No. 21-_____

IN THE

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

— v. —

DAVID SHINN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS;
MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JUSTIN S. WEDDLE
WEDDLE LAW PLLC
250 West 55th Street,
30th Floor
New York, NY 10019
(212) 997-5518
jweddle@weddlelaw.com

ERICA T. DUBNO
Counsel of Record
FAHRINGER & DUBNO
43 West 43rd Street,
Suite 261
New York, NY 10036
(212) 319-5351
erica.dubno@fahringerlaw.com

Counsel for Petitioner

January 29, 2021

QUESTIONS PRESENTED

1. Can a court find counsel's conduct to be effective under *Strickland v. Washington* by positing strategies that hypothetically *could have*, but demonstrably *did not*, motivate counsel's conduct?

2. Is counsel's uninformed decision on a crucial issue—such as consenting to post-mistrial deliberations by discharged jurors made without any investigation of law and facts—a strategic judgment entitled to deference under *Strickland*?

3. Is counsel's failure to preserve an obvious federal constitutional challenge to a state statute imposing on the defendant the burden to prove his innocent intent deficient performance under *Strickland*?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

On October 17, 2017, Arizona Attorney General Mark Brnovich was substituted for former Arizona Attorney General Thomas C. Horne.

On March 27, 2020, Director of the Arizona Department of Corrections David Shinn was substituted for former Director of the Arizona Department of Corrections Charles L. Ryan.

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Petitioner Stephen Edward May respectfully requests a writ of certiorari to review the decisions of the United States Court of Appeals for the Ninth Circuit, entered on March 27, 2020.

STATEMENT OF RELATED PROCEEDINGS

May v. Ryan (Shinn), Nos. 17-15603, 17-15704 (9th Cir.) (Sept. 9, 2020 order staying mandate; Sept. 2, 2020 order denying rehearing; Mar. 27, 2020 opinion and memorandum disposition on rehearing reversing District Court's habeas corpus grant; Mar. 27, 2020 order withdrawing the memorandum affirming habeas; Mar. 26, 2019 memorandum affirming District Court's grant of habeas).

May v. Ryan, No. CV 14-409-NVW (D. Ariz.) (Mar. 28, 2017 order granting habeas and adopting in part magistrate's Sept. 15, 2015 Report and Recommendation).

May v. State, No. 13-102 (S. Ct.) (Oct. 7, 2013 order denying certiorari).

State v. May, No. CR-12-416-PR (Ariz.) (Apr. 23, 2013 order denying petition for review).

State v. May, No. 2 CA-CR 2012-257-PR (Ariz. Ct. App., Div. 2) (Sept. 7, 2012 memorandum decision granting review and denying relief).

State v. May, No. CR2006-30290-001 SE (Ariz. Sup. Ct., Maricopa Cnty.) (Nov. 7, 2011 order denying post-conviction post-hearing relief; Jan. 3, 2011 order partially denying post-conviction relief).

State v. May, No. 08-1393 (S. Ct.) (Oct. 5, 2009 order denying certiorari).

State v. May, No. CR-12-416-PR (Ariz.) (Mar. 27, 2009 order denying reconsideration; Feb. 10, 2009 order denying review).

State v. May, No. 1 CA-CR 07-144 (Ariz. Ct. App., Div. 1) (July 24, 2008 memorandum affirming judgment and sentence).

State v. May, No. CR 2006-30290-001 SE (Ariz. Sup. Ct., Maricopa Cnty.) (Feb. 16, 2007 judgment and sentence).

OPINIONS AND ORDERS BELOW

The District Court decision (App.84) granting habeas corpus is reported. 245 F.Supp.3d 1145. The Ninth Circuit's decision affirming the grant of habeas corpus is unpublished (App.69; 766 Fed. App'x 505).

The Ninth Circuit's opinion after rehearing, upon which certiorari is sought, is reported. 954 F.3d 1194 (App.1). The court's memorandum decision, upon which certiorari is also sought, is unpublished (App.60; 807 Fed. App'x 632). The Ninth Circuit's order denying rehearing and staying the mandate are unpublished (App.273, 275). The magistrate judge's Report and Recommendation is unpublished (App.123; 2015 WL 13188352).

Arizona's Court of Appeals' affirmance of the conviction and 75-year sentence on direct appeal is unpublished (App.262; 2008 WL 2917111). Arizona's Supreme Court's denial of review is unpublished (App.261). This Court's order denying certiorari on direct appeal is published. 130 S. Ct. 80.

