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[Redacted]  
Attorney at Law  
Bar [Redacted]  
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[Redacted]

Attorney for Petitioner

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YUMA**

THE STATE OF ARIZONA,  
  
Respondent,  
  
v.  
  
[Redacted],  
  
Petitioner.

Case No.: [Redacted]  
  
**PETITIONER’S PETITION FOR  
POST-CONVICTION RELIEF**  
  
Honorable [Redacted]

Comes now, Petitioner, [Redacted] (“Petitioner”), by and through undersigned counsel, and files this Petition For Post-Conviction Relief (the “Petition”).

This matter is before this Court following the [Redacted], ruling by the Arizona Court of Appeals (the “Court of Appeals”), in [Redacted]

1 [REDACTED]. In [REDACTED] the Court of Appeals affirmed Petitioner's  
2 [REDACTED], conviction and [REDACTED] sentence. *Id.* This Petition,  
3 pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, seeks relief on the  
4 basis of ineffective assistance of counsel. As discussed in greater detail below,  
5  
6 Petitioner's trial counsel's ("Trial Counsel") actions fell below an objective  
7 standard of reasonableness, thereby prejudicing Petitioner, particularly where Trial  
8 Counsel: (1) failed to properly explain the relative merits of two plea agreements  
9 offered by the respondent State of Arizona (the "State") in comparison to the  
10 potential sentence that he faced if convicted of the charges against him, and also  
11 failed to request a [REDACTED] Hearing; (2) failed to call an expert witness for the  
12 defense to combat the State's expert, even though Petitioner paid for the services  
13 of an expert; (3) failed to call any character witnesses on Petitioner's behalf who  
14 were available at trial and willing to testify, among other things, that Petitioner had  
15 no history of engaging in the behavior that the State's charges accused him of; (4)  
16 failed to ask this Court to take curative measures relative to the duplicitous nature  
17 of the charges against Petitioner causing Petitioner to lose any entitlement to relief  
18 on this basis in the Court of Appeals; and (5) under any circumstance, Trial  
19 Counsel failed to request that this Court issue an order which would allow  
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21 Petitioner to appeal to the [REDACTED] for a  
22 [REDACTED] within ninety (90) days of sentencing.  
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1 Accordingly, for the reasons set forth below, Petitioner requests that this  
2 Court grant this Petition and any relief that it deems appropriate, up to and  
3 including, granting Petitioner a new trial.

4 **MEMORANDUM**

5 **A. Procedural History**

6 On [REDACTED], on the [REDACTED] day of trial, Petitioner, a [REDACTED]  
7 [REDACTED] with no adult criminal record, was convicted of one count [REDACTED]  
8 [REDACTED] and one count [REDACTED]. See Transcript of Proceedings, dated  
9 [REDACTED] (“[REDACTED]”), at [REDACTED], attached hereto as Exhibit A.  
10  
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12 On [REDACTED], Petitioner filed a Motion For New Trial. See  
13 Motion For New Trial, dated [REDACTED], attached hereto as Exhibit B.  
14 On [REDACTED], the Court denied Petitioner’s Motion For New Trial. See  
15 Transcript of Imposition Of Sentence and Motion for New Trial, dated [REDACTED]  
16 [REDACTED], attached hereto as Exhibit C.  
17

18 On [REDACTED], Petitioner was sentenced to [REDACTED] years in prison on the  
19 first count and [REDACTED] years in prison on the second count. See Minute Entry  
20 Imposition of Sentence (Prison), dated [REDACTED] (“[REDACTED]”), [REDACTED],  
21 attached hereto as Exhibit D. The sentences were to be served consecutively. *Id.*  
22  
23

24 Subsequently, Petitioner filed a timely appeal with the Court of Appeals.  
25 See generally Appellant’s Opening Brief, attached hereto as Exhibit E. Petitioner’s

1 appeal was denied by the Court of Appeals on [REDACTED]. See [REDACTED]  
2 [REDACTED], *supra*. Now, Petitioner brings the  
3 instant Petition.

4 **B. Relevant Facts And Trial Counsel’s Failures**

5 This matter stems from accusations of [REDACTED] made by the [REDACTED]  
6 [REDACTED] (“[REDACTED] of Petitioner’s [REDACTED] (“[REDACTED]”). See Reporter’s  
7 Transcript Of Proceedings, dated [REDACTED] (“[REDACTED]”), at [REDACTED],  
8 attached hereto as Exhibit F. Petitioner and [REDACTED] were in a romantic  
9 relationship that lasted roughly [REDACTED] years, or from the time that [REDACTED] was [REDACTED] until  
10 he was [REDACTED] years old. *Id.* [REDACTED] claimed that the [REDACTED] [REDACTED] took  
11 place only during the last six months of Petitioner’s relationship with [REDACTED].  
12 See Transcript Of Proceedings, dated [REDACTED] (“[REDACTED]”), [REDACTED],  
13 attached hereto as Exhibit G.

