

**ORIGINAL**

18-8337  
No.

**ORIGINAL**

---

**In The  
Supreme Court of the United States**

---

DAVID MICHAEL DECKER,

Petitioner,

v.

ROB PERSSON,

Respondent.

---

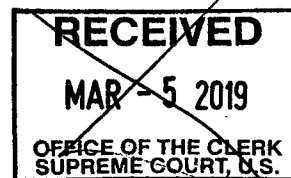
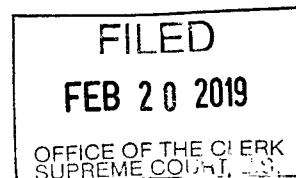
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

**PETITION FOR WRIT OF CERTIORARI**

David Michael Decker #16222317  
Oregon State Correctional Institution  
3405 Deer Park Drive, SE  
Salem, Oregon 97301

Petitioner *pro se*



### Questions Presented

- (1) Whether an initial post-conviction attorney's failure to raise a substantial claim of ineffective assistance of counsel could be considered reasonable under a *Martinez v. Ryan*, 566 US 1 (2012), analysis thereby precluding relief under 28 USC §2254.
- (2) Whether trial counsel's failure to request a lesser-included jury instruction based on an ignorant or incorrect knowledge of the relevant statutory law falls within the meaning of "deficient performance" under *Strickland v. Washington*, 466 US 668 (1984).
- (3) Whether Mr. Decker's claim of actual innocence warranted relief under 28 USC § 2254.

## LIST OF PARTIES

Petitioner:  
Pro se

DAVID MICHAEL DECKER #16222317  
Oregon State Correctional Institution  
3405 Deer Park Drive, SE  
Salem, Oregon 97301

Respondent:  
Represented by:

ROB PERSSON  
ELLEN F. ROSENBLUM  
Attorney General State of Oregon  
BENJAMIN N. GUTMAN  
Solicitor General  
SAMUEL A. KUBERNICK  
Assistant Attorney General  
1162 Court St. NE  
Salem, Oregon 97301-4096  
Benjamin.N.Gutman@doj.state.or.us  
Samuel A. Kubernick@doj.state.or.us  
Tel: (503) 378-4402

SOLICITOR GENERAL OF THE UNITED STATES  
Room 5614  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-000

## TABLE OF CONTENTS

PROCEDURAL HISTORY AND RELEVANT FACTS .....	1
1. Opinion Below .....	1
2. Jurisdictional Statement .....	2
3. Constitutional Provisions .....	2
4. Statement of the Case .....	2
a. Trial .....	2
b. State postconviction proceedings .....	7
c. District court proceedings .....	8
d. First Ninth Circuit opinion ( <i>Decker I</i> ) .....	10
e. District court on remand .....	11
f. Second Ninth Circuit opinion ( <i>Decker II</i> ) .....	11
5. Reasons for Granting the Writ .....	12
a. Review is necessary to secure uniformity in the circuits regarding the “deficient performance” prong of <i>Strickland v. Washington</i> .....	13
b. This Court’s guidance is necessary to secure uniformity among the circuits regarding the meaning of “frivolous” in the context of state post-conviction counsel’s failure to raise claims of trial counsel’s ineffective assistance under <i>Martinez v. Ryan</i> .....	17
c. The <i>Decker II</i> decision involves a question of exceptional importance – to wit, whether defense counsel’s decision to abandon a defense with a high probability of success constitutes a “strategic” decision sufficient to defeat a claim of deficient performance .....	19
CONCLUSION .....	21

## INDEX OF APPENDICS

APPENDIX A–	Order denying petition for rehearing en banc filed September 25, 2018
APPENDIX B –	Ninth Circuit Memorandum Opinion and dissent filed August 16, 2018
APPENDIX C –	District Court’s Order following remand filed February 1, 2017
APPENDIX D –	Ninth Circuit Memorandum Opinion and dissent filed September 8, 2016
APPENDIX E –	District Court’s Order and judgment filed October 5, 2015
APPENDIX F –	Magistrates Judges Findings and Recommendations [adopted by the district court] filed on July 30, 2015
APPENDIX G –	The district court’s order granting a stay of the trial until the conclusion of the appeal process, but releasing Mr. Decker pending the completion of the appeal filed on November 13, 2015.

