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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA Plaintiff, vs. THOMAS GRANILLO, Defendant.	CR 20054476 **PETITION FOR POST-CONVICTION RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** Hon. Charles S. Sabalos

COMES NOW, Petitioner, Thomas Granillo, by and through undersigned counsel, and hereby submits his Petition for Post-Conviction Relief. This Petition for Post-Conviction Relief is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this ____ day of February, 2009.

RONALD ZACK, ESQ.
ATTORNEY FOR PETITIONER

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

Thomas Granillo was charged with an aggravated assault against Zulma Carrera and her three-year-old son Iziah, armed robbery of Carrera, and possession of a deadly weapon by a prohibited possessor. (ROA 1).

The State further alleged that the aggravated assault charges were of a dangerous nature, that the assault upon Iziah was a dangerous crime against children, and that Granillo had a prior conviction. (ROA 1).

Granillo rejected a plea offer. (ROA 63). The Plea Agreement included one charge, Armed Robbery, a class two felony, for which the presumptive sentence was five years. (See Exhibit A, Plea Agreement). The "Rejection of Plea Agreement" form was not signed by either the defendant or counsel. (See *Id*.) The issue of the rejected plea agreement was raised at the motions hearing the afternoon before trial. (RT 7/17/06 PM, 81-83) The Court questioned defense counsel as to whether he explained all the implications of the plea to the defendant and he said he had (*Id*.) The defendant was not present for the motions hearing at which the plea agreement was discussed. (*Id*.) The plea offer had been made the morning of the motions hearing, approximately 24 hours before the start of the trial. (*Id*.)

The first day of trial, Defense counsel made an oral motion for a Rule 11 evaluation, which was denied. (RT July 18, 2006, page 101-2). Counsel expressed concern that the petitioner was unable to read, was possibly mentally ill or retarded, and had difficulty

understanding the language his attorney used to explain the consequences. (Id.) Defense counsel stated "I think, also, with the fact that the plea came and I had an hour to explain the plea to him that was given yesterday, that he did not have adequate time to sufficiently ponder the consequences of rejecting the plea or not, as well as really the gravity of the plea to sink in." (*Id*. at 102). The case proceeded to a jury trial before a 12-member jury on July 18, 2007. (ROA 64).

Prior to trial the Court ruled on several pre-trial evidentiary motions. First, the Court denied Granillo's motion to suppress his identification by Carrera under *State v. Dessureault*, 104 Ariz. 380, 384, 453 P. II d 951, 955 (1960), ruling that the identification was unduly suggestive but did not taint the in-court identification. (ROA 63). Second, the Court admitted evidence of a holster and ammunition seized during a search of Granillo's bedroom though the State could not provide a nexus between the particular firearm and the crime. This evidence had been originally precluded, but the Court granted the State's Motion for Reconsideration and allowed introduction of the evidence at trial. (ROA 63-64).

The jury found Granillo guilty on all charges. (ROA 68, 74-77). It further found all the allegations were proven. (ROA 68, 74-77). The State dismissed a prior conviction allegation before sentencing. (RT 7/20/06 64-65).

On September 19, 2006, the Court sentenced Granillo to partially mitigated prison terms. (ROA 96). The Court ordered the dangerous crime against children offense to run consecutively to the others pursuant to A.R.S. section 13-604.01 (D). (ROA 96; RT 9/19/06,

19). As a result, he received a prison sentence totaling 21.5 years in prison. (ROA id.); RT *id*.).

Granillo timely filed his notice of appeal on September 26, 2006. (ROA 101). The Court of Appeals filed a memorandum decision on July 7, 2008 affirming the lower court's decision. The issues raised on appeal were the in-court identification, the enhancement for dangerous crimes against children under A.R.S. 13-604.01 (D), and the admission into evidence of the holster and handgun.

STATEMENT OF FACTS

Zulma Carrera testified that on October 17, 2005, she was returning to her apartment with her three-year-old son, Iziah, between two and three p.m. when a man approached her from behind and put a gun to her head. (RT 7/18/06, 145-147). He ordered her to open the door and they entered the apartment. (RT 7/18/06, 148).