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17 As Trial Counsel explained to the Court during a side-bar discussion, the  
18 defense’s theory of the case was that [REDACTED] fabricated the  
19 accusations because they were upset that Petitioner would not provide them with  
20 certain financial gain. See Transcript Of Proceedings, dated [REDACTED]  
21 (“[REDACTED]”), at [REDACTED], attached hereto as Exhibit H. Specifically, [REDACTED] wanted  
22 Petitioner to buy him a car and [REDACTED] wanted to be a [REDACTED] on  
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1 Petitioner’s trust. See Transcript – Excerpt Of Proceedings, dated [REDACTED]  
2 [REDACTED] (“[REDACTED]”), at [REDACTED], attached hereto as Exhibit I.

3 Unfortunately for Petitioner, Trial Counsel’s defense of Petitioner included  
4 the following:

5  
6 **i. Trial Counsel’s failures related to two plea agreements offered to  
7 Petitioner by the State.**

8 During the State’s prosecution of this matter, Petitioner was offered two  
9 separate plea agreements. See Plea Agreement, dated [REDACTED] (the  
10 “[REDACTED] Plea Agreement”); see also Plea Agreement, dated [REDACTED] (the  
11 “[REDACTED]”), both Plea Agreements attached hereto as Exhibit J.

12  
13 However, Trial Counsel failed to properly explain to Petitioner the relative merits  
14 of the two plea agreements offered by the State in comparison to the potential  
15 sentence that Petitioner faced if convicted of the charges against him. See  
16 generally, Petitioner’s Affidavit Supporting Post-Conviction Relief (“Petitioner’s  
17 Affidavit”), [REDACTED], attached hereto as Exhibit K. Prior to trial, Trial Counsel  
18 insinuated he could “[REDACTED].” *Id.*, at [REDACTED]. Before trial, Trial  
19 Counsel told Petitioner that the [REDACTED] was “[REDACTED]”  
20 [REDACTED]. *Id.* Petitioner has since found out that there actually  
21 was a written plea offer from the State offering [REDACTED]. *Id.*,  
22 see also [REDACTED], *supra*. Trial Counsel never adequately explained  
23 either plea offer with Petitioner and Petitioner did not know of its existence in  
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1 writing until just prior to commencing this Petition. See Petitioner’s Affidavit,  
2 *supra*, [REDACTED]. Trial Counsel’s improper explanation of either plea agreement caused  
3 Petitioner to change his plea and go to trial. See generally Change Of Plea Hearing  
4 Transcript, dated [REDACTED], attached hereto as Exhibit L. Petitioner was  
5 never properly counseled by Trial Counsel regarding the consequences of going to  
6 trial. See Pre-Sentence Report, dated [REDACTED], attached hereto as  
7 Exhibit M. Petitioner’s statement in the Pre-Sentence Report clearly shows that he  
8 had no idea that he was likely to face significant prison time, even after he was  
9 found guilty at trial. *Id.*, at 1; ([REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] Significantly, Trial Counsel never requested,  
13 and the Court never conducted, a [REDACTED] Hearing to ensure Petitioner’s  
14 understanding of his rejection of the State’s offered plea agreements. See Change  
15 Of Plea Hearing, *supra*, at [REDACTED]. Indeed, no one explained to Petitioner that [REDACTED]  
16 [REDACTED]  
17 [REDACTED], and that he would serve [REDACTED] without the benefit of  
18 any credit for good behavior. See Petitioner’s Affidavit, *supra*, [REDACTED].

22 **ii. Trial Counsel’s failure to call an expert witness to combat the**  
23 **State’s expert witness.**

24 At Petitioner’s trial, the State called a “[REDACTED]” expert to testify regarding the  
25 forensic interviews of [REDACTED] [REDACTED]. See generally Testimony of [REDACTED]

1 [REDACTED], Reporter's Transcript Of Proceedings, dated [REDACTED]  
2 ("[REDACTED]"), starting at [REDACTED], attached hereto as Exhibit N. The State was able to  
3 elicit testimony from its expert that [REDACTED]  
4 [REDACTED], that offenders tend to have a [REDACTED]  
5 [REDACTED], and that [REDACTED]. *Id.*,  
6  
7 at 76-78. This was particularly damaging to Petitioner, where the victim in this  
8 matter was [REDACTED]. Unfortunately, Trial  
9 Counsel failed to call an expert witness for the defense to refute the damaging  
10 testimony of the State's expert, even though Petitioner paid for the services of an  
11 expert. See Petitioner's Affidavit, *supra*, at [REDACTED]. Trial Counsel told Petitioner that [REDACTED]  
12 [REDACTED] paid by  
13 Petitioner. *Id.* Petitioner was neither told [REDACTED] nor did Petitioner  
14 see a report [REDACTED] related to [REDACTED]  
15 [REDACTED]. *Id.* Trial Counsel simply told Petitioner, [REDACTED]  
16 [REDACTED] *Id.*

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20 **iii. Trial Counsel's failure to call any character witnesses on  
21 Petitioner's behalf.**

22 At trial, in addition to testimony related to [REDACTED] accusations, the State  
23 presented testimony from various witnesses [REDACTED].  
24 See [REDACTED], *supra*, at [REDACTED]. Chief among them were [REDACTED] and her  
25 [REDACTED], [REDACTED] ("[REDACTED]"). *Id.* [REDACTED]