## TABLE OF AUTHORITIES

### United States Supreme Court Cases

<i>Glover v. United States</i> , 531 US 198 (2001) .....	20
<i>Harrington v. Richter</i> , 562 US 86 (2011) .....	10
<i>Hinton v. Alabama</i> , 134 US SCt 1081 (2014)( <i>per curium</i> ).....	21
<i>Neder v. United States</i> , 527 US 1 (1999) .....	16
<i>Rompilla v. Beard</i> , 545 US 374 (2005) .....	16
<i>Sears v. Upton</i> , 561 US 945 (2010) .....	16
<i>Strickland v. Washington</i> , 466 US 668 (1984) .....	i, 10, 12, 13, 14, 15, 16, 17, 20, 21
<i>Wiggins v. Smith</i> , 539 US 510 (2003) .....	17

## Federal Court Cases

<i>Anderson v. Simmons</i> , 476 F3d 1131 (10th Cir 2007) .....	17
<i>Butcher v. Marquez</i> , 758 F2d 373 (9th Cir 1985) .....	16
<i>Decker v. Persson</i> , 2018 US App LEXIS 27391 (9th Cir 2018) .....	2
<i>Decker v. Persson</i> , 663 Fed Appx 520 (9th Cir 2016) .....	1
<i>Dickens v. Ryan</i> , 740 F3d 1302 (9th Cir 2014)( <i>en banc</i> ) .....	18
<i>Ramonez v. Berghuis</i> , 490 F3d 482 (6th Cir 2007) .....	20
<i>United States v. Alferahin</i> , 433 F3d 1148 (9th Cir 2006) .....	16
<i>United States v. Span</i> , 75 F3d 1383 (9th Cir 1996) .....	16

## Oregon Court Cases

<i>State v. Berndt</i> , 282 Or App 73 (Or Ct App 2016) .....	6
<i>State v. Chatelain</i> , 347 Or 278 (Or SCt 2009) .....	6, 13
<i>State v. Madison</i> , 93 Or App 182 (Or Ct App 1988) .....	6
<i>State v. Pitts</i> , 259 Or App 372 (2013) .....	13

## United States Constitution

Sixth Amendment .....	2, 8, 11, 20
-----------------------	--------------

## Oregon Statutes

ORS § 138.550(3) .....	18
------------------------	----

ORS § 163.115(3).....	14
ORS § 164.215 (1)(2006) .....	2
ORS § 164.215(1).....	6
ORS 164.225.....	2

### Miscellaneous Authorities

4 William Blackstone, <i>Commentaries on the Laws of England</i> (1769).....	13, 19
Kelly Reissmann, “ <i>Our System Is Broken</i> ”: <i>A Study of the Crisis Facing the Death-Eligible</i> <i>Defendant</i> , 23 N. ILL. U. L. REV. 43 (2002).....	20

### United States Code

28 U.S.C. §1254(1) .....	2
28 USC §1254(1) .....	2

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

---

David Michael Decker respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

**PROCEDURAL HISTORY AND RELEVANT FACTS**

**1. Opinion Below**

The magistrate judge filed findings and recommendations on July 30, 2015. (Appendix F). The order of the district court adopting the findings and recommendations of the magistrate judge and granting Mr. Decker a writ of habeas corpus was filed on October 6, 2015. (Appendix E). The decision of the Ninth Circuit reversing the district court's grant of the writ was filed September 8, 2016, *Decker v. Persson*, 663 Fed Appx 520 (9<sup>th</sup> Cir 2016)(*Decker I*)(Appendix D). The Ninth Circuit's order denying the petition for rehearing and rehearing en banc was issued on October 21, 2016.

Mr. Decker filed a Petition for Writ of Certiorari in this Court on January 19, 2017; this Court denied Certiorari on March 6, 2017. *Decker v. Persson*, 197 LEd2d 470 (2017).

On remand the District Court issued an Order denying habeas relief filed February 1, 2017. (Appendix C). The decision of the Ninth Circuit affirming the district court's denial of the writ was filed August 16, 2018, *Decker v. Persson*, 2018 US App LEXIS 22823 (9<sup>th</sup> Cir 2018)(Appendix B)(*Decker II*). The Ninth Circuit's order denying the petition for rehearing and rehearing en banc was filed on



September 25, 2018, *Decker v. Persson*, 2018 US App LEXIS 27391 (9<sup>th</sup> Cir 2018)(Appendix A).

**2. Jurisdictional Statement**

This Court's jurisdiction is invoked under 28 USC §1254(1).

**3. Constitutional Provisions**

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Oregon Revised Statute (ORS) § 164.215 (1)(2006), provides:

(1) Except as otherwise provided in ORS 164.225, a person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein.

**4. Statement of the Case**

**a. Trial**

On January 20, 2006, Mr. Decker was charged in the Marion County, Oregon Circuit with two varieties of murder arising out of a single killing committed by his codefendant, Starrett: felony murder and intentional murder with an aiding and abetting theory. After a three-day jury trial, Mr. Decker was found guilty of felony murder, but not guilty of intentional murder. The State presented the following evidence at Mr. Decker's trial.