Arizona's Superior Court's decisions dismissing post-conviction relief are unpublished (App.251, 258). Arizona's Court of Appeals' decision affirming denial of post-conviction relief is unreported (App.242; 2012 WL 3877855). Arizona's Supreme Court's denial of review is unpublished (App.241). This Court's denial of certiorari on post-conviction review is published. 134 S. Ct. 295.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Petition is timely. The Ninth Circuit's decisions reversing habeas were issued on March 27, 2020. App.1, 60. The Ninth Circuit's order denying rehearing and rehearing *en banc* was issued on September 2, 2020. App.273. The 150-day period for filing this Petition expires on February 1, 2021. *See* Supreme Court Order dated March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." *See* U.S. Const. amends. V and XIV.

Section 13-1410(A) of the Arizona Revised Statutes provides, in pertinent part, that a "person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact." Pursuant to A.R.S. § 13-1401(3), "sexual contact" includes "any direct or indirect touching" of the genitals. A.R.S. § 13-1407(E) provided "[i]t is a defense to a prosecution pursuant to . . . § 13-1410 that the defendant was not motivated by a sexual interest."

STATEMENT OF THE CASE

"This case, and in particular [Stephen] May's sentence, reflects poorly on our legal system." App.31. Those words were written by the Circuit Judge responsible for vacating the District Court's grant of habeas relief and reinstating Stephen's 75-year sentence based upon "he-said/she-said" allegations that, in public places, he momentarily touched a few children over their clothing.

This case reflects poorly on our legal system because, as recognized by the District Court, Stephen was convicted under Arizona's unique burden-shifting statute that considered any person who touches a child's genitals—including parents changing diapers—to be a felonious child molester unless he or she proves the touching had no sexual intent. App.87.

This case reflects poorly on our legal system because, as originally recognized by the Ninth Circuit, Stephen's counsel was ineffective when he failed to object to permitting hung, discharged jurors to resume deliberations after they left the courtroom following a mistrial. App.72.

This case reflects poorly on our legal system because, as recognized by the dissent, Stephen "has already served ten years based on his counsel's ineffectiveness, and has been at liberty since March 2017, without incident, ever since [the District Judge] granted his *habeas* petition based on a statute of dubious constitutionality." App.59.

This Court can and should grant certiorari in this case, which presents important and unresolved constitutional questions, clear conflicts among the lower courts, and clear conflicts with this Court's jurisprudence.

1. Counsel Acquiesces in Discharged Jurors Resuming Deliberations After a Hung Jury and Mistrial

On Friday, January 12, 2007, 12 jurors were deliberating Stephen May's fate after a one-week trial devoid of physical, surveillance, or eyewitness evidence. The charge was that Stephen—a former schoolteacher and swim instructor—on different occasions and in public, had touched four children's genitals while each was clothed. Even though adults were always nearby, no one claimed to have seen anything. App.12.

The jurors had been deliberating for two full days when they submitted a note stating "[w]e are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." App.308.

After the judge delivered an *Allen* charge and the jurors continued deliberating, they sent another note seeking clarification of "reasonable doubt" because some jurors still believed there was reasonable doubt while others did not. App.309.[1]

Recognizing the continued deadlock, the judge conferred with counsel and then declared a mistrial. App.288. No party raised any objection to a mistrial, and there is no indication defense counsel thought a mistrial was premature, unwarranted, or disadvantageous. The judge excused the jurors and thanked them for their service. App.286-87. She also advised the discharged jurors to wait back in the jury room if they were willing to speak with the lawyers about the case. The trial was over. App.324.

After the discharged jurors exited the courtroom, defense counsel again did nothing to indicate a strategic preference for avoiding a mistrial. App.287. Rather, while counsel remained silent, the judge set a new trial date and a date for jury selection. The judge continued Stephen's release and bail conditions. *Id.* As later recognized by the only standard of care expert to testify in the post-conviction hearing, at that moment Stephen had "won not with an acquittal" but by "liv[ing] and fight[ing] another day." App.38.