1 testified that Petitioner had a [REDACTED] and had no [REDACTED]  
2 [REDACTED]. *Id.*, at [REDACTED]. [REDACTED] testified regarding alleged  
3 [REDACTED] behavior as well as [REDACTED] about  
4 Petitioner being an [REDACTED], although the Court did strike the [REDACTED]  
5 [REDACTED]. *Id.*, at [REDACTED].  
6

7         Aside from calling Petitioner to testify on his own behalf, Trial Counsel did  
8 not call any witness who could refute the [REDACTED], despite  
9 such witnesses being available and present at the trial. See generally [REDACTED]  
10 (Petitioner’s case in chief), *supra*. Trial Counsel’s defense of Petitioner consisted  
11 of cross-examining the State’s witnesses, re-calling two of the State’s witnesses  
12 and calling Petitioner. *Id.*, beginning at [REDACTED]. While the State paraded witnesses  
13 through the court who attacked [REDACTED], Trial Counsel did very little  
14 to present a defense that refuted the State’s [REDACTED].  
15

16 *Id.* There were at least two witness who were available to testify regarding  
17 [REDACTED] at trial who were not called to testify by Trial Counsel. See  
18 generally [REDACTED] Affidavit Supporting Post-Conviction Relief (the “[REDACTED]  
19 [REDACTED]”), [REDACTED], attached hereto as Exhibit O; (noting that both [REDACTED]  
20 [REDACTED] were present and willing to testify on [REDACTED] behalf at  
21 trial). The [REDACTED] County Sherriff’s Office generated a report related to this case  
22 which inaccurately indicates that either [REDACTED] were [REDACTED] by  
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1 Petitioner and that they [REDACTED]. *Id.*, at [REDACTED].  
2 [REDACTED] were in no way ever [REDACTED] by Petitioner, [REDACTED]  
3 otherwise. *Id.* [REDACTED] fully support Petitioner and both wanted to  
4 testify [REDACTED]. *Id.*, at [REDACTED]. [REDACTED] always  
5 maintained a normal relationship with Petitioner and [REDACTED]  
6 [REDACTED], which of course directly refutes the testimony of [REDACTED]. *Id.*,  
7 at [REDACTED]. [REDACTED] spent holidays and other special  
8 occasions with Petitioner and they visited together often. *Id.* Although the  
9 [REDACTED] report clearly alleges [REDACTED], no one from the [REDACTED] County Sherriff's  
10 Office nor the [REDACTED] County Attorney's Office ever [REDACTED] interview [REDACTED]  
11 [REDACTED]. *Id.* [REDACTED] and [REDACTED]  
12 were both listed as witnesses for the defense in Petitioner's trial. *Id.* They both  
13 [REDACTED] [REDACTED] waited outside the courtroom during  
14 the course of the trial. *Id.* However, [REDACTED] were never called to  
15 testify and never given a reason as to why their testimony was not taken. *Id.* [REDACTED]  
16 [REDACTED] who are now [REDACTED]  
17 [REDACTED]. *Id.* [REDACTED] had a relationship with Petitioner their entire lives.  
18 *Id.* They were [REDACTED] and they were all shocked by the  
19 allegations and verdict. *Id.* [REDACTED] always had [REDACTED] around Petitioner  
20 and never had any [REDACTED] problems. *Id.* Although [REDACTED]

1 know about Petitioner’s case and conviction, none has come forward with [REDACTED]  
2 [REDACTED]. *Id.* [REDACTED] do not believe the allegations  
3 and ask about [REDACTED]. *Id.* Petitioner raised [REDACTED]  
4 [REDACTED] along with the help of the [REDACTED] [REDACTED] grandmother. *Id.* While growing up  
5 they had [REDACTED] with Petitioner. *Id.* [REDACTED] would  
6 regularly have their friends [REDACTED] there  
7 were never any problems. *Id.* [REDACTED] contends that Petitioner has no prior  
8 criminal record and he did not suddenly become a [REDACTED] [REDACTED].  
9 *Id.* [REDACTED] and her family know Petitioner to be an innocent man wrongfully  
10 convicted. *Id.*

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13 **iv. Trial Counsel’s failure to ask this Court to take curative measures**  
14 **relative to the [REDACTED] charges against Petitioner.**

15 As noted by the Court of Appeals in its Memorandum Decision related to  
16 this matter, Trial Counsel failed to ask this Court to take curative measures relative  
17 to the [REDACTED] the charges against Petitioner. See [REDACTED]  
18 [REDACTED]. The Court of Appeals noted that Trial Counsel’s failure “[REDACTED]  
19 [REDACTED]—such as either requiring the State to elect  
20 the specific act underlying each count, or instructing the jurors that they must, for  
21 each count, unanimously agree on the act that [REDACTED] committed—  
22 [Petitioner] is not entitled to relief absent fundamental error. *Id.*, citing *State v.*  
23 *Klokic*, 219 Ariz. 241, 244, ¶ 13 (App. 2008).  
24  
25