Officers of the Salem Police Department (SPD) found the body of Kirk Jones in his apartment on January 11, 2006. Mr. Jones was openly homosexual. Mr. Decker, who was homeless, was arrested early in the morning of January 12, 2006 and questioned about Mr. Jones's death. Mr. Decker gave the police two taped statements. The first occurred shortly after his arrest, while Mr. Decker was extremely intoxicated. According to Mr. Decker, on either January 4th or 5th, he had been at Mr. Jones's apartment, along with two other individuals: Michelle Wolf, a friend of Mr. Jones, and Justin Starrett, another homeless man with whom Mr. Decker camped. The four were drinking vodka and beer while playing a drinking game called "quarters." He stated that they drank together in the evening for two or three hours and everyone was having fun. Eventually, Ms. Wolf left to make a phone call. About five minutes after she left, Mr. Starrett and Mr. Jones, who were in a romantic relationship, started arguing, and Mr. Starrett began using homophobic slurs to insult Mr. Jones. Mr. Jones told Mr. Starrett that, if he was "gonna to act this way, [he should] just leave." Mr. Starrett told Mr. Jones that he was going to "fuck [him] up" and began hitting him with a lamp that he had picked up. Mr. Decker saw Mr. Starrett hit Mr. Jones three or four times with the lamp, breaking the light bulb. Mr. Jones appeared to be cut on the head and sat down, holding his head in his hands. Mr. Decker stood up and asked Mr. Starrett to stop. Mr. Starrett got a knife from the kitchen and went back to Mr. Jones and started yelling homophobic slurs again. Mr. Decker walked out the door and left.

Later the same day, after the police had given Mr. Decker time to regain his sobriety, another SPD detective interviewed Mr. Decker, and Mr. Decker gave his second taped statement. Mr. Decker's second statement was largely the same as his first, except that Mr. Decker added the following details to his account of the murder. After Mr. Starrett had begun hitting Mr. Jones with the lamp, Mr. Decker had picked up a vodka bottle that was sitting beside him and threw it toward Mr. Jones, who was approximately ten feet away. At the time, he was extremely intoxicated and threw the bottle for no particular reason. The bottle glanced off of the top of Mr. Jones's head and fell to the floor two or three feet away. Mr. Jones asked, "oh why are you doing this?" Mr. Decker responded to Mr. Starrett that they should "leave him alone." It was at that point that Mr. Starrett went into the kitchen and got the "large butcher knife" that he used to attack Mr. Jones again. Mr. Decker saw Mr. Starrett strike Mr. Jones one time with the knife, then left the apartment.

The state medical examiner, Dr. Christopher Young, testified that, during the autopsy that he had performed on Mr. Jones, he determined that Mr. Jones had a blood alcohol concentration of .23 percent and that three blunt-force injuries to the head had been the cause of his death. Dr. Young opined that the injuries that caused Mr. Jones's death "could have been caused by an object like a lamp." Dr. Young also noticed a "lighter blow" on the top of his head, which was consistent with being struck by a bottle, which, in his opinion, would not have been fatal.

Mr. Decker had an obvious defense to both the felony murder charge with burglary as the predicate offense (of which he was convicted) and the intentional murder charge based on an aiding and abetting theory (of which he was acquitted) because both offenses have a specific-intent element. In the case of the felony murder for which the jury found him guilty, Mr. Decker had two separate intent defenses: (1) that there was no evidence that he intended to commit an assault (the predicate for the burglary that was the predicate for felony murder) at the time that he committed *actus reus* (remaining in the apartment after his authorization to be there was revoked) and (2) that he was highly intoxicated at the time of the murder. Nonetheless, his trial attorney did not call any defense witnesses or elicit from the State's witnesses evidence relating to Mr. Decker's mental state at the time of the murder, did not make a motion for judgment of acquittal or argue to the jury that the evidence was legally insufficient to convict Mr. Decker, did not ask for a specific jury instruction relating to the intent element of burglary, or ask for a lesser included offense instruction for the crime of assault (which cannot be a predicate for felony murder under Oregon law). Instead, trial counsel chose to present a frivolous affirmative defense, which lacked even a plausible basis in facts, particularly in light of Mr. Decker's pretrial statements to the police in which he personally admitted to facts that would preclude the viability of the defense.

The only evidence presented by the defense was to recall three of the SPD detectives who investigated the case and asking them if they had any evidence to indicate ahead of time that Mr. Decker knew about the assault by Mr. Starrett.