Inside he pointed the gun at Iziah and ordered Zulma to take her son into the child's bedroom. (RT 7/18/06, 149-150, 175-176). While the two stayed in the bedroom, the gunman searched the master bedroom and took items of value, including jewelry and Carrera's boyfriend's handgun. (RT 7/18/06, 159-169. When the intruder left, Carrera saw a primer gray Sedan leaving the scene. (RT 7/18/06 160). On October 18, 2005, a patrol officer stopped Granillo in a primer gray Oldsmobile Cutlass. (RT 7/19/06, 9).

Late in the evening of October 27, 2005, the police arrested Granillo at his residence. (RT 7/19/06, 95-96, 102). The following day they returned to execute a search warrant. (RT

7/19/06, 71-72). During the search they found a holster for a handgun and 40 rounds of .38 special caliber ammunition. (RT 7/19/06, 58, 73, 78).

When Carrera spoke to the police after the robbery, she told them that Bernie Granillo (Bernardo is Thomas Granillo's middle name) robbed her. (RT 7/17/06 p.m., 28). She said that she had known Granillo since they attended middle school together. RT 7/17/06 p.m., 29). Her cousin Bianca married Bernie Granillo's brother Guillermo, so she saw him at family gatherings, such as birthday parties and softball games and was familiar with his appearance. (RT 7/17/06 p.m., 30-31). Carrera did not like the Granillo family so she avoided personal contact with them at these gatherings. (RT 7/17/06 p.m., 38-39).

Carrera gave the first officers a general physical description of her assailant and told them what he was wearing. (RT 7/17/06 p.m., 49-50, 53-54, 60). She told the first officer on the scene that she recognized Granillo by his voice. (RT 7/17/06 p.m., 51). At the evidentiary hearing she also said that she got a good look at his face. (RT 7/17/06 p.m. 34).

Based on this information, Detective Carroll obtained a copy of Granillo's M.V.D. photograph. (RT 7/17/06 a.m., 15). On October 27, 2005 Detective Carroll met with Carrera and she reacted when she saw the photograph and claimed that he was the one who assaulted and robbed her. (RT 7/17/06 a.m., 11-12, 16).

The Court found that the one photograph line-up was unduly suggestive; it concluded, however, that the in-court identification would not be tainted by the identification procedure.

(RT 7/17/06 a.m., 7; RT 7/17/06 p.m., 79-80). It agreed to instruct the jury on the in-court identification as provided in Dessureault.

STATEMENT OF PERTINENT FACTS WITHIN PETITIONER'S PERSONAL KNOWLEDGE

Defense counsel, James Alexander and Justin Castillo, represented Petitioner with respect to all aspects of his case. (See, Exhibit B, Affidavit of Thomas Granillo). Justin Castillo, an inexperienced attorney who had never conducted a trial of this nature, conducted the entire trial. (*Id.*) A plea offer was made the day before the trial; defense counsel discussed the offer with Petitioner briefly on the day of the trial. (*Id.*) The petitioner did not understand the implications of the plea agreement or the potential sentence should he lose at trial. (*Id.*) When the plea agreement offer was discussed, the petitioner was under the influence of medications that affected his thinking. (*Id.*) Had he understood the implications of losing at trial, the petitioner would have accepted the offer. (*Id.*)

The petitioner lived in a house with several other people and shared a room with two others. (*Id.*) Defense counsel did not interview the defendant's roomates and did not attempt to obtain evidence or put on evidence at trial to refute ownership of, or the petitioner's knowledge of the ammunition and holster found in the room.

STANDARD OF REVIEW

Pursuant to Rule 32.1(a), Ariz. R. Crim. Proc., a criminal defendant may seek post-conviction relief where the conviction was obtained in violation of the United States and/or Arizona Constitutions. In the instant case, Rule 32 provides a proper avenue for granting the Petitioner's request for a resentencing and vacating his conviction. Petitioner's conviction and sentence were obtained in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner was not afforded effective assistance of counsel as constitutionally guaranteed, as explained below. Furthermore, evidence was insufficient to prove all the elements of the charge of Aggravated Assault on a Minor. Therefore, Petitioner brings these proper claims under Rule 32.