1           **v. Trial Counsel failed to request that this Court issue an order**  
2           **which would allow Petitioner to appeal to the Arizona Board of**  
3           **██████████ for a ██████████ within ninety (90)**  
4           **days of sentencing.**

5           At the conclusion of Petitioner’s trial this Court sentenced Defendant, a █████  
6           ██████████, with no prior adult criminal history, to serve ██████ in prison. See  
7           ██████████, *supra*, at █. As the Court stated at the sentencing, this is effectively a  
8           █████ sentence. See Reporter’s Transcript Of Proceedings, dated ██████████  
9           (“█████”), at █, attached hereto as Exhibit P. Under, A.R.S. 13-603(L), the sentencing  
10          court “may enter a special order allowing the person sentenced to petition the  
11          board of executive clemency for a commutation of sentence within ninety days  
12          after the person is committed to the custody of the state department of corrections,”  
13          if “the court is of the opinion that a sentence that the law requires the court to  
14          impose is clearly excessive.” See A.R.S. 13-603(L). Only this Court can state  
15          whether it would have considered entering a 603(L) order, but, under any  
16          circumstance, Trial Counsel never even raised the issue with the Court at  
17          sentencing, perhaps denying Petitioner a lesser sentence. See generally █████, *supra*.

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20           **C. Standard Of Review**

21           Under Rule 32.8(c) of the Arizona Rules of Criminal Procedure, the petitioner  
22           “has the burden” of proving his claims of post-conviction relief “by a  
23           preponderance of the evidence.” *State v. Saenz*, 197 Ariz. 487, 489 ¶ 7, 4 P.3d  
24           1030, 1032 (App. 2000). To prevail on an ineffective assistance of counsel claim,  
25

1 a petitioner must satisfy the two-pronged *Strickland* test. *Strickland v Washington*,  
2 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Febles*, 210 Ariz.  
3 589, ¶ 18, 115 P.3d 629, 635 (App. 2005).

4 First, the petitioner must show that his counsel's performance was deficient,  
5 meaning it “fell below an objective standard of reasonableness.” *Strickland*, 466  
6 U.S. at 690. The Court determines “whether, in light of all the circumstances, the  
7 identified acts or omissions were outside the wide range of professionally  
8 competent assistance.” *Id.* at 690. The Court's review is deferential, as “strategic  
9 choices made after thorough investigation of law and facts relevant to plausible  
10 options are virtually unchallengeable.” *Id.* at 690-691.

11 Second, the petitioner must show that the deficiency prejudiced his defense; in  
12 other words, “that there is a reasonable probability that, but for counsel's  
13 unprofessional errors, the result of the proceeding would have been different.” *Id.*  
14 at 695.

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18 **D. Arguments**

19  
20 **i. Trial Counsel failed to properly explain the relative merits of two**  
21 **plea agreements offered by the State in comparison to the potential**  
22 **sentence that he faced if convicted of the charges against him, and also**  
23 **failed to request a [REDACTED] Hearing.**

24 Trial Counsel’s objectively unreasonable explanation of either the [REDACTED] [REDACTED]  
25 Agreement or the [REDACTED] agreement did not suffice to permit Petitioner to make  
a reasonably informed decision regarding this matter, and caused Petitioner to

1 incur a substantially harsher sentence than would have been imposed as a result of  
2 a plea. *State v. Donald*, 198 Ariz. 406, 413, ¶ 14, 10 P.3d 1193 (App. 2000); (“a  
3 defendant may state a claim for post-conviction relief on the basis that counsel's  
4 ineffective assistance led the defendant to make an uninformed decision to reject a  
5 plea bargain and proceed to trial.”). To sustain this claim, the petitioner must  
6 prove either his counsel did not promptly communicate a plea proposal or his  
7 counsel's explanation did not suffice to permit the defendant to make a reasonably  
8 informed decision. *Id.* at 411, ¶ 9 (citations omitted). Prejudice is established by  
9 showing a reasonable probability the defendant would have accepted the plea offer  
10 absent his attorney's deficient advice; such prejudice most often takes the form of a  
11 substantially harsher sentence than would have been imposed as a result of a plea.  
12 *Id.* at 414, ¶ 20 (citations omitted); see also *State v. McCluskey*, 2017 Ariz. App.  
13 Unpub. LEXIS 528, \*5-6, 2017 WL 1712736.