Under Oregon law, in order to be guilty of burglary, Mr. Decker had either to enter or remain unlawfully in Jones's apartment with the intent to commit a crime therein and that the requisite intent had to be formed on or before the time of the criminal act of entering or remaining unlawfully. See ORS § 164.215(1). Under clear Oregon precedent, if the jury believed that Mr. Decker formed the intent to commit a crime after he had already been asked to leave the premise by Jones and remained anyway, he was innocent of both burglary and felony murder and should have been found not guilty of felony murder count of the indictment. See *State v. Chatelain*, 347 Or 278, 285-86 (Or SCt 2009); *State v. Berndt*, 282 Or App 73, 76-77 (Or Ct App 2016); *State v. JNS*, 258 Or App 310, 318-19 (Or Ct App 2013); see generally *State v. Madison*, 93 Or App 182, 184 (Or Ct App 1988)(citing with approval the trial court's giving of a lesser included offense instruction for theft in a case in which the defendant was charged with felony murder with a robbery predicate).

Prior to deliberations, the state trial court instructed the jury generally:

Oregon law provides that a person commits the crime of Burglary in the First Degree if the person enters or remains unlawfully in a dwelling with the intent to commit a crime therein. In this case, to establish the crime of Burglary in the First Degree, the state must prove beyond a reasonable doubt . . . [that] at the time of entering or remaining unlawfully, David Decker had the intent to commit the crime of assault.

Mr. Decker's trial counsel did not request (and the trial court, therefore, did not give) any additional instructions to the jury clarifying the necessity that the *actus reus* (remaining) and the *mens rea* (intent to commit a crime) had to be

contemporaneous in order for Mr. Decker to be found guilty of burglary and felony murder (with a burglary predicate). This omission was particularly prejudicial in light of the fact that, in closing argument, the State argued a legally incorrect theory of the relationship between the *actus reus* and *mens rea* elements of burglary under Oregon law. *See Decker II, supra*, (Murguia, C.J., dissenting), at 7. As Judge Murguia explained in dissent from the panel opinion:

[T]he jury was incorrectly allowed to believe that there were two times in which Decker might have formed the intent to commit the assault on Jones—either at the time Jones asked Decker to leave, or at the time of the assault itself. This legal error was not corrected in the jury instructions, even though this Oregon burglary offense required intent to have been formed at the time Jones verbally rescinded his permission for Decker to remain and not later. This error was also compounded by the prosecution’s repeated misstatements of what the law required during closing statements.

*Id.*

The jury ultimately acquitted Mr. Decker of the intentional murder of Jones *but* convicted him of burglary and felony murder.

**b. State postconviction proceedings**

While most of Mr. Decker’s federal habeas claims relating to his trial counsel’s ineffectiveness were not raised by his state postconviction attorney, one was – namely, counsel’s failure to request a lesser-included instruction for the crime of assault (in lieu of felony murder with a burglary predicate). During the state postconviction relief proceedings, Mr. Decker’s trial counsel submitted an affidavit explaining why he did not request the instruction, which stated, in pertinent part:

The prosecutor’s theory was that Petitioner committed felony murder when, in the course of a burglary, the victim (Kirk Jones) was killed. The prosecution argued that Petitioner committed the crime of

burglary when he remained at Jones' residence despite Jones' request that Petitioner (and his co-defendant, Justin Starrett) leave, and subsequently assaulted Jones. Petitioner's position, throughout my representation of him, was that he did not aid, assist or help in any way to cause the death of Mr. Jones. According, there were no LIO instructions that would have been appropriate.

***My decision not to request an LIO instruction was also strategic. In my professional experience, juries respond negatively to the argument, 'my client is not guilty. But if he is, please find him guilty of a lesser (sic) offense.'***"

(emphasis added). The state postconviction court accepted this subjective explanation for the tactical nature of the decision, holding:

I find that the attorney made a strategy decision not to ask for lesser included (sic) because he believed the jury disfavored arguments that Petitioner was not guilty, but if he is guilty, he's guilty of only a lesser-included offense. I do not find that an unreasonable decision for an attorney to make. Really, that talks about (phonetic) the assault four, because I've already ruled, but I don't think there is a lesser included of the felony murder.

**c. District court proceedings**

Mr. Decker filed a federal *habeas corpus* petition on August 13, 2013. In that petition, he raised, *inter alia*, a claim that his trial counsel had rendered ineffective assistance of his trial counsel. In the petition, he enumerated eight individual instances of his attorney's deficient performance: (A) his counsel's failure to exclude the Mr. Starrett's out-of-court testimonial statements, which were inadmissible under the Confrontation Clause of the Sixth Amendment; (B) counsel's failure to request a jury instruction on the lesser-included offense of assault with regard to the felony-murder charge; (C) counsel's failure to request a correct theory of the defense instruction explaining the specific intent element of the burglary that was

the predicate to the alleged felony-murder offense; (D) counsel's failure to call expert witnesses to establish that the injury that Mr. Decker inflicted with the vodka bottle was not the cause of Mr. Jones's death; (E) counsel's failure to consult or call an expert toxicologist to offer an opinion about Mr. Decker's (in)ability voluntarily to waive his rights to counsel and silence when he was interrogated by the police in investigation and support of a motion to suppress his custodial statements; (F) counsel's failure to make a motion for judgment of acquittal when the evidence was insufficient to show that he had the requisite intent for burglary, the predicate felony for the felony-murder charge; (G) counsel's failure to inform Mr. Decker of the terms of the State's propose plea offer; and (H) counsel's failure to object to the imposition of attorney fees.

