No. 13-1057

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, Petitioner,

vs.

MICHAEL JOE MURDAUGH, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JON M. SANDS
Federal Public Defender
District of Arizona

Paula K. Harms*
**Counsel of Record*
Therese Day
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
paula_harms@fd.org
therese_day@fd.org
Counsel for Respondent Murdaugh

****CAPITAL CASE****

QUESTION PRESENTED FOR REVIEW

Where a state supreme court decides that its harmless error analysis of the lack of a jury on the death sentence involves reviewing mitigating, as well as aggravating facts, and where the new state statute requires a jury on all of the facts underlying a death sentence, was it proper for the Court of Appeals to review those facts as well?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

RELEVANT STATUTORY PROVISIONS

Ariz. Rev. Stat. § 13-703(E) (West 2002) provides that:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances . . . and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

STATEMENT OF THE CASE

Murdaugh was one of a group of 21 Arizona capital defendants who were sentenced to death by a judge, prior to this Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), which found that practice unconstitutional. Because their convictions were not yet final on direct review, the Arizona Supreme Court reviewed each defendant's death sentence to determine whether the lack of a jury on the facts underlying the death sentence was harmless. Of the 21 defendants who had their sentences reviewed, 19 were sent back for resentencing because it was found that the lack of a jury was not harmless in their case.[1] Murdaugh was only one of two

---

[1] *State v. Lamar*, 115 P.3d 611 (Ariz. 2005); *State v. Moody*, 94 P.3d 1119 (Ariz. 2004); *State v. Dann*, 79 P.3d 58 (Ariz. 2003); *State v. Montano*, 77 P.3d 1246 (Ariz. 2003); *State v. Nordstrom*, 77 P.3d 40 (Ariz. 2003); *State v. Rutledge*, 76 P.3d 443 (Ariz. 2003); *State v. Prasertphong*, 76 P.3d 438 (Ariz. 2003); *State v. Ring (Ring IV)*, 76 P.3d 421 (Ariz. 2003); *State v. Cropper*, 76 P.3d 424 (Ariz. 2003); *State v. Prince*, 75 P.3d 114 (Ariz. 2003); *State v. Jones*, 72 P.3d 1264 (Ariz. 2003); *State v. Phillips*, 67 P.3d 1228 (Ariz. 2003); *State v. Finch*, 68 P.3d 123 (Ariz. 2003); *State v. Tucker*, 68 P.3d 110 (Ariz. 2003); *State v. Lehr*, 67 P.3d 703 (Ariz. 2003); *State v. Harrod*, 65 P.3d 948 (Ariz. 2003); *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003); *State v.*

defendants whom the Arizona Supreme Court did not remand for resentencing, finding that no rational juror could have found leniency and sentenced Murdaugh to life. *See State v. Murdaugh*, 97 P.3d 844 (Ariz. 2004); *see also State v. Sansing*, 77 P.3d 30 (Ariz. 2003).

The Arizona Supreme Court determined that because its capital sentencing statute, passed in response to *Ring*, gave these defendants the right to a jury trial on mitigating as well as aggravating facts, that its harmless error analysis must include an examination of mitigation. *See State v. Ring (Ring III)*, 65 P.3d 915, 935, 943 (Ariz. 2003) (noting that under the old scheme, a judge found "the ultimate element required to complete a capital murder offense: at least one aggravating circumstance not outweighed by one or more mitigating factors" and that under either the old or the new scheme, neither a judge or the jury "can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency[ ]"). The panel opinion merely applied well-settled law regarding error analysis, under the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA"). Here, both the state court and the federal court were in agreement that an error occurred; the federal court simply determined that the complete lack of a jury had a substantial and injurious effect upon the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Murdaugh was evaluated for competency by several different experts.

Hoskins, 65 P.3d 953 (Ariz. 2003); *State v. Cañez*, 42 P.3d 564 (Ariz. 2002).

