is highly

different sir”. Mr. Thurston then went on to remind Mr. Griffen that Mr. Griffen was under oath. RT 5/24/05 at 105.

Mr. Goldberg requested that the prosecutor be removed. That request was strenuously objected to by the state and, after a hearing, was denied.

Additionally, Mr. Goldberg requested that the post-conviction proceedings be transferred to a “neutral court.” Judge Mackey removed himself and testified at the PCR hearing. However, the case was transferred to another Yavapai Superior Court; therefore, Judge Mackey testified before one of his colleagues in Yavapai County. Judge Mackey admitted that he “use to meet with counsel off of the record”, but may not in the future. *Id.* At 40. He admitted that he had off the record conferences in this case and had asked about the plea negotiations. Nevertheless, since the post-conviction hearing was held in the same county there is certainly an appearance of impropriety and/or a conflict. This record does not support a finding that Mr. Paige received a full and fair hearing because the matter was not transferred out of Yavapai County to a truly “neutral” court. Therefore, this Court should grant an evidentiary hearing in order for Mr. Paige to present supporting testimony, documents, exhibits and receive a full and fair constitutional review.

VI. THE PRESUMPTION OF CORRECTNESS PURSUANT TO 28 U.S.C. 2254 (E) (1) DOES NOT APPLY TO THIS CASE

Section 2254 (d) (2) and (e) (1) provides that a determination of a federal issue made by a state court shall be presumed to be correct. However, that presumption does not apply where the state court proceedings or findings are deficient. *Id.*; *Townsend v. Sain*, 372 U.S. 293, 318 (1963). A petitioner can rebut the presumption with clear and convincing evidence.

The presumption of correctness ordinarily applicable to state court findings of fact is not a bar to relief to a petitioner, such as Mr. Paige, when an ineffective assistance of counsel claim is raised. As the United States Supreme Court long ago opined:

[I]n a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. 2254 (d). Ineffective assistance is not a question of ‘basic, primary, or historical fact[t],’...Rather, like the question whether multiple representations in a particular case gave rise to a conflict of interest, it is a mixed question of fact and law....Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to deference requirement of 2254 (d),...both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of fact and law.

Strickland v. Washington, 466 U.S. 668, 698 (1984) (citations omitted).

This Court should not presume that the state findings are correct for several reasons: (1) because of the circumstances surrounding the PCR hearing and the voluntariness of the plea; (2) because the issues raised in this case involve the actions of the state prosecutor and the trial court; (3)

because the post-conviction hearing was held, just as the first trial and the plea sentencing were held, in Yavapai County; (4) because the trial prosecutor represented the state in all of the state proceedings; and (5) because neither the Court of Appeals nor the Arizona Supreme Court made individual, separate factual findings. They merely summarily dismissed the Petitions for Review.

VII. THIS COURT SHOULD REQUIRE THE ARIZONA COURTS OR THE STATE TO TRANSFER THE ENTIRE STATE FILE

In regard to the record, the “[p]etitioner is not required by statute or Rules to attach to his petition or to file a state court record in order to avoid a dismissal for facial insufficiency, although often in summarizing the facts, a petitioner necessarily or as a matter of convenience may refer to state court proceedings and even attach extracts there from.” *Bundy v. Wainwright*, 808 F. 2d 1410, 1414 (11th Cir. 1987), See Advisory Committee Note to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. (“The obligation to come forward with the state court record is squarely upon the respondent, not upon the petitioner. This makes common sense as well as legal sense – in some cases the petitioner has no copy of the state court proceedings, while the [Habeas] Rules recognize that generally the attorney general has access to them.”)

Mr. Paige requests this Court to order the Yavapai County Superior Court, the Arizona Court of Appeals, Division One, and the Arizona Supreme Court or the state prosecutor (County Attorney or Attorney General) to forward the complete state court files to this Court in order for this Court to have the entire record available to assure a full and fair review of the issues, both procedural and substantively. This request is necessary because of the issues involved as well as the procedural history.

The entire record is necessary in order to evaluate whether Mr. Paige was provided due process, effective assistance of counsel, and a full and fair inquiry into whether he was capable of making informed, intelligent decisions regarding the plea offer and his ability to understand and comprehend the proceedings and the criminal justice system.

This request is also necessary because this is not a case of a petitioner claiming “innocence”. It is a case where the Petitioner, Mr. Paige, pled not guilty but insane. The mental health aspects of the case demands close review.

Moreover, the involvement of the prosecution and the superior court judges also demand close scrutiny. Judge Mackey’s testimony, or admissions, that in the future he will make sure every thing is on the record, opens the door for this Court to closely review all of the pleadings, exhibits,

affidavits, and testimony in order to be able to adequately review and comprehend the pressures, the suggestions, the understandings or misunderstandings, and the workings of the criminal justice system in Yavapai County.

Additionally, claims of ineffective assistance of counsel can be based on individual misdeeds or the cumulative effect of the misdeeds. In order to determine whether Mr. Paige received a fair trial this Court must review the entire record. *Lindstadt v. Keene*, 239 F.3d 191 (2d Cir. 2001). Likewise, in order to determine the voluntariness of a plea, courts look to the totality of the circumstances, examining both the defendant's "subjective state of mind" and the "constitutional acceptability of the external forces inducing the guilty plea. *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986); *Busch v. Woodford*, No. 06-16154 (9th Cir. Filed 8/29/07).

If this Court does not order the State to provide their files in total, it is requested that Mr. Paige have additional time to amend the record and to submit additional transcripts, pleadings, correspondence, etc. that is in the state record.

VIII. CONCLUSION

In conclusion, Mr. Paige requests this Court to consider both of his

claims, review the entire record, and base its decision on the totality of the circumstances. Mr. Paige requests that this Court not presume that the state findings are correct because of the particulars that are involved in this case.

Then Mr. Paige requests that this Court an evidentiary hearing and resolve this matter in his favor: allowing him to withdraw his plea. This Court could then either order specific performance or remand the matter for further proceedings in the state court.

IX. RELIEF REQUESTED

Based upon the foregoing, Mr. Paige is entitled to the following relief:

- A. An order directing that the state answer this Petition for Writ of Habeas Corpus and order either the state or the state courts to file the entire record from all of the state proceedings with this Court.
- B. An order allowing Mr. Paige to conduct additional necessary discovery.
- C. An order finding that this Court has jurisdiction over this matter.
- D. An order finding that the presumption of correctness does not apply in this case.
- E. An order finding that all of the claims raised in this Petition have been exhausted.

F. An order setting an evidentiary hearing in order that Mr. Paige may submit proof of the allegations in his Petition for Writ of Habeas Corpus.

G. Any and all such further relief that this Court deems appropriate.

RESPECTFULLY SUBMITTED THIS 4th day of September 2007.

s/Thomas A. Gorman
Thomas A. Gorman
Attorney for Mr. Paige