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[1] It also said "we feel we need more guidance to 'proof beyond a reasonable doubt.'" *Id.*

Then something remarkable happened. The discharged foreman, who believed Stephen was guilty,[2] gave a "pep talk" to the other discharged jurors to press them to recommence deliberations and reach a verdict. One of the holdouts later described the foreman's efforts to reassemble the jury as "coercion." App.325. She continued, "[o]ne person says yes, and everybody's like okay, yeah, fine, okay, okay. You know, and he gets on to me and [the other holdout] and we're like okay we can talk about it some more." *Id.* She added, "[a]bsolutely every one of us" got on their cellphones after the discharged jurors—who had been relieved of their oath—were excused from the courtroom. App.332.

The former foreman then had an oral conversation with the bailiff.[3] The bailiff reported something to the judge, who went back on the record—out of the presence of the discharged jurors—and said:

> The bailiff has received a communication from the jury that they do not wish to have a hung jury and wish to continue deliberating and communicate that to the counsel.

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[2] *See* App.310 ("he, the minute he was elected foreman said there is only one way I'm going to vote and that is guilty").

[3] Prior to the mistrial, the jurors only communicated with the court through written notes. The court had directed that "[n]o member of the jury should ever attempt to communicate with me except by a signed writing." The jurors wrote over 100 notes to the judge during the trial.

App.288. Why the jurors wanted this and what the bailiff and foreman discussed were never revealed. The judge never received a note or had any direct communication with the former jurors. She never polled them to see whether each discharged juror wanted to return to deliberations. She never inquired as to the circumstances giving rise to the surprising request including any improper communication or influence, the jurors' interactions with the bailiff, or their observations of people in the courtroom after the mistrial was declared.

In short, when recalling the discharged jurors, the judge did nothing to "determine whether any juror ha[d] been directly tainted" or to consider "factors that can indirectly create prejudice." *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1893-94 (2016) (even in a civil trial there is a "potential for taint" that "looms even larger when a jury is reassembled after being discharged").

The judge did, however, ask the prosecutor and counsel whether they had any objection. App.288. Counsel made no attempt to learn additional information about what had changed or possible influences on the jurors. He sought no re-affirmation of the jurors' oath. He conducted no research on whether discharged jurors actually can be reconvened as a "jury" at all. He did not ask for time to investigate the facts or law, to analyze the proper course of action, or to conduct a meaningful consultation with his client.

Instead, counsel had a "very, very brief" conversation with Stephen—about 20 to 30 seconds—before stating he had no objection. App.295-96. Counsel later stated, in a sworn declaration, that the judge's "declaration of a mistrial on the record, then her subsequent decision to allow the jury to resume deliberating, caught everyone in the case by surprise." App.305. Counsel added:

> While I do not recall precisely how long it lasted, in a very brief conversation, I spoke with [Stephen] about the situation. Essentially, our decision related to the options of allowing the jury to resume deliberating, or to go through another complete trial with the prosecution then in possession of a complete transcript of his testimony from the mistried case.
>
> Caught in the moment by a circumstance I had never before encountered in almost 300 previous felony jury trial[s], I did not consider what had caused the jury to change their minds, whether we should inquire as to what had happened, or whether the jury—having been discharged and released from their oath and admonition—could even be reconstituted.

App.305-06.

Without ever speaking directly to the discharged jurors, the judge orally directed the bailiff to tell them they could resume deliberating. App.288. There is no memorialization or record of the bailiff's instructions to the discharged jurors. The jurors were never re-sworn or reminded of their oath.

Four days later, after continued deliberations and a holiday weekend, the discharged jurors "finally came to a settlement." App.324. They acquitted Stephen on allegations relating to one child but convicted him on counts regarding the three others. Stephen May, who had been free to leave the courtroom after the mistrial, was remanded into custody and ultimately sentenced to 75 years' imprisonment.

2. Counsel Fails to Research or Preserve a Constitutional Objection to Arizona's Burden-Shifting Law

Arizona is the only state to presume guilt of molestation based on a showing of non-accidental contact, and to put the burden on defendants to disprove that presumption by establishing a lack of sexual intent. A.R.S. § 13-1407(E). However, as recognized by the Senior District Judge who granted habeas relief to Stephen May, this statutory scheme shifts the burden to defendants to disprove the most important element of the crime charged—criminal intent. App.86.

Counsel never lodged a due process objection to the statute. The closest counsel came was to request a jury instruction placing the burden on the prosecution to prove sexual intent beyond a reasonable doubt. The trial judge invited briefing on the issue; the prosecution submitted a brief but the defense did not. App.119. Had counsel researched the burden-shifting issue, he would have found cases holding that a state "may not shift the burden of proof" on intent to defendants. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *State v. Jensen*, 153 Ariz. 171, 176 (1987) (*en banc*).