Pet. App. A-6, 7. These reports noted paranoid and delusional beliefs. *Id.* For instance, Murdaugh requested a skull x-ray due to his sincere belief there was a tracking device in his head. Pet. App. A-7. This prompted the prosecutor to request that the court order one, to assure Murdaugh no tracking device existed and to protect any plea of guilt. *Id.* The court granted the prosecutor's request. *Id.* In her dissent on direct appeal, Justice Berch noted "[t]here was substantial evidence that Murdaugh was a mental mess." *Murdaugh*, 97 P.3d at 863 (Berch, J., concurring in part and dissenting in part).

The sentencing judge found that Murdaugh had a history of paranoid beliefs, including a belief that there was a tracking device in his head placed there by the CIA; a lengthy history of chronic drug abuse that may have contributed to the existence of these paranoid delusions; that he was under the influence of methamphetamines when he committed the murder; that he possibly had a mental disorder that was exacerbated by his use of methamphetamine; and that these facts may have impacted his mental abilities at the time of the crime. Pet. App. A-14, 36. Moreover, the judge found that Murdaugh's cooperation with law enforcement, admission of guilt, and expressions of concern toward the families of the victims were all mitigating. Pet. App. A-14. However, the judge also found that Murdaugh had a prior conviction and that the crime was committed in a heinous, cruel or depraved manner, both of which are aggravating factors. Pet. App. A-13,14.

In reviewing the death sentence for harmlessness due to the lack of a jury[2], the Arizona Supreme Court asserted that none of the expert reports "found a causal nexus" between the crime and Murdaugh's chronic methamphetamine use. *Murdaugh,* 97 P.3d at 860. One of the main reasons the panel found this analysis unreasonable was because this finding was clearly erroneous. One of the experts specifically concluded that "[t]he use of methamphetamine quite likely greatly contribute to the alleged offenses having occurred." Pet. App. A-36, 39. This evidence could have lead a rational juror to find a statutory mitigating factor – that Murdaugh's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired. *Id.* As stated by Justice Berch on direct appeal:

> I cannot know whether the jurors would weigh as lightly as the trial judge did Murdaugh's impairment from drug use at the time of the murder, his diminished mental abilities, his cooperation, his remorse, or his desire to spare his family and the victim's family. They might well; but they would not be unreasonable if they gave greater weight to such factors.

Murdaugh, 97 P.3d at 864 (Berch, J., concurring in part and dissenting in part).

---

[2]In its review of the death sentence, the Arizona Supreme Court struck the trial court's finding that Murdaugh relished the murder: "the record does not contain sufficient evidence that Murdaugh said or did anything, beyond the commission of the crime itself, that manifests that he savored the murder." *Murdaugh*, 97 P.3d at 856.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

Petitioner's issue is not with the panel's interpretation of *Ring v. Arizona*, 536 U.S. 584 (2002), but with the Arizona Supreme Court's interpretation of *Ring*. The panel's opinion did nothing to extend the *Ring* right in Arizona. The Arizona Supreme Court agreed there was *Ring* error in this case, but found the error harmless. Petitioner's only real complaint then is with the Court's error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). This is hardly the kind of groundbreaking legal opinion that requires Supreme Court review.

The cases cited by Petitioner as conflicting Court of Appeal opinions do not involve the same question addressed by the panel decision. Pet. at 16-20. Almost all of these cases involve questions regarding the weighing decision and the proper burden of proof, not the effect of the complete absence of a jury on the death penalty decision. *Id.*

The panel opinion does not substantially affect a rule of national application but instead, at most, may affect one other Arizona habeas petitioner. *Sansing*, 77 P.3d 30. *Sansing* is the only other case, out of 21, in which the *Ring* error was held harmless and no remand for resentencing was ordered. *Id.* In addition, due to individual variances in facts, it is not clear that Murdaugh will dictate relief for Sansing.

I.

THE PANEL'S OPINION DOES NOT VIOLATE CLEARLY ESTABLISHED LAW. THE ARIZONA SUPREME COURT WAS CORRECT THAT A *RING* ERROR OCCURRED.