17 Trial Counsel’s performance was objectively unreasonable, particularly  
18 where he inexplicably and unreasonably failed to properly explain to Petitioner the  
19 relative merits of the [REDACTED] agreements offered by the State in comparison to the  
20 potential sentence that Petitioner faced if convicted of the charges against him. See  
21 generally Petitioner’s Affidavit, *supra*. According to documents obtained by  
22 undersigned counsel of this Petition, the State offered [REDACTED] [REDACTED]  
23 agreements to Defendant. See [REDACTED],

1 *supra*. Based on the records obtained by undersigned counsel it is unclear what  
2 happened to the [REDACTED] Agreement. Indeed, there is nothing in either the  
3 transcripts or the minute entries related to this matter showing that the [REDACTED]  
4 Agreement was ever formally rejected, and Petitioner only found out about its  
5 existence in writing recently. *Id.*, at [REDACTED]. On the contrary, the record does show that  
6 the [REDACTED] Agreement was offered by the State and then rejected by Petitioner.  
7 See [REDACTED] Agreement, *supra*; Unopposed Motion To Set Change Of Plea And  
8 Order, dated [REDACTED] (“Change of Plea Motion”); Change of Plea  
9 Transcript, *supra*; Order, dated [REDACTED] (“Change of Plea Order”); the  
10 Change of Plea Motion and the Change of Plea Order are attached hereto as  
11 Exhibits Q and R respectively. However, the record is silent regarding whether  
12 Petitioner was ever properly appraised of the [REDACTED] Agreement or whether  
13 Petitioner understood the consequences of rejecting the plea. *Id.*

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17       Indeed, Trial Counsel did not adequately explain the nature of the [REDACTED]  
18 Agreement to Petitioner, and Petitioner did not understand the consequences of  
19 rejecting the [REDACTED] Agreement. See Petitioner’s Affidavit, *supra*, at [REDACTED]. The  
20 [REDACTED] Agreement offered to drop one of the counts against Petitioner and even  
21 left open the option for a [REDACTED]. See [REDACTED] Agreement, *supra*.  
22 Petitioner asserts that Trial Counsel insinuated [REDACTED]  
23 [REDACTED]” *Id.*, at [REDACTED]. But before trial, Trial Counsel told Petitioner that the [REDACTED]  
24 [REDACTED]  
25

1 [REDACTED] was “[REDACTED]” but [REDACTED]. *Id.* Trial  
2 Counsel’s improper explanation of either [REDACTED] agreement caused Petitioner to  
3 [REDACTED] [REDACTED] go to trial. See Change Of Plea Hearing Transcript, *supra*.

4 To further establish that Petitioner was never properly [REDACTED]  
5 Counsel regarding the [REDACTED], look no further than the [REDACTED]  
6 [REDACTED] related to this matter. See Pre-Sentence Report, *supra*.

7  
8 Petitioner’s statement in the [REDACTED] clearly shows that he had no idea  
9 that he [REDACTED], even after he [REDACTED]

10  
11 [REDACTED] *Id.*, at [REDACTED]; (“[REDACTED]  
12 [REDACTED]  
13 [REDACTED]”).

14  
15 Finally, and significantly, Trial Counsel never requested, and the Court  
16 never conducted, a [REDACTED] Hearing to ensure Petitioner’s understanding of [REDACTED]  
17 [REDACTED] See Change Of Plea Hearing,  
18 *supra*, at [REDACTED]; see also *Donald*, 198 Ariz. 406. Indeed, no one explained to

19  
20 Petitioner that if [REDACTED], that he would serve [REDACTED]  
21 [REDACTED], and that he [REDACTED], meaning [REDACTED]  
22 [REDACTED]. See Petitioner’s Affidavit, *supra*, at [REDACTED].

23 The [REDACTED] sentence given to Petitioner was substantially harsher than  
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1 would have been imposed had Petitioner accepted the [REDACTED] Agreement. See  
2 [REDACTED] Agreement, *supra*.

3 For the reasons set forth above, Trial Counsel's explanation of the State's  
4 plea offers did not suffice to permit Petitioner to make a reasonably informed  
5 decision, and absent Trial Counsel's deficient advice, Petitioner would have  
6 accepted the [REDACTED] Agreement, particularly where the sentence given after trial  
7 was much harsher than would have been imposed after accepting the [REDACTED]. See  
8 *Donald*, 198 Ariz. at 411, ¶ 9, 413, ¶ 14, *supra*. Therefore, Petitioner respectfully  
9 requests that this Court grant any relief that it deems appropriate, up to and  
10 including, granting Petitioner a new trial.  
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13 **ii. Trial Counsel failed to call an expert witness for the defense [REDACTED]**  
14 **[REDACTED], even though Petitioner paid [REDACTED]**  
15 **[REDACTED].**

16 Trial Counsel's decision to not call an expert witness on Petitioner's behalf  
17 and Petitioner's trial was objectively unreasonable, particularly where Trial  
18 Counsel's decision lacked sufficient information about an expert's potential  
19 testimony, such that counsel could not reasonably evaluate whether that expert's  
20 opinion would be valuable or weigh the risks or benefits of calling an expert at  
21 trial. *State v. Denz*, 232 Ariz. 441, 445, 306 P.3d 98, 102 (Ct. App. 2013); see also  
22 *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) (noting that strategic decisions  
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1 are “conscious, reasonably informed decision[s] made by an attorney with an eye  
2 to benefitting his client.”).