In order for a defendant to establish a successful claim of ineffective assistance of counsel he or she must prove the following two elements: 1) counsel's representation was deficient; and, 2) the defendant was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

ARGUMENT

I. MR. GRANILLO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

A criminal defendant is entitled to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, §24 of the Arizona Constitution. Counsel is ineffective if (1) his acts or omissions fall below objective standards of reasonableness and (2) the defendant suffers prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Effective assistance of counsel means adequate investigation into the case as well as a working familiarity with basic legal principles. *Strickland***,** 466 U.S. at 690-91; *State v. Lee*, 142 Ariz. 210, 216, 689 P.2d 153, 159 (1984). "Trial counsel … has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Fisher,* 152 Ariz. 116, 119, 730 P.2d 825, 828 (1986), *citing Strickland*, 466 U.S. at 688. Although courts must refrain from second-guessing trial counsel's strategies, actions based on a failure to research and understand the law constitute ineffective assistance when prejudice results. *Lankford v. Arave*, 468 F.3d 578, 583-84 (9th Cir. 2006).

The Arizona Supreme Court set forth the two part test for finding ineffective assistance of counsel by requiring a criminal defendant to show: "first, that under the circumstances and in light of prevailing professional norms, counsel showed less than minimal competence in representing the criminal defendant and, second, that 'there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Lee*, 142 Ariz. at 214, 689 P.2d 157 (*citing Strickland*, 466 U.S. at 686). The court defined "reasonable probability" as "less than 'more likely than not' but more than a mere possibility." *Id*. Thus, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The court must consider not only the individual errors of counsel but also the cumulative effect of those errors. *Id*. at 694; *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005), *citing Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989). Disagreements in trial strategy will not alone support a claim of counsel ineffectiveness, provided the challenged conduct had some reasoned basis. *Lee*, 142 Ariz. at 214, 689 P.2d 157. Where there is no reasoned basis for trial counsel's trial strategy, however, and prejudice results, the defendant's conviction will be reversed. *Id*. In evaluating these claims of ineffectiveness, the court's inquiry is not whether trial and appellate counsel are experienced or generally competent and diligent attorneys. *Dugas*, 428 F.3d at 328. "Rather, [this court] must decide whether, given the particular facts of this case, [counsel] fell below the constitutional standard of competence by inadequately investigating" or failing to pursue specific matters important to Mr. Granillo's defense. *Id.* (*citing Wiggins v. Smith*, 539 U.S. 510, 523 (2003)).

A. IAC: Evaluating the Relative Merits of the Plea Offer Compared to Chances at Trial

The right to effective assistance of counsel includes assistance with respect to plea bargaining. *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994). "To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea." *State v. Donald*, 198 Ariz. 406, 413, 10 P.3d 1193, 1200 (App. 2000) In addition to informing a defendant of the existence of a plea offer, counsel is required to provide the defendant "with an understanding of law in relation to the facts so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." *State v. Rosas*, 183 Ariz. 421, 423, 904 P.2d 1245, 1247 (App. 1995) (citation omitted). In other words, "a lawyer has an obligation to explain the problem, lay out the significant choices, and help the client make an informed, rational decision." *Matter of Wolfram*, 174 Ariz. 49, 56, 847 P.2d 94, 101 (1993).

To establish prejudice in the rejection of a plea offer, a defendant must show "a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer" and declined to go forward to trial. *Donald*, 198 Ariz. at 414, 10 P.3d at 1201. "A defendant may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would

have been imposed as a result of a plea." *Id*. Where a lawyer has failed to effectively explain the "relative merits of the offer compared to the defendant's chances at trial" to the defendant's prejudice, the trial conviction must be vacated and the plea offer reinstated. *Id*. at 411 and 418, 10 P.3d at 1198 and 1205. The basic rationale is that a defendant is entitled to be "put back in the position he would have been in if the Sixth Amendment violation had not occurred." *Blaylock*, 20 F.3d at 1468.