In Arizona, *Ring* error does not just occur when one aggravating factor is found by a judge rather than a jury. *Ring* error occurs when the jury is not involved in all the fact-findings upon which the death sentence hinges: "the judge found . . . the ultimate element required to complete a capital murder offense: at least one aggravating circumstance not outweighed by one or more mitigating factors." *Ring III*, 65 P.3d at 935, 943 (rejecting State's contention *Ring* error could be harmless if one aggravating factor was outside the purview of *Ring*.) (emphasis added) The panel's analysis is consistent with the Arizona Supreme Court's interpretation of its own law, as well as clearly established Supreme Court law.

Although Petitioner is correct that the litigant in *Ring* framed the question as a narrow one – whether the Sixth Amendment applied to aggravating factors – the answer given by the United States Supreme Court was a broader one. *See Ring*, 536 U.S. at 597 n.4 ("Ring's claim is tightly delineated"); *see also State v. Whitfield*, 107 S.W.3d 253, 257-58 (Mo. 2003) (noting that although Ring himself only challenged the factual findings on aggravating factors, the Supreme Court "set out the general principle that courts must use in applying *Ring* to determine whether a particular issue must be determined by the jury or can be determined by a judge."). The *Ring* test is a practical one. It is not what the legislature labels facts that

determines whether the right to a jury trial is implicated – it is how those facts function. *See Ring*, 536 U.S. at 602 (if "a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."). Because *Ring* clearly defined what "facts" implicate the Sixth Amendment, the Arizona Supreme Court was able to determine that its statute required a jury on mitigating facts, just as it did on aggravating facts. *See Whitfield*, 107 S.W.3d at 257 ("The Supreme Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury.") Whether you call them aggravating or mitigating, they are the key facts upon which the maximum sentence turns and they must be found by a jury. *See Ring*, 536 U.S. 584 at 610 (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury.").

Walton v. Arizona, which allowed judicial fact-finding for death sentences, prevailed as the law of the land for several years because the federal court misinterpreted how Arizona's death penalty statute actually operated. 497 U.S. 639 (1990), *overruled by Ring*, 536 U.S. 584. Petitioner repeats this same mistake by arguing that the Arizona Supreme Court incorrectly found *Ring* error here.

However, the Arizona Supreme Court is the final arbiter of how its death penalty statute operates. *See Ring*, 536 U.S. at 603 ("Recognizing that the Arizona court's construction of the State's own law is authoritative, *see Mullaney v. Wilbur*, 421 U.S. 684 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*."). Although Murdaugh disagrees with how the state court ultimately resolved the question of harmlessness, both the state court and the panel agreed a *Ring* error occurred. *See also Arizona v. Pandeli*, 540 U.S. 962 (2003) (denying certiorari on the question of whether the Arizona Supreme Court improperly extended *Ring* by reviewing mitigating facts in its harmless error analysis). Reversing the panel opinion would have the effect of a federal court reinterpreting Arizona's death penalty statute. This would be inconsistent with the purposes of the AEDPA and respect for state court judgments.

II.

THE PANEL'S ERROR ANALYSIS DID NOT VIOLATE THE AEDPA.

Petitioner argues it was not enough that the panel conduct analysis of whether the complete lack of a jury had a substantial and injurious effect on the death sentence. Pet. at 15-16. They argue that the panel also needed to specifically determine whether the the state court's harmlessness analysis was objectively unreasonable under the AEDPA. *Id.* at 16. However, the panel's mode of analysis has been specifically endorsed by the Supreme Court. Under *Fry v. Pliler*, 551 U.S.