On July 30, 2015, the magistrate judge issued findings and recommendations, recommending that the district court grant Mr. Decker's petition based on Grounds (B), (C), and (F) and deny the petition as to the other claims. See (Appendix F at 15-20, 23-26). On October 5, 2015, the district court adopted the magistrate judge's findings and recommendations and ordered the State to release Mr. Decker or retry him within 90 days. See (Appendix E). On November 13, 2015, the district court granted the State's request for a stay pending the completion of the appeal on November 13, 2015. See (Appendix G). Rejecting detention of Mr. Decker pending appeal where the harm to him would be substantial if he was required to continue to serve a prison sentence based on a conviction that the Court has found unconstitutional. See (Appendix G at 9).



**d. First Ninth Circuit opinion (*Decker I*)**

The Ninth Circuit reversed the district court grant of habeas relief on claims (B) and (F). Because claim (B) was raised and litigated in the state courts, the federal courts are required to apply the deferential standard of review contained in 28 USC § 2254. Because claim (F) was not raised and litigated in the state courts due to the ineffective assistance of Mr. Decker's state postconviction counsel, there was no state court decision to which to give such deference. In reversing the district court's grant of the petition based on claim (B) finding, the Ninth Circuit found: "In light of defense counsel's affidavit, the Oregon state [post-conviction] court denied claim 1(B), holding that defense counsel's decision not to request an assault instruction was strategic." The Ninth Circuit held, based on this Court's decision in *Harrington v. Richter*, 562 US 86 (2011), that the state court's holding was not an unreasonable application of this Court's decision in *Strickland v. Washington*, 466 US 668 (1984), without addressing the district court's reasons for finding the opposite. With regard to claim (F), the Ninth Circuit held that "defense counsel's decision to argue an affirmative defense rather than Decker's lack of intent did not constitute ineffective assistance of counsel" under *Strickland*, again without any discussion of the facts on which the district court relied in finding to the contrary. With regard to claim (C) the Ninth Circuit "remanded to the District Court to determine in the first instance whether the burglary instruction given by the Oregon trial court to the jury were sufficient or insufficient concerning the intent element of burglary under Oregon law."

**e. District court on remand**

On remand Mr. Decker's third (and only surviving) habeas claim was that his trial counsel rendered him constitutionally ineffective assistance, in violation of the Sixth Amendment to the United States Constitution, by failing to request a specific instruction regarding the intent element of burglary as applied to the facts of his case – specifically, that Mr. Decker had to have formed the intent to commit a felony at either the time that he unlawfully entered Jones's apartment or at the time that he remained unlawfully therein. Mr. Decker further claimed that his counsel's instructional failure permitted the jury to erroneously convict Mr. Decker when the evidence of the requisite intent for the burglary count – which was also the predicate felony for the felony-murder count – was legally insufficient. On remand, the district court found that the general jury instruction for burglary fairly covered the timing of intent in Mr. Decker's case.

**f. Second Ninth Circuit opinion (*Decker II*)**

After remand, and on appeal to the Ninth Circuit, Mr. Decker argued that he was entitled to relief because his trial counsel rendered ineffective assistance of counsel when he failed to request an instruction on the intent element of the burglary charge that would have clarified to the jury that the burglary charge required the state to prove that Decker formed the intent to assault Jones at the time that Decker “unlawfully remained” in Jones' apartment; that is, when Jones told Decker and Starrett to leave (thus withdrawing their licenses to be in his home) and they did not leave.

The majority concluded that:

trial counsel's failure to seek a more detailed instruction on the timing of Decker's intent to assault Jones—because trial counsel reasonably pursued a different defense—was “within the wide range of reasonable professional assistance.” *Strickland*, 466 US at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*.” (emphasis added)).

*Decker II*, at \*4-5. And,

Moreover, even if we were inclined to depart from the law of the case to hold that trial counsel's failure to raise another defense was unreasonable (and thus that failure to request a jury instruction in service of that other defense was unreasonable as well), we would not be able to say here that *PCR* counsel's failure to raise an IAC claim on that basis was itself unreasonable.

*Decker II*, at \*5.