3 Admittedly, generally, the “decision not to hire experts falls within the realm  
4 of trial strategy.” *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). And, “the  
5 decision whether to call a particular witness is normally a strategic decision to be  
6 made by counsel, *see State v. Mata*, 185 Ariz. 319, 335, 916 P.2d 1035, 1051  
7 (1996), and avoiding a so-called ‘battle of the experts’ may, in some cases,  
8 constitute sound trial strategy.” *Harrington v. Richter*, 562 U.S. 86, 108-110, 131  
9 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011). For example, the risk that additional  
10 expert testimony might distract the jury or unduly emphasize aspects of a case that  
11 counsel wishes to minimize may justify a counsel's decision to forgo calling a  
12 particular witness. *See id.* (decision to not present expert evidence justified based  
13 on “possibility that expert testimony could shift attention to esoteric matters of  
14 forensic science . . . [or] distract the jury from whether [witness] was telling the  
15 truth”). However, “[a] purportedly strategic decision is not objectively reasonable  
16 ‘when the attorney has failed to investigate his options and make a reasonable  
17 choice between them.’” *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005), quoting  
18 *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); see also *Strickland*, 466  
19 U.S. at 690-91 (“strategic choices made after less than complete investigation are  
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1 reasonable precisely to the extent that reasonable professional judgments support  
2 the limitations on investigation.”).

3 Here, it is unclear whether Trial Counsel’s decision not to call an expert  
4 witness was a “strategic decision” like those contemplated by *Strickland*. *Id.* Trial  
5 Counsel and Petitioner discussed potentially calling an expert witness [REDACTED]  
6 [REDACTED] and Trial Counsel [REDACTED]  
7 [REDACTED] See Petitioner’s  
8 Affidavit, *supra*, at [REDACTED]. Petitioner was neither [REDACTED] nor did  
9 Petitioner see [REDACTED] related to Trial Counsel’s apparent  
10 discussion [REDACTED]. *Id.* Trial Counsel simply told Petitioner, “[REDACTED]  
11 [REDACTED].” *Id.*

12 What is known, is that at Petitioner’s trial, the State called a “[REDACTED]  
13 to testify regarding the forensic interviews of [REDACTED]. See  
14 generally [REDACTED], starting at [REDACTED]. The State was able to elicit testimony from its  
15 expert that [REDACTED]  
16 [REDACTED]  
17 [REDACTED]. *Id.*, at 76-78. This was particularly  
18 damaging to Petitioner, where the [REDACTED] the son of Petitioner’s  
19 ex-girlfriend [REDACTED]. Unfortunately, Trial Counsel failed to [REDACTED]  
20 [REDACTED] for the defense to refute the [REDACTED] of the State’s [REDACTED], even  
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1 though Petitioner paid [REDACTED]. See Petitioner’s Affidavit,  
2 *supra*, at [REDACTED].

3 In *Holsomback v. White*, 133 F.3d 1382, 1387-88 (11th Cir. 1998), the court  
4 found counsel ineffective for not calling or consulting an expert witness in a [REDACTED]  
5 [REDACTED] with no medical evidence of abuse and only evidence of guilt testimony  
6 of alleged victim. In *Holsomback*, the court held an evidentiary hearing where  
7 testimony was elicited from trial counsel regarding his decisions not to contact the  
8 physicians and not to subpoena the medical records based on his view that there  
9 was nothing to be gained from this line of investigation in light of the prosecutor's  
10 concession that there was no medical evidence to substantiate the allegations of  
11 [REDACTED]. *Holsomback*, 133 F.3d at 1387-88. The court found trial counsel’s  
12 justifications unpersuasive, particularly where trial counsel did not bother to  
13 investigate any medical expert or physician. *Id.*

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17 Similarly, this matter concerns a [REDACTED] case with no medical evidence  
18 of abuse and only evidence of guilt testimony of alleged victim. [REDACTED], *supra*,  
19 at [REDACTED]. Trial Counsel did, allegedly, discuss this matter with [REDACTED]  
20 [REDACTED], but due to the vague nature [REDACTED], it cannot be said that Trial  
21 Counsel’s decision was the type of strategic decision contemplated by *Strickland*.  
22 See Petitioner’s Affidavit, *supra*, at [REDACTED]; see also *Strickland*, 466 U.S. at 690-91. As  
23 mentioned above, the testimony elicited by the State [REDACTED] was damaging  
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1 [REDACTED], and was not combated by Trial Counsel. [REDACTED], *supra*, at [REDACTED].

2 An expert for Petitioner could have testified to the unlikelihood that a person

3 would exhibit the behavior that Petitioner was accused of for the first time in [REDACTED]

4 [REDACTED], as well as the likelihood that someone in [REDACTED] would have

5 fabricated the accusations, especially where that someone had [REDACTED]

6 [REDACTED]. Such testimony would have certainly been helpful to

7 Petitioner, especially given his theory of the case, that [REDACTED]

8 fabricated the accusations because they were upset that Petitioner would not

9 [REDACTED]. [REDACTED], *supra*, at [REDACTED].