112 (2007), federal habeas courts can avoid the question of whether the state court's harmless error analysis was unreasonable under the AEDPA. Instead, the Court can simply ask whether the complete lack of a jury had a substantial and injurious effect upon the death sentence. *Id.* at 120. This is because the "substantial and injurious" test of *Brecht* is more stringent than the AEDPA determination of whether the harmlessness inquiry was reasonable. The *Brecht* inquiry subsumes the AEDPA inquiry. If the error was substantial and injurious, it was unreasonable to find it harmless under the AEDPA. *Fry*, 551 U.S. at 120 ("it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former [ ]")

The question under *Brecht* is not whether there was sufficient evidence to support the death penalty, but whether the lack of a jury may have affected the outcome. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) ("[t]he inquiry cannot be merely whether there was enough to support the result"). Murdaugh has a lengthy history of mental illness and his delusions were consistently reported in several competency reports. Pet. App. A-6,7. In fact, the trial court granted the prosecutor's request for a skull x-ray to ease Murdaugh's fears that a tracking device had been implanted in his head. *Id.* at 7. When Murdaugh received a CT scan instead, which showed no implant, "Murdaugh believed the results were doctored and requested an MRI." *Id.*

Mental illness is precisely the type of mitigation that moves rational jurors to spare the lives of defendants. In addition, one of the competency reports specifically linked his drug use at the time of the crime to the murder: "the use of methamphetamine quite likely greatly contributed to the alleged offenses having occurred." App. A-36, 39. Therefore, it was objectively unreasonable for the Arizona Supreme Court to conclude that "no mental health professional found a causal nexus" between Murdaugh's drug use and the murder. *Murdaugh*, 97 P.3d, at 860.

The sentencing judge found that Murdaugh "was a chronic drug abuser who was specifically impaired by crystal meth at the time of the murder." *Id.* There was evidence to support the fact that this crime was the result of a perfect storm of mental illness and drug abuse, not the product of a lifelong pattern of violent crime. When confronted with his crime, Murdaugh confessed, pled guilty, and helped locate the victim's body. It is clear that a reasonable juror may have viewed the death sentencing decision differently than the trial judge did because the question inevitably turns upon the impact of mental illness and severe drug abuse upon the intent of the defendant. Complex issues regarding the defendant's state of mind are at the heart of this determination and it was unreasonable to find the lack of a jury to be harmless. *See Neder v. United States*, 527 U.S. 1, 17 (1999) (distinguishing the situation in *Neder*, where error involving the jury on a factual question was deemed harmless, from facts going "to the crux of the case – the defendant's

intent."); *see also Ring*, 536 U.S. at 599 (noting that at English common law, the juries' role "in determining critical facts in homicide cases was entrenched. . . .many of which related to difficult assessments of the defendant's state of mind.") (quotation and citation omitted).

III.

THERE IS NO CIRCUIT SPLIT ON THIS ISSUE AND THE PANEL OPINION WILL NOT HAVE A WIDE-RANGING EFFECT ON NON-CAPITAL SENTENCES.

Petitioner's assertion of a lopsided circuit split is disingenuous. No other Circuit Court of Appeals has been asked to address a new state statute that the state's own supreme court has determined implicates *Ring* in the context of harmless error analysis. The cases cited by Petitioner as conflicting Court of Appeal opinions involve questions about the weighing decision and the proper burden of proof that the jury should be instructed on, not the effect of the complete absence of a jury on the death penalty decision. *See Lockett v. Trammel,* 711 F.3d 1218, 1253-55 (10th Cir. 2013) (addressing whether the jury should have been instructed it must find, beyond a reasonable doubt, that the aggravating facts outweigh the mitigating facts); *United States v. Runyon,* 707 F.3d 475, 515-16 (4th Cir. 2013) (same); *United States v. Mitchell,* 502 F.3d 931, 993-94 (9th Cir. 2007) (same); *United States v. Sampson,* 486 F.3d 13, 31-32 (1st Cir. 2007) (same).