## 5. Reasons for Granting the Writ

In this case, Mr. Decker's trial counsel failed to understand that Mr. Decker was actually innocent of felony murder and to request an appropriate and legally accurate jury instruction on the pertinent law not because of any informed strategic decision, but rather out of ignorance of the law and a lack of due diligence. The result of these failures was that the adversarial process failed to produce a just result and allowed an innocent man to be convicted of felony murder, not in a case in which the parties disagreed in any significant way as to the relevant facts, but rather in a case in which the facts were largely uncontested but defense counsel simply failed to understand (or point out) their legal relevance to the judge or the jury. As the dissent in the Ninth Circuit panel decision noted, “had [Mr. Decker's trial counsel] made intent the centerpiece of his defense, the prosecution's case

would have failed.” *Decker II*, *supra*, (Murguia, C.J., dissenting), at 3. The record below also established that counsel’s failure to request an instruction regarding the timing of the intent element of the burglary charge was not a reasoned and informed decision, but rather the result of counsel’s lack of awareness of the state of the law of burglary in Oregon and to comprehend the viability of Mr. Decker’s intent defense.

**a. Review is necessary to secure uniformity in the circuits regarding the “deficient performance” prong of *Strickland v. Washington*.**

In *Strickland*, this Court held that 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.” 466 US at 686. In this case, as noted, counsel’s strategy to front an affirmative defense to Mr. Decker’s murder charges was based on a profound failure to adequately research the plain elements of burglary leading to a fundamental unfairness that resulted in Mr. Decker being erroneously convicted of felony murder. Importantly, the dissent in *Decker II* appeared to fully grasp (1) the elements of burglary in Oregon;<sup>1</sup> and (2) how detrimental counsel’s acts and omissions affected the outcome of Mr. Decker’s trial.

---

<sup>1</sup> In *State v. Pitts*, 259 Or App 372, 376 (Or Ct App 2013) the Court held that:

[T]he requirement that a defendant intends to commit a crime within the unlawful-entered building is an essential feature of burglary. “Since the time of Blackstone, the defendant’s intent to commit a crime in the building has been the characteristic distinguishing burglary from mere trespass.” *State v. Chatelain*, 347 Or 278, 286 . . . (2009)(citing 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769)(“[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass.”)) Furthermore, the defendant must possess the intent

Nonetheless, the majority of the panel in the Ninth Circuit found that Mr. Decker's ineffective assistance claim could not "overcome the deference applied to the performance of both PCR and trial counsel." *Decker II, supra*, at 4-5. It concluded that trial counsel's decision to pursue an affirmative defense under ORS § 163.115(3) – a defense for which Mr. Decker patently did not qualify – rather than the lack of *mens rea* at the time of the alleged *actus reus* for burglary "was 'within the wide range of reasonable professional assistance'" acceptable under *Strickland*. *Id.* at 5-6 (citation omitted). As the dissent noted, this "statutory affirmative defense, which requires proof of each of five elements, several of which were lacking here, was flimsy at best."<sup>2</sup> *Decker II, supra* at 9 (Murguia, C.J., dissenting).

---

to commit a crime *at the time* of the unlawful entry. *State v. Chatelain*, 220 Or App 487, 492 . . . (2008), *aff'd*, 347 Or 278 . . . (2009) This requirement is consistent with the underlying legislative purpose of burglary, which is to punish trespass for the purpose of committing a crime. *State v. JNS*, 258 Or App 310, 319 . . . (2013).

Further, as the Oregon Legislature defined "with the intent to commit a felony" in the Commentary when enacting Oregon's Criminal Code in 1971:

5. With intent to commit a felony: That defendant, charged with first degree murder, entered house unlawfully, that there were one or more human beings present therein, and that he intended to commit one or more crimes therein, constitute burglary . . .

Oregon Criminal Code: Final Draft and Report §136 (1970)

<sup>2</sup> In order to mount an affirmative defense to felony murder, Mr. Decker would have had to prove that he:

- (a) was not the only participant in the underlying crime;
- (b) did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission thereof;
- (c) was not armed with a dangerous or deadly weapon;
- (d) had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and

The panel majority rejected Mr. Decker's claim of ineffective assistance of counsel based on a misapplication of *Strickland* and its progeny: the majority's belief that trial counsel's conscious and intentional choice to pursue one (ineffectual) defense in lieu of another meritorious one of which he was simply unaware was the type of "strategic" decision that *Strickland* requires be given a strong presumption of reasonableness. The evidence establishes that, far from making an objectively reasonable "strategic" decision, counsel simply had no idea that Mr. Decker had a valid intent defense to felony murder because he lacked a complete understanding of the elements of burglary under Oregon law and therefore was unaware that he should request a jury instruction specifically addressing the State's failure of proof.

A significant area of disagreement between the Ninth Circuit panel majority and dissent involved the issue of what constitutes a "strategic decision" by defense counsel. *See Decker II, supra* (Murguia, C.J., dissenting), at 9 ("I respectfully disagree with the conclusion . . . that [Mr. Decker's trial counsel]'s decision to argue an affirmative defense rather than Decker's lack of intent was a legitimate trial strategy"). Judge Murguia correctly characterized the majority opinion as holding that trial counsel was "immunized from constitutional challenge because he had *any* strategy," including "his decision to abandon an alternative defense that had a high probability of success." *Id.* at 10 (emphasis in original).