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12 For the reasons set forth above, Petitioner respectfully requests that this  
13 Court grant any relief that it deems appropriate, up to and including, granting  
14 Petitioner a new trial.  
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16 **iii. Trial Counsel failed to call any witnesses on Petitioner’s behalf**  
17 **who were available at trial and willing to testify that Petitioner had no**  
18 **history of engaging in the behavior that the State’s charges accused him**  
19 **of.**

20 Trial Counsel’s performance at Petitioner’s trial was objectively  
21 unreasonable, particularly where Trial Counsel allowed the State to offer witnesses  
22 [REDACTED] without calling witnesses who were present at  
23 trial and willing to testify on Petitioner’s behalf, thereby negatively affecting the  
24 outcome of the trial. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173  
25 (1993) (“A colorable claim of ineffective assistance of counsel is ‘one that, if the

1 allegations are true, might have changed the outcome’ of the case.’); *State v.*  
2 *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v.*  
3 *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (“To  
4 state a colorable claim of ineffective assistance of counsel, a defendant must show  
5 both that counsel's performance fell below objectively reasonable standards and  
6 that this deficiency prejudiced the defendant.”). “To show sufficient prejudice, the  
7 defendant must point to the actual bias he suffered.” *State v. Walton*, 159 Ariz.  
8 571, 592, 769 P.2d 1017, 1038 (1989) quoting *State v. Richmond (Richmond II)*,  
9 136 Ariz. 312, 317, 666 P.2d 57 (1983).

12 Speculative arguments will not support an ineffective assistance of counsel  
13 claim. *State v. Berryman*, 178 Ariz. 617, 620-21, 875P.2d. 850, 853 54 (App.  
14 1994). There is a strong presumption that counsel provided effective assistance.  
15 In order to overcome that presumption, a petitioner is “required to show counsel's  
16 decisions were not tactical in nature, but were the result of ineptitude, inexperience  
17 or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677  
18 (1984).

21 Here, Trial Counsel’s actions exhibit ineptitude, particularly where Trial  
22 Counsel chose not to call character witnesses to testify on Petitioner’s behalf to  
23 refute the [REDACTED]. See [REDACTED],  
24 *supra*, at [REDACTED]. As mentioned above, [REDACTED] testified that Petitioner had a  
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1 [REDACTED]. *Id.*,  
2 at [REDACTED]. [REDACTED] testified regarding alleged [REDACTED]  
3 behavior as well as making an [REDACTED]  
4 [REDACTED], although the Court did strike the [REDACTED]. *Id.*, at  
5 [REDACTED].  
6 [REDACTED].

7 Trial Counsel inexplicably, and unreasonably, chose not to address the  
8 above [REDACTED] during [REDACTED]. See generally [REDACTED]  
9 (Petitioner's case in chief), *supra*; (Trial Counsel's defense of Petitioner consisted  
10 of cross-examining the State's witnesses, re-calling two of the State's witnesses  
11 and calling Petitioner). Trial Counsel's inept inaction is particularly glaring, where  
12 there were at least two witness who were available to testify regarding Petitioner's  
13 character at trial who were not called to testify by Trial Counsel. See generally  
14 the [REDACTED] Affidavit, *supra*; (noting that both [REDACTED] were present  
15 and willing to testify [REDACTED]).

18 [REDACTED] were willing and able to testify, they were both  
19 listed as witnesses for the defense [REDACTED] [REDACTED], and they both [REDACTED]  
20 [REDACTED] waited outside the courtroom during the course of the trial. *Id.*  
21 They would have testified that [REDACTED]  
22 [REDACTED] *Id.* [REDACTED] would have testified that they  
23 [REDACTED]  
24 [REDACTED] with Petitioner and never [REDACTED]  
25 [REDACTED]

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which of course directly refutes the testimony of [REDACTED] thereby calling into question the veracity of [REDACTED]. *Id.*, at [REDACTED]. Which would have been particularly important where the defense’s theory of the case was that [REDACTED] fabricated the accusations in this matter because they were upset that Petitioner would not [REDACTED]. See [REDACTED], at [REDACTED]. Specifically, [REDACTED] wanted Petitioner to buy [REDACTED] and [REDACTED] wanted to be a [REDACTED]. See [REDACTED] Excerpt, at [REDACTED], [REDACTED]. Indeed, [REDACTED], and [REDACTED] spent holidays and other special occasions with [REDACTED]. [REDACTED] Affidavit, *supra*, at [REDACTED]. [REDACTED] has [REDACTED] all of whom had a relationship with [REDACTED]. *Id.* They were not [REDACTED] and they were all shocked by the allegations [REDACTED]. *Id.* [REDACTED] always had [REDACTED] and never had any [REDACTED] problems. *Id.* Further, Petitioner raised [REDACTED] along with the help of the [REDACTED] [REDACTED]. *Id.* While growing up they had a good relationship [REDACTED]. *Id.* [REDACTED] would regularly have their [REDACTED]. *Id.* [REDACTED] would have testified that [REDACTED] and he did not suddenly become a [REDACTED]. *Id.* [REDACTED]

1 [REDACTED] know Petitioner to be an innocent man wrongfully convicted  
2 and would have testified to that. *Id.*

3       However, [REDACTED] were never called to testify and never  
4 given a reason as to why their testimony was not taken. *Id.* There is no strategic  
5 reason for leaving the above potential testimony on the sideline, while allowing  
6 [REDACTED] in the minds of the jury. *State v. Sorensen*, 104 Ariz.  
7 503, 506, 455 P.2d 981, 984 (1969) (standing for the notion that criminal  
8 defendants can present evidence of their character for being law abiding; see also  
9 *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981) (character evidence that  
10 defendant is law abiding is “always relevant”); Ariz. R. Evid. 405(a) (“[i]n all  
11 cases in which evidence of character or a trait of character of a person is  
12 admissible, proof may be made by testimony as to reputation or by testimony in the  
13 form of an opinion. On cross-examination, inquiry is allowable into relevant  
14 specific instances of conduct.”).