Petitioner's assertion that this ruling will have a wide-ranging effect on non-capital sentencing is also incorrect. Arizona has determined that sentencing

functions differently in capital cases than it does in non-capital cases. In Arizona, pre-*Ring*, a first-degree murder conviction only authorized a life sentence. *See State v. Martinez*, 100 P.3d 30, 33 (Ariz. Ct. App. 2004) (citation omitted). In *Martinez*, there was an alleged sentencing error in a first-degree murder case where the death penalty was not an issue and the judge was left with the decision of imposing a life sentence with or without the possibility of release. *Martinez*, 100 P.3d at 34. In finding no error, the court noted that in the capital context, it was unacceptable to have the "mingling of sentencing authority between the judge and the jury." *Id.* at 35 (citation omitted). However, "[b]y contrast, Arizona's non-capital felony sentencing provisions have accommodated a scheme where some factual determinations which increase a defendant's sentence are found by the jury while others are found by the judge." *Id.* Arizona has determined that its capital sentencing scheme functions differently than its non-capital scheme in terms of the jury's role. The panel's decision merely endorses the state supreme court's interpretation of its own capital sentencing statute. There is no reason to believe that interpretation will extend beyond Arizona.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted: May 14, 2014.

JON M. SANDS
Federal Public Defender
District of Arizona

By _____
Paula K. Harms*
*Counsel of Record
Therese Day
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
paula_harms@fd.org
therese_day@fd.org
Counsel for Respondent Murdaugh

No. 13-1057

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, Petitioner,

vs.

MICHAEL JOE MURDAUGH, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39, Petitioner Michael Joe Murdaugh hereby seeks leave to proceed *in forma pauperis* before this Court in the above-captioned case on the ground that he lacks sufficient funds to pay for fees and expenses. Mr. Murdaugh is a state death-row prisoner incarcerated at Arizona State Prison in Florence, Arizona. On April 20, 2009, Mr. Murdaugh asked the United States District Court for the District of Arizona to appoint counsel for him under 18 U.S.C. § 3599(a)(2); 28 U.S.C. §§ 1651, 2241 and 2251; and *McFarland v. Scott*, 512 U.S. 849 (1994). On April 23, 2009, the district court granted that motion. A copy of this appointment order is attached hereto. Accordingly, Mr. Murdaugh is entitled to proceed *in forma pauperis* before this court.

Respectfully submitted:

May 14, 2014.

JON M. SANDS
Federal Public Defender
District of Arizona

PAULA K. HARMS*
**Counsel of Record*
Therese Day
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
paula_harms@fd.org
therese_day@fd.org
Counsel for Respondent Murdaugh

Appendix Table of Contents

APPENDIX 1

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Joe Murdaugh, Petitioner, v. Charles L. Ryan, et al.,[1] Respondents.	No. CV 09-831-PHX-CKJ DEATH PENALTY CASE **ORDER OF APPOINTMENT AND GENERAL PROCEDURES**

IT IS ORDERED that Petitioner's Motion for Appointment of Counsel (Dkt. 4) is **GRANTED**. Jon M. Sands, Federal Public Defender for the District of Arizona, is appointed as Counsel for Petitioner in this federal habeas corpus proceeding. The Federal Public Defender is authorized to designate an Assistant Federal Public Defender to handle the case. Appointment is made pursuant to 18 U.S.C. § 3599(a)(2). Without express authorization of the Court, counsel shall not represent Petitioner in state forums.

IT IS FURTHER ORDERED that Petitioner's application to proceed *in forma pauperis* (Dkt. 3) is **GRANTED**.

IT IS FURTHER ORDERED that the designated Assistant Federal Public Defender shall file a notice of appearance with the Court within **ten (10) days** from the entry of this Order.

---

[1] Charles L. Ryan, Director of the Arizona Department of Corrections, is substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

IT IS FURTHER ORDERED that the Arizona Attorney General shall file a notice of appearance with the Court within **ten (10) days** from the entry of this Order.

IT IS FURTHER ORDERED that, in an effort to achieve greater uniformity in the treatment of federal capital habeas corpus cases in this District and to inform counsel in advance of the Court's expectations, the following procedures shall govern the briefing and resolution of this matter:

I. Case Management Conference (CMC)

A case management conference will be held on **Wednesday, May 27, 2009, at 2:00 PM in Courtroom 506, Sandra Day O'Connor United States Courthouse.** Non-local counsel may, if requested, appear by telephone. Any request to appear by telephone must be filed at least ten (10) days prior to the scheduled conference. Prior to the conference, Petitioner's counsel is expected to personally meet with Petitioner and to review any published court rulings in Petitioner's case. Counsel is further expected to contact Petitioner's state court counsel to obtain preliminary information about the case and to begin assembly of prior counsel's files and records from the state proceedings. Absent a motion detailing significant delays, problems, or obstacles encountered in obtaining copies of pertinent files and records, the Court will not assist directly in obtaining such materials.