Here, defense counsel had received the plea agreement the day before the trial. (RT 7/17/06 PM, 81-83). Although counsel represented to the Court he had discussed the plea with Mr. Granillo that morning (*Id*.), Mr. Granillo does not recall having that discussion until the day of trial (Exhibit B). The discussion, according to counsel, was very brief ("an hour") and Mr. Granillo "did not have adequate time to sufficiently ponder the consequences of rejecting the plea or not." (RT 7/18/06, 102) In fact, counsel was so concerned about Mr. Granillo's understanding of the plea agreement that he requested to stay the trial for a Rule 11 evaluation. (*Id*. at 101) That request was denied. (*Id*. at 104).

B. IAC: Failure to Address Issues Relating to Intent and Apprehension Elements of Aggravated Assault of Minor Through Use of an Expert, Objections to Leading Questions, Speculative and Foundationally Insufficient Questions, and Offering Readily Available Rebuttal Testimony

Failure to make reasonable investigations, including to consult with and present the testimony of qualified experts in support of a defense falls below an objective standard of reasonable representation. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation of the investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91; *see also Wiggins v. Smith*, 539 U.S. 510 (2003). The *Wiggins* Court found trial counsel ineffective for failing to adequately investigate mental health mitigation, a claim supported by the post-conviction expert testimony of a forensic social worker. The case was reversed despite trial counsel's strategic choice to focus on Wiggins' degree of responsibility in mitigation because, according to the Supreme Court, "the investigation supporting their choice was unreasonable." *Id*. at 536.

Under the controlling principles of *Strickland* and *Wiggins*, failure to investigate whether scientific testimony will bolster a defense constitutes ineffective assistance if prejudice results. Arizona law reflects this rule. *See State v. Glassel*, 211 Ariz. 33, 51 n.9, 116 P.3d 1193, 1211 n.9 (2005) (though trial counsel's failure to present mental health experts at penalty phase did not constitute complete denial of right to counsel, defendant could still claim ineffective assistance of counsel in a Rule 32 petition); *State v. Edwards*, 139 Ariz. 217, 220-21, 677 P.2d 1325, 1328-29 (App. 1983) (finding ineffectiveness

based, in part, on failure to present testimony from qualified expert on insanity). In addition, Arizona courts look to federal rulings in determining how to apply United States Supreme Court precedent, since federal courts can overturn state convictions on habeas review. *See Lynn v. Reinstein*, 205 Ariz. 186, 191, 68 P.3d 412, 417 (2003).

A survey of federal case law reveals a consensus that failure to investigate and present expert testimony to support a defense can result in ineffective assistance of counsel. *Dugas v. Coplan*, *supra* (failure to consult arson expert as part of investigation into arson charge constituted ineffective assistance); *Foster v. Lockhart,* 9 F.3d 722 (8th Cir. 1993) (failure to investigate, develop, and present strong defense of impotency in rape case constituted ineffective assistance); *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992) (trial counsel ineffective for failure to investigate and present evidence that, consistent with claim that shooting was accidental, there was powder residue on quilt with bullet holes); *see also Dando v. Yukins*, 461 F.3d 791, 799-800 (6th Cir. 2006) (counsel ineffective in advising defendant to plead no-contest without first investigating through expert the possibility of a duress defense based on battered woman's syndrome); *Mayfield v. Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (ineffective assistance at penalty phase of capital trial for failure to present testimony of experts in endocrinology and toxicology); *Holsomback v. White*, 133 F.3d 1382, 1387 (11th Cir. 1998) (counsel ineffective for failure to conduct adequate investigation into lack of medical evidence of sexual abuse to support defendant's claim of innocence); *Elledge v. Dugger*, 823 F.2d 1439, 1446 n.15

(11th Cir. 1987) (defendant can establish ineffective assistance by showing that it was professionally unreasonable for counsel not to investigate and that reasonable investigation would have uncovered expert with testimony helpful to defense); *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) ("We believe that it should have been obvious to a competent lawyer that the assistance of an accountant would be necessary to trace the distribution of the funds alleged to have been illegally spent;" reversing conviction due to ineffective assistance); *Steidl v. Walls*, 267 F. Supp. 2d 919, 936-40 (D. Ill. 2003) (granting habeas petition due, in part, to trial counsel's failure to present scientific testimony to refute state's theory of the case); *Shumate v. Newland*, 75 F. Supp. 2d 1076, 1093 (N.D. Cal. 1999) ("[T]o be effective, defense counsel is under an obligation to present expert testimony when, in the absence of such testimony, lay jurors are incapable of making reasoned judgments regarding the evidence") (*citing Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)).