In this regard, the majority opinion is not only inconsistent with this Court's precedent but also inconsistent with prior the Ninth Circuit decisions in *United*

---

(e) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

*States v. Alferahin*, 433 F3d 1148, 1161 (9th Cir 2006)(holding that Alferahin’s counsel’s decision to forego a crucial materiality instruction was not a “strategic” one,<sup>3</sup> but rather was made because counsel “had no idea that such an instruction was available to his client as a matter of right”), and *United States v. Span*, 75 F3d 1383, 1387–88 (9th Cir 1996)(holding that Span’s counsel’s performance was deficient in failing to object to an erroneous instruction on an excessive force defense, even though counsel asserted three other valid defenses at trial). It is also inconsistent with the Ninth Circuit’s decision in *Butcher v. Marquez*, 758 F2d 373, 377 (9th Cir 1985), which emphasized that trial counsel’s decision to forego a defensive instruction could only be considered “strategic” for *Strickland* purposes if it came about with reference to legal knowledge and due diligence (“Apparently defense counsel, *with adequate knowledge of the law and the evidence*, abandoned pursuit of an instruction on voluntary manslaughter in accord with the strategy that he believed would procure the most advantageous defense for Butcher. It can be inferred that in taking this course of action counsel believed that such a request would have been fruitless or even harmful to his client”)(emphasis added). *Cf. Sears v. Upton*, 561 US 945, 954 (2010)(rejecting the State’s suggestion that an attorney’s decision to focus on one potentially reasonable trial strategy could be justified as “a tactical decision” when the attorney failed to conduct a thorough investigation before making it); *Rompilla v. Beard*, 545 US 374, 394 (2005)(O’Conner,

---

<sup>3</sup> This Court has instructed that “materiality” requires only that a false or omitted statement have “a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.” *Neder v. United States*, 527 US 1, 16 (1999)(brackets and internal quotation marks omitted).

concurring)(finding ineffective assistance and noting defense counsel failed to properly investigate an issue that “threatened to eviscerate one of the *defense’s* primary [] arguments”)(italics in original).<sup>4</sup>

This Court should, therefore, grant the writ to clarify its interpretation of deficient performance of counsel, and specifically “strategic decision making,” under *Strickland* and to ensure that its opinions demonstrate a uniform application of *Strickland* within the lower courts.

**b. This Court’s guidance is necessary to secure uniformity among the circuits regarding the meaning of “frivolous” in the context of state post-conviction counsel’s failure to raise claims of trial counsel’s ineffective assistance under *Martinez v. Ryan*.**

Mr. Decker has always conceded, throughout his federal *habeas* proceedings, that his state postconviction relief (PCR) counsel failed to raise his meritorious ineffective-assistance-of-counsel claim before the state PCR courts. In *Martinez*, this Court stated that “[t]he right to effective assistance of counsel at trial as a bedrock principle in our justice system” and “without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” For that reason, this Court held: “Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez v. Ryan*, 566 US 1, 9 (2012).

Under the Ninth Circuit’s post-*Martinez* precedents, in order to excuse his PCR counsel’s procedural default under *Martinez*, Mr. Decker had to demonstrate

---

<sup>4</sup> See also *Anderson v. Simmons*, 476 F3d 1131, 1145 (10th Cir 2007)(Although “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,” “the investigation supporting counsel’s decision . . . was *itself reasonable*”)(italics in original)(quoting *Wiggins v. Smith*, 539 US 510, 523 (2003));



that the merits of his ineffective-assistance claim were “substantial,” his PCR counsel was ineffective; the state PCR proceeding was his initial review proceeding; and state procedural-default rules required him, *de jure* or *de facto*, to bring the claim in the PCR proceeding. *See Dickens v. Ryan*, 740 F3d 1302, 1319 (9th Cir 2014)(*en banc*)(citing *Trevino v. Thaler*, 569 US 413 (2013)). The third and fourth elements of *Dickens* were clearly met (state procedural-default rules required Mr. Decker to raise his ineffective-assistance claim at his first opportunity, which was his PCR petition). *See* ORS § 138.550(3)(“All grounds for relief claimed by petitioner in a [PCR] petition must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition”). The crucial issue for Mr. Decker’s *Martinez* excuse was whether his PCR counsel was ineffective for failing to do so and whether the claim was “substantial,” inquiries which, by their nature, overlap. Under *Martinez*, a claim is “substantial” if it has “some merit.” *Martinez*, 566 US at 14, and, almost by definition, a failure to raise a substantial claim of the ineffective assistance of trial counsel cannot itself be either adequate performance or nonprejudicial. For the reasons set forth above delineating the ineffective assistance of Mr. Decker’s trial counsel, Mr. Decker’s PCR counsel was ineffective in failing to raise his ineffectiveness claim on PCR review in the state courts.