At the conference, Petitioner's counsel will be expected to discuss the status of file and record assembly and any problems encountered in that regard, whether assistance regarding the record is needed from Respondents or the Court, and the estimated time needed to complete review of the file and record. Both parties should be prepared to articulate their positions regarding the statute of limitations and to discuss any other issues which may affect the filing of the Petition or efficient resolution of this matter.

Following the conference, the Court will issue a Case Management Order scheduling CMC #2. At CMC #2, the Court will set **firm deadlines** for the filing of the Petition, responsive pleadings, motions for evidentiary development, and other pleadings as the Court may deem necessary. Absent extraordinary circumstances justifying a continuance, the parties are expected to adhere to the deadlines set at CMC #2.

II. Petition

Pursuant to 28 U.S.C. § 2244, a second or successive petition may not be filed in this Court without prior authorization from the Ninth Circuit. Under § 2244(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent upon Petitioner to raise in his first petition all known claims of constitutional error or deprivation, setting forth "the facts supporting each ground" for habeas relief. *See* Rule 2(c), 28 U.S.C. foll. § 2254. In addition to the requirement of Local Rule Civil 7.1, the Petition shall:

(1) separately enumerate in a sequential manner *every* claim for federal habeas corpus relief (including each individual claim of ineffective assistance of counsel);

(2) set forth, in a clear and concise manner, including full citations to the appropriate portions of the record and application of the appropriate standards of review under 28 U.S.C. § 2254(d), the legal and factual basis for each claim for relief; and

(3) state with specificity when and where each claim for relief was presented to or considered by the Arizona Supreme Court.

III. Answer

After the Petition is filed, Respondents shall file an Answer. Pursuant to Rule 5 of the Rules Governing Section 2254 Cases, Respondents' Answer shall specifically respond to each of the allegations contained in the petition. In lieu of motions for summary judgment and motions to dismiss, the Answer shall be a comprehensive responsive pleading, addressing both the factual allegations and legal contentions raised in the Petition as well as any procedural defenses with respect to individual claims. Accordingly, Respondents shall address the merits of every enumerated claim, regardless of whether Respondents allege a claim is barred from review by the federal court.

Respondents are advised that Petitioner is obligated under Rule 2(c) of the Rules Governing Section 2254 Cases to include in his Petition all known claims for relief and facts in support thereof. Accordingly, the Court will not entertain motions to strike any portion of the Petition or exhibits thereto on the basis that such facts were not developed in state court. Rather, Respondents' arguments concerning factual development should be included

in the Answer as well as the response to any motion for evidentiary development filed by Petitioner.

IV. Reply

Petitioner shall file a Reply to Respondents' Answer. The Reply shall respond to Respondents' allegations regarding both procedural defenses and the merits of each enumerated claim. In addition, Petitioner shall affirmatively raise in the Reply any arguments concerning availability of state remedies, cause and prejudice, fundamental miscarriage of justice, and/or equitable tolling in response to any allegations by Respondents of procedural or timeliness bars. The Reply shall not be used to raise new claims or new material facts in support of existing claims.