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18       For the reasons set forth above, Petitioner respectfully requests that this  
19 Court grant any relief that it deems appropriate, up to and including, granting  
20 Petitioner a new trial.  
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22       **iv. Trial Counsel failed to ask this Court to take curative measures**  
23 **relative to the [REDACTED] the charges against Petitioner**  
24 **causing Petitioner to lose any entitlement to relief on this basis in the**  
25 **Court of Appeals.**



1 Trial Counsel’s actions at trial, specifically not taking curative measures  
2 relative to the [REDACTED] against Petitioner, were not  
3 objectively reasonable and prejudiced Petitioner on appeal. *State v. Runningeagle*,  
4 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (“A colorable claim of ineffective  
5 assistance of counsel is ‘one that, if the allegations are true, might have changed  
6 the outcome’ of the case.”).

8 As noted by the Court of Appeals in its Memorandum Decision related to  
9 this matter, Trial Counsel failed to ask this Court to take curative measures relative  
10 to [REDACTED] against Petitioner. See *State v. Crews*,  
11 *supra*, at 3. The Court of Appeals noted that Trial Counsel’s failure “[REDACTED]  
12 [REDACTED] [REDACTED]  
13 [REDACTED], for  
14 each count, unanimously agree on the act that [REDACTED] committed [REDACTED]  
15 [REDACTED] is not entitled to relief [REDACTED]. *Id.*, citing *State v.*  
16 *Klokic*, 219 Ariz. 241, 244, ¶ 13 (App. 2008). Trial Counsel’s above actions were  
17 objectively unreasonable and clearly prejudiced Petitioner on appeal where  
18 Petitioner faced a greater burden of proof than Petitioner would have absent Trial  
19 Counsel’s error.  
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1 For the reasons set forth above, Petitioner respectfully requests that this  
2 Court grant any relief that it deems appropriate, up to and including, granting  
3 Petitioner a new trial.

4 **v. Under any circumstance Trial Counsel failed to request that this**  
5 **Court issue an order which would allow Petitioner to appeal to the**  
6 **Arizona Board [REDACTED]**  
7 **within ninety (90) days of sentencing.**

8 Trial Counsel’s failure to request that this Court issue an order which would  
9 allow Petitioner to appeal to the Arizona Board of [REDACTED]  
10 [REDACTED], prejudiced Petitioner by causing Petitioner to endure an  
11 excessive sentence. A.R.S. 13-603(L) (the sentencing court “may enter a special  
12 order allowing the person sentenced to petition the board of executive clemency  
13 for a commutation of sentence within ninety days after the person is committed to  
14 the custody of the state department of corrections,” if “the court is of the opinion  
15 that a sentence that the law requires the court to impose is clearly excessive.”) See  
16 A.R.S. 13-603(L).  
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19 At the conclusion of Petitioner’s trial this Court sentenced Defendant, [REDACTED]  
20 [REDACTED], with no prior adult criminal history, to [REDACTED] in prison. See  
21 [REDACTED], *supra*, at [REDACTED]. As the Court stated at the sentencing, this is effectively  
22 a [REDACTED] sentence. See Reporter’s Transcript Of Proceedings, dated [REDACTED]  
23 (“[REDACTED]”), at [REDACTED], attached hereto as Exhibit P. Only this Court can state whether it  
24 would have considered [REDACTED] order, but, under any circumstance, Trial  
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1 Counsel never [REDACTED] with the Court at sentencing, perhaps denying  
2 [REDACTED]. See generally [REDACTED], *supra*. There is no satisfactory  
3 strategic reason why Trial Counsel did not attempt to spare Petitioner from his  
4 prejudicial and excessive sentence. *Strickland*, 466 U.S. at 690-95; (counsel’s  
5 actions are objectively unreasonable where “in light of all the circumstances, the  
6 identified acts or omissions were outside the wide range of professionally  
7 competent assistance,” and a petitioner was prejudiced where “there is a  
8 reasonable probability that, but for counsel's unprofessional errors, the result of the  
9 proceeding would have been different.” *Id.* at [REDACTED].  
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12 For the reasons set forth above, Petitioner respectfully requests that this  
13 Court grant any relief that it deems appropriate, up to and including, granting  
14 Petitioner a new trial.  
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16 **E. Conclusion**

17 WHEREFORE, based on the above arguments, Petitioner respectfully  
18 requests that this Court grant any relief that it deems appropriate, up to and  
19 including, granting Petitioner a new trial.  
20

21 Respectfully submitted,

22  
23 [REDACTED]  
24 Attorney for Petitioner  
25