The decision of trial counsel whether to call expert witnesses is a matter of trial strategy, and, unless counsel's decision has no "reasonable basis," a reviewing court will not find ineffectiveness. *Sammons*, 156 Ariz. at 56, 749 P.2d at 1377. But the decision not to call an expert witness is entitled to little deference when an expert is not even consulted. *Sims*, 970 F.2d at 1580-81 (counsel ineffective when he did not consult an expert and did not make a reasonable decision that further investigation of the physical evidence was unnecessary); *Dugas*, 428 F.3d at 329 (same); *Lord v. Wood*, 184 F.3d

1083, 1095 n.8 (9th Cir. 1999) (decision not to call a witness entitled to little deference if lawyer does not interview witness).

In the instant case, the jury was instructed that each count was a separate and distinct offense and that each count must be decided separately (RT 7/20/06, 46; ROA 67). The jury was provided definitions for terms such as "assault," "intentionally," and the definition that "a person commits assault by placing another person in reasonable apprehension of imminent physical injury."

"A reasonable apprehension of imminent physical injury is an essential element of assault." *State v. Rineer*, 131 Ariz. 147, 148, 639 P2d. 337 (App. 1981) The statute requires that the intent in an assault must be to produce the essential result – in other words, the defendant must intend to produce reasonable apprehension by his actions. Id. at 149. "[T]he apprehension form of assault requires proof of intentionality placing a person in apprehension. Knowingly placing a person in apprehension is a less culpable mental state and is not sufficient for this crime." *State v. Johnson*, 205 Ariz. 413, 72 P.3d. 343 (App 2003) (*citations omitted*). Fear or apprehension as an element of assault can be established by circumstantial evidence. *State v. Angle*, 149 Ariz. 499, 504, 720 P.2d 100 (App. 1985)

Here, there is virtually no evidence that Mr. Granillo intended to place the child in apprehension, raising a separate issue of insufficient evidence (see below). Although it may be reasonably construed that the defendant intended to place Ms. Carrera in

apprehension of physical injury, there is no evidence that his intent was the same for the child. It does not appear that trial counsel conducted any inquiry or investigation regarding this issue. Neither was this specific charge or its elements addressed in the Rule 20 Motion.

Furthermore, there is little, if any, evidence that the child was actually placed in apprehension. The victim was a three year old child and any evidence of his involvement is limited to three or four leading questions that were asked by the prosecutor with no objection from defense counsel.

> Q. Did he point the gun at your son?
> A. Yes, he did.
> Q. Do you remember how he did that?
> A. Just pointed it at him.
> Q. Did he put the gun to his head?
> A. Yes.
> (RT 7/18/06, 149-150)

Defense counsel failed to object to any of these leading questions – the only non-hearsay testimony that indicated a gun was even pointed at the child. There is no evidence the child was aware of the gun, aware of the situation or placed in apprehension. Although the apprehension element of assault can be established by circumstantial evidence, other than the child's mere presence, there are no other facts from which the child's apprehension can be reasonably inferred. When asked if her son was crying, Carrera answered "Yeah, he was. He was terrified." (*Id*. at 158-159) Defense counsel did not object as to foundation or speculation. How did she know he was terrified? What

was terrifying him? What other factors may account for a three year old crying?

Defense counsel did not explore the issue of intent to place the child in apprehension or the issue of whether the child was in apprehension of imminent harm. The testimony from the mother was that the child was crying. But other reasons for the child crying were never investigated. Defense counsel never requested an evaluation of the child or requested any records from the child's subsequent counseling. No expert was consulted as to a three year old child's perception of such events or whether the child had sufficient awareness to be placed in apprehension by the actions alleged.

Also, the defense counsel failed to elicit testimony from the first responding officer, Officer Del Principe, regarding the child's demeanor. Del Principe was the first officer responding after the incident. In his defense interview (Exhibit C), he described a scene in which Carrera was in a panic and required treatment by paramedics. The child, on the other hand, did not appear to be upset, was not crying or "freaking out." (Exhibit C, 20) Although Officer Del Principe testified as a defense witness at trial, none of these issues raised in his interview were raised before the jury, leaving the issues of apprehension, a key element of the charge of assault of the child, unchallenged.