V. Evidentiary Development

Following the filing of the Petition, Answer, and Reply, Petitioner will be provided an opportunity to file a motion for evidentiary development. Such motions include, but are not limited to, requests for Discovery, Expansion of the Record, and Evidentiary Hearing under Rules 6, 7, and 8 of the Rules Governing Section 2254 Cases. A motion for evidentiary development shall not recite legal authority on the merits or present new material facts in support of the claims raised in the petition; nor shall the motion raise new claims for habeas relief. Rather, the motion shall be limited to the identification of the claims for which development is sought, the evidence or facts sought to be developed, and the applicable standards governing evidentiary development. To this end, any motion for evidentiary development shall:

1. not exceed sixty (60) pages cumulatively (excluding appendices);[2]
2. identify the enumerated claim(s) Petitioner contends need further factual development;
3. provide an offer of proof (i.e., declarations, documentary evidence, summaries of proposed testimony) setting forth the facts to be developed and the source of the proffered evidence; and

[2] Responses to motions for evidentiary development shall not exceed sixty (60) pages cumulatively, and replies shall not exceed forty (40) pages cumulatively.

(4) apply the applicable standards for obtaining evidentiary development, including an explanation of why the claim was not developed in state court and why the failure to develop the claim in state court was not the result of lack of diligence, in accordance with 28 U.S.C. § 2254(e)(2) and *Williams v. Taylor*, 529 U.S. 420 (2000).

Any motion for evidentiary development that is filed prior to the filing of Respondents' Answer or that fails to address the above-listed requirements will be summarily denied.

VI. State Court Record

It is the custom in this District for the federal habeas court, following the filing of Respondents' Answer, to *sua sponte* request a certified copy of the state court record from the Arizona Supreme Court. This record ordinarily contains all trial and post-conviction transcripts. Therefore, the Court relieves Respondents of their obligation under Rule 5(c) of the Rules Governing Section 2254 Cases to provide the trial transcripts. Although the record provided by the Arizona Supreme Court also includes all trial, appeal, and post-conviction filings, the Court directs Respondents to comply with Rule 5(d) of the Rules Governing Section 2254 Cases in filing their Answer. In addition, for ease of citation, the Court encourages the parties to provide in an appendix any additional parts of the state court record that the parties believe are relevant to resolving allegations in the Petition, Answer, Reply, and/or evidentiary development motion briefing.

V. Electronic Case Filing

Pursuant to Section II.D.3 of the Electronic Case Filing Administrative Policies and Procedures Manual, a paper courtesy copy of any electronically-filed document exceeding ten (10) pages in length that would normally be sent to the assigned judge shall instead be directed to the "Capital Case Staff Attorney Office." For the following specific documents, in lieu of providing copies to the assigned judge, the parties shall provide **TWO** paper courtesy copies to the Capital Case Staff Attorney: Petition, Answer, Reply, Motion for Evidentiary Development, and evidentiary development responsive briefs.

Any filing that exceeds 50 pages in length, including appendices, shall be spiral bound

on the left and shall include a table of contents, an exhibits list, and tabs between exhibits.

VI. Miscellaneous

In addition to the requirements of Local Rule Civil 7.1, the following shall apply to any filing in this matter:

(1) The parties shall not include photographs, charts, or graphs in the body of any pleading. Any such exhibit must be contained within an appendix to an appropriate pleading.

(2) The parties shall not refer to either party by informal first name only. All references to a party shall be by last name, by governmental name (i.e., "State") or by formal title, such as "Petitioner" or "Respondents."

IT IS FURTHER ORDERED that this case, having been randomly reassigned, by lot, to **Judge Frederick J. Martone**, pursuant to Local Rule Civil 3.8, shall be redesignated as **No. 09-831-PHX-FJM**.

IT IS FURTHER ORDERED that the Clerk of the Court shall, pursuant to Fed. R. Civ. P. 25(d), substitute, as a Respondent, Charles L. Ryan for Dora B. Schriro as Director of the Arizona Department of Corrections.

IT IS FURTHER ORDERED that a copy of this Order be served by the Clerk of Court upon Respondents Charles L. Ryan and William White and upon Kent Cattani, Assistant Arizona Attorney General, pursuant to Rule 4, Rules Governing Section 2254 Cases.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Petitioner Michael Joe Murdaugh, ADOC # 162753, P.O. Box 3400, Florence AZ 85232.

DATED this 23rd day of April, 2009.

Cindy K. Jorgenson
United States District Judge