The burden-shifting scheme not only violated due process, but it also had the practical effect of forcing Stephen to testify in order to prove his lack of criminal intent. Stephen testified that any momentary touching—such as while playfully tossing children in the community pool in the presence of other adults—was not sexually motivated. But Stephen suffers from a neurological condition resulting in an abnormally large head, movement disorder, and other manifestations. Jurors perceived him to be "odd" and the "perfect profile of someone to do such a crime." App.196.

3. Direct Appeal

On direct review, new counsel raised the preserved issue—the "jury instructions unconstitutionally placed the burden of proof on the defendant"—but did not challenge the statutory scheme itself on due process grounds, nor did the Arizona Court of Appeals *sua sponte* consider the issue. It held the "superior court did not abuse its discretion in instructing the jury that [Stephen] had the burden to prove he was not motivated by sexual interest." App.266.

The Arizona Court of Appeals also reviewed the constitutionality of re-convening the discharged jury, but only under the heightened standard for objections not preserved at trial—fundamental error. The court distinguished *State v. Crumley*, 128 Ariz. 302, 306 (1981), which held that "[o]nce discharged, we think this jury could not be properly recalled to further decide an issue in this case." The court reasoned that in Stephen's case the jurors "did not have the extended opportunity for contact with the public that occurred in *Crumley*." App.266-68. The Arizona Supreme Court denied review. App.261.

4. This Court Requests the Prosecution to Respond to the Certiorari Petition

New counsel sought certiorari. The petition argued that Arizona's molestation statute is unconstitutional because it places the burden on the defendant to prove he had no sexual motivation when the alleged touching occurred. SCOTUS Blog featured Stephen's case as a "Petition to Watch."[4]

This Court requested the State's response. Although acknowledging that the "constitutional validity of Arizona's child-molestation statutes is a matter of great importance,"[5] the State urged denial of the petition, arguing it was "based upon arguments . . . never properly presented to the state courts." Certiorari was denied.

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[4] *See* Kristina Moore, SCOTUSblog (2009), http://www.scotusblog.com/2009/09/petitions-to-watch-conference-of-9-29-09-part-iii (last visited Jan. 26, 2021).

[5] *See* Respondent's Brief in Opposition to the Petition for Certiorari in *May v. State of Arizona*, No. 08-1393, 2009 WL 2524209, *30 (Aug. 14, 2009).

5. Post-Conviction Proceedings

A post-appeal investigation revealed that serious improprieties and significant potential outside influences occurred after the discharged jurors, who had been freed from their oath, were allowed to resume deliberations, including (1) jurors' cellphone use; (2) oral communications with the bailiff; and (3) the foreman's speculation to a holdout that Stephen would probably "only get a year or two." App.149-51. This misinformation—Stephen was actually sentenced to 75 years' imprisonment—was the "biggest thing" the foreman used to convince a holdout to change her vote. App.329. *See* William E. Nelson, *Political Decision Making by Informed Juries*, 55 Wm. & Mary L. Rev. 1149, 1159 (2014) (finding Stephen's conviction to be "deeply unjust" because a "compromise based on a one to two year sentence" resulted in, effectively, a life sentence).

Stephen's post-conviction petition raised a number of critical issues under the state and federal constitutions. The Arizona Superior Court dismissed some claims without a hearing, including:

(1) Stephen was deprived of his right to trial by jury when unsworn jurors were allowed to pass judgment on his guilt;

(2) the judge coerced guilty verdicts by allowing jurors to continue deliberations after a mistrial;

(3) the court's failure to properly instruct the jurors denied Stephen his jury trial rights and violated Arizona's command that judges shall declare the law;

(4) Stephen's convictions violated due process because Arizona's child molestation statute does not require the state to prove every element of the crime beyond a reasonable doubt;

(5) no reasonable trier of fact could have found Stephen guilty of child molestation because the statute unconstitutionally relieves the state of its burden to prove intent; and

(6) cumulative errors violated due process. App.258-60.

The court held an evidentiary hearing on the remaining three claims; (1) the jurors' use of extrinsic evidence—the foreman's daughter's teddy bear—to resolve questions about intent; (2) the jury traded votes; and (3) counsel was ineffective. Following the hearing, the court denied relief. App.251-57.