C. IAC: Failure to Investigate and Offer Evidence Rebutting Possession, Ownership or Knowledge of Ammunition and Holster Found in Search

The petitioner was found guilty of Possession of a Deadly Weapon by Prohibited Possessor. An empty holster and ammunition was found in a search of the room in the

defendant's grandmother's house where the defendant stayed with other people. This evidence was offered as circumstantial evidence that the defendant was in possession of a gun. (ROA 62) Defense counsel argued in a pre-trial motion that items obtained in a search, including ammunition, but not including the holster, should be precluded for a variety of reasons including questions as to ownership of such items and whether Granillo actually or constructively possessed the items. (ROA 59)

Defense counsel was apparently aware that the petitioner's ownership and knowledge of those items was questionable. The room was not exclusively occupied by the defendant (Exhibit B) and no foundation was laid regarding when the items were placed in the room or whether the defendant had any knowledge of them. Yet, aside from asking officers questions regarding how they determined which room was the defendant's, it does not appear that counsel conducted any other investigation that could have led to rebuttal evidence. Counsel did not, apparently, interview the other occupants of the room or the house to determine if they owned those items, when those items were put in the room and whether the defendant had any knowledge that the items had been there. Counsel did interview the owner of the house, Luz Granillo, but did not ask her about the seized items and the defendant's ownership or knowledge of them. (See Exhibits B and D)

Furthermore, defense counsel filed a Motion to Continue indicating he would not be prepared for trial. (ROA 34) That motion was denied. (ROA 38)

D. IAC: Failure to Object to Improper Closing Argument

Failure to object to an improper comment made by a prosecutor in closing argument may, when considered with other factors, be ineffective assistance of counsel. *State v. Valdez*, 167 Ariz. 328, 806 P. 2d. 1376 (1991). In Valdez, the Arizona Supreme Court considered an improper comment made in closing. Although they clearly deemed the comment improper and indicated defense counsel should have objected, they held that it did not raise to the level of ineffective assistance because "[e]ven though defense counsel should have made the proper objection, this single mistake, in and by itself, does not bring the defendant's representation within the purview of the first prong of *Strickland*. Viewing the trial overall, we do not find ineffective assistance of counsel." (*Id.*)

In the instant case, the prosecution used closing argument to improperly focus on the petitioner's criminal history. Although the prior felony conviction was stipulated to and the jury was instructed that petitioner's prior conviction of a felony was not to be considered for any other purpose, the prosecutor highlighted prior convictions without any objection from defense counsel. The prosecutor, in his summation, told the jury:

> And defense counsel wants to distract you with thoughts about her boyfriend's alleged criminal history. [speaking of Carerra's boyfriend who shared her apartment] But that's not what we heard from Detective Carroll. We heard there's no criminal history to speak of, nothing significant in his life.
>
> Unlike the defendant. But, again, you don't even consider that. The

> fact that he is a convicted felon, that shouldn't even weigh in your determination. Don't use that to think he is guilty of this. We know why he is guilty of this crime or how, rather, he is guilty of this crime. The victim identified him.
>
> So don't consider the fact that the defendant has a prior felony conviction against him. He is guilty on his own. The victim identified him. All the evidence pointed to him. Don't consider that in whether or not he is guilty of the armed robbery.
>
> Now, he was guilty of the prohibited possessor charge, as well, and that's because he was a convicted felon and had his civil rights not restored. (RT 7/20/06, 31)

It was highly prejudicial for the prosecutor to repeatedly placed focus on the defendant's prior criminal history, repeatedly referring to the defendant as a convicted felon. The issue of priors was not even before the jury, as it had been stipulated. To raise it in closing argument and hammer on the convicted felon status, may very well have been grounds for a mistrial.

In this regard, defense counsel had multiple options. He could have objected, he could have moved for a mistrial, or much earlier, he could have requested that the prohibited possessor charge be bifurcated to avoid the unfair prejudice that resulted from raising the issue in this trial.