The majority of the panel below found simply that Mr. Decker's PCR counsel's failure to raise his trial counsel's ineffective assistance in state PCR proceedings was "reasonable." See *Decker II*, *supra*, at 6. This decision is inconsistent with both *Martinez* and other Ninth Circuit published opinions interpreting it, and this Court should, therefore, grant its writ.

**c. The *Decker II* decision involves a question of exceptional importance – to wit, whether defense counsel's decision to abandon a defense with a high probability of success constitutes a "strategic" decision sufficient to defeat a claim of deficient performance.**

Mr. Decker was convicted of a murder that he did not commit. He was wrongfully convicted because none of the lawyers who represented him in his previous proceedings – trial, appeal, or state PCR – realized that he was innocent. Mr. Decker is proof of the nightmare that can happen when a defendant does not have counsel, at any stage of his state proceedings, who were effective enough to realize that he was charged with two types of murder, both of which required the formation of specific intent, which the evidence clearly established that he lacked at the time of the crime. Because of his counsels' collective ignorance of fundamental principles of a charge of burglary, the elements of which have not changed in centuries, *Blackstone*, *supra*, Mr. Decker's jury was never instructed regarding his obvious defense to the murder charges, and trial counsel's ineffective assistance was never brought to the attention of the state appellate or PCR courts. Mr. Decker's innocence is clearly shown by the record as the State offered no evidence at his trial that, at the time that he remained in Jones's apartment after he had told Starrett to leave, Mr. Decker had any intent to commit a crime. Instead, the evidence showed

that Starrett spontaneously began to assault Jones to Mr. Decker's surprise. The failures of Mr. Decker's trial counsel to request a specific jury instruction on the intent issue in the case resulted in an innocent man being convicted of a nonexistent crime that carried a mandatory sentence of twenty-five years to life imprisonment. *See Glover v. United States*, 531 US 198, 203 (2001)(explaining, in noncapital case on ineffective assistance of counsel, that "any amount of actual jail time has Sixth Amendment significance").

The Ninth Circuit's misapplication of *Strickland*, in *Decker II*, as well as this Court's *Strickland* precedents, flowed from a misperception: that "strategy" and "intentionality" are interchangeable.<sup>5</sup> While this Court stressed in *Strickland* that counsel's performance must be given a strong presumption of reasonableness, *see Strickland*, 466 US at 689, that presumption was clearly overcome by the facts in this case. Nonetheless, *Decker II* dismissed as "strategic" attorney decision-making that the record below clearly establishes was uninformed and indefensible. This misapplication of *Strickland* deference insulates wrongful convictions like Mr. Decker's from review. *Cf.* Kelly Reissmann, "*Our System Is Broken*": A Study of the Crisis Facing the Death-Eligible Defendant, 23 N ILL U L REV 43, 44 (2002)("Even

---

<sup>5</sup> "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on 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 US at 690-91, before deciding on the strategy to be followed at the trial and the penalty phase, with a particular emphasis on the latter. *Id.* at 690 (While "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," labeling a decision "trial strategy" or "tactic" does not automatically immunize an attorney's performance" from Sixth Amendment challenge); *see also Ramonez v. Berghuis*, 490 F3d 482, 488 (6th Cir 2007)("Constitutionally effective counsel must develop trial strategy in the true sense - not what bears a false label of 'strategy' - based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation");

in capital cases, most claims of ineffective assistance are dismissed as ‘tactical decisions . . .”).

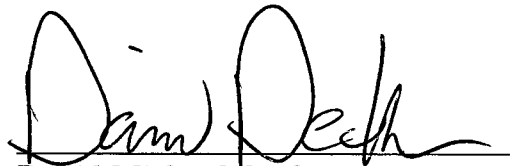
Under those circumstances, the trial counsel should have requested a clarifying instruction. Instead, counsel’s lack of even the most rudimentary elements of burglary caused an innocent man to be convicted of a sentence of life in prison. Under *Strickland*, a lawyer’s “ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance . . . “ *Hinton v. Alabama*, 134 US SCt 1081 (2014)(*per curium*).

Further instruction from this Court is needed to offer lower courts a brighter-line guidance on the issues presented herein lest other innocent people be deprived of their liberty.

### CONCLUSION

For those reasons, this Court should issue its writ.

**Dated** this 19th day of February, 2019.

A handwritten signature in black ink, appearing to read 'David Decker', written over a horizontal line.

David Michael Decker #16222317  
3405 Deer Park Drive SE  
Salem, OR 97310