This case is easily distinguished from *Valdez*. In *Valdez*, while the Court acknowledged defense counsel should have objected, it did not rise to the level of IAC because it was a single mistake. Here, there are numerous mistakes, scattered throughout the trial and outlined above.

II. EVIDENCE OF ELEMENTS OF AGGRAVATED ASSAULT OF MINOR CHARGE WAS INSUFFICIENT

A defendant is entitled to relief under Rule 32.1(h) if "The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt . . ."

The assault statute requires that the intent in an assault must be to produce the essential result – in other words, the defendant must intend to produce reasonable apprehension by his actions. *Rineer*, 131 Ariz. at 149. "[T]he apprehension form of assault requires proof of intentionality placing a person in apprehension. Knowingly placing a person in apprehension is a less culpable mental state and is not sufficient for this crime." *State v. Johnson*, 205 Ariz. 413, 72 P.3d. 343 (App 2003) (*citations omitted*).

The jury was charged with considering each count as a separate and distinct offense and deciding each count separately, uninfluenced by any other count (RT 7/20/06, 46; ROA 67). The jury was given the legal elements of each charge and legal definitions for significant terms. (ROA 67)

In the instant case, there was no evidence offered to establish the defendant's intent to instill fear or apprehension in the child. In fact, if all of the evidence is to be believed

regarding a home invasion and armed robbery, there is no logical reason for the defendant having such intent. He was not robbing the boy or taking any of the boy's belongings. The boy happened to be present. The defendant's intent was clearly to place Carerra in apprehension, not the child. The State did not present any alternative theories, such as transferred intent, and the jury was not instructed regarding any particular theory.

There was no evidence, whatsoever, and no alternative legal theory, to prove the element that the defendant intended to place the child in apprehension. A reasonable trier of fact could not have found the defendant guilty of Aggravated Assault of a Minor Under Fifteen.

III. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING

Petitioner should be granted a hearing on the claims presented herein. To deprive Petitioner of a hearing under these unique and compelling circumstances would deny Petitioner due process of law under the United States and Arizona Constitutions. *United States v. Schaflander*, 743 F.2d 714 (9th Cir. 1984). Factual and legal issues must be resolved by the Court at a plenary hearing, and it may summarily deny a Petition only when it conclusively determines there are absolutely *no* material issues of fact or law in dispute. Rule 32.6(c), Arizona Rules of Criminal Procedure.

Petitioner has presented viable claims herein, which, if true, would have changed the outcome for the Petitioner in several appreciable ways. *State v. Watton*, 164 Ariz. 323,

793 P.2d 80 (1990). Defense counsel was ineffective in numerous ways, as outlined above.

The proper inquiry in this regard concerns whether, "if appellant's contentions are taken as true, do they successfully show ineffective assistance of counsel?" *State v. Suarez*, 23 Ariz.App. 45, 530 P.2d 402 (1975). The Arizona Supreme Court has held that a petitioner is invariably entitled to an evidentiary hearing where a colorable claim–one that, "if the defendant's allegations are true, *might* have changed the outcome"–is presented. *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002) (*En Banc*) (emphasis added), *citing*, *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990), *citing, State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). However, "[a] petitioner need not provide detailed evidence, but must provide specific factual allegations that, if true, would entitle him to relief." *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980). In this case, however, Petitioner has set forth detailed evidence that shows he is entitled to relief.

The Court at this stage must assume all of Petitioner's claims to be true, and make its determination as to whether a hearing is warranted based strictly upon that assumption. *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (1996). Assuming the facts stated herein to be true, Petitioner has made out colorable claims of ineffective assistance of counsel.

CONCLUSION

For these reasons, Petitioner requests this Court to find that Petitioner's claims are colorable, and to set an evidentiary hearing on the claims pursuant to Rule 32.6(c). Petitioner asks this Court to vacate his convictions and order a new trial, or in the alternative, to order the State to reinstitute the plea offer under *Donald*.

RESPECTFULLY SUBMITTED this ___ day of February, 2009.

RONALD ZACK, ESQ.
ATTORNEY FOR PETITIONER

A copy of the foregoing mailed/delivered on this _____ day of February, 2009, to:

Hon. Charles Sabalos

Deputy County Attorney

Thomas Granillo
Petitioner