The Arizona Court of Appeals granted review but denied relief. The court assumed—"without deciding"—that counsel's performance was deficient for failing to object to the resumption of deliberations, but found no prejudice because, on direct appeal, the court had rejected the underlying claim of error.

App.246-49.[6] Amici curiae including the ACLU Foundation of Arizona, Arizona Attorneys for Criminal Justice, and the Maricopa County Public Defender's Office supported Stephen's petition for Arizona Supreme Court review. The Arizona Supreme Court (App.241) and this Court declined review.

6. The U.S. District Court Grants Habeas Based on Burden-Shifting

In a thorough opinion, United States District Judge Neil V. Wake granted habeas relief based on the burden-shifting law's violation of Stephen's due process rights. App.87.[7]

The court found that counsel's ineffectiveness provided cause and prejudice to overcome the procedural default of failing to object at trial. App.120. Counsel's performance was deficient where it "should have been obvious that the burden-shifting scheme presented a serious constitutional question that could have been dispositive" for Stephen. App.119. There were "no reasons, tactical or other, for failing to

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[6] Because no objection had been preserved, the Arizona Court of Appeals only analyzed for *fundamental error* whether the jury was improperly reconstituted. App.75.

[7] Judge Wake rejected the State's "absolutist" approach in "maintaining that *legislatures have unbounded capacity to shift to defendants the burden of disproving anything*," subject only to the specific examples listed in *Patterson v. New York*, 432 U.S. 197, 215 (1977). App.100. These examples are that a legislature "cannot command that the filing of an indictment, or mere proof of the identity of the accused, should create a presumption of all the facts essential to guilt." 432 U.S. at 210.

preserve the federal constitutional claim." *Id.* "Given how close it was under the prejudicial instruction actually given and the two deadlocks on reasonable doubt" there was also clear prejudice. App.115.[8]

Judge Wake adopted without comment the magistrate judge's Report & Recommendation on counsel's failure to object to reconstituting the jury. App.87. That Report found no deficient performance because it believed "strategic reasons" supported counsel's decision not to oppose renewed deliberations. The Report cited counsel's post-trial sworn statement that if the case was retried, the prosecution would have the transcript of Stephen's trial testimony. App.203. The Report also considered the jurors' notes leading up to the mistrial and speculated: "Under these circumstances, [counsel] could reasonably conclude that this jury would give [Stephen] the benefit of the doubt and acquit him on all counts when they ultimately resumed deliberations." App.203-04. The Report found no prejudice, claiming Stephen "improperly speculates" that motions to investigate the circumstances—which counsel never made—would have been granted. App.204.

After serving 10 years in custody, Stephen was released. App.59.

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[8] Judge Wake also analyzed AEDPA deference rules at length. App.87, 91, 111, 117, 120-21.

7. The Ninth Circuit Affirms Habeas Relief Based on Counsel's Failure to Object to Reconvening the Discharged Jurors

The Ninth Circuit (2-1) affirmed habeas relief based on different deficient conduct by counsel. The court found it was "not 'sound trial strategy'" for counsel "not even to attempt to preserve the mistrial based on a hung jury, because a mistrial here would have been a clearly advantageous result" for Stephen, and the "State's case turned entirely on the jury's believing the testimony of several child victims who all . . . struggled to provide details of the alleged molestation on the stand, including failing to remember whether some of the incidents even took place." App.72.

The panel found a "reasonable chance that, if the mistrial had remained in place, the State would not have pursued a second trial at all, or that the State would have pursued fewer charges if it did re-try" Stephen. App.73. The panel also recognized several other reasons why "competent counsel would have objected" and why failing to object "could not have been considered a 'sound trial strategy.'" App.75.

The court noted that the normal deference due to state court decisions was inapplicable because the state court did not rule on the merits of the claim. App.71. Since the Arizona Court of Appeals "assum[ed], without deciding, that counsel's performance was deficient," the panel's review was *de*

novo. App.71-72. The panel reviewed the second prong—prejudice—*de novo* as well because it found the Arizona Court of Appeals' decision was contrary to and an unreasonable application of *Strickland*. App.74-75.

Notably, the Circuit did not rely on the record evidence (adduced in state post-conviction litigation) regarding counsel's actual thought process in consenting to reconvening the dismissed jury, which showed that his 20-30 second discussion with Stephen only noted the availability of a transcript in a retrial; he didn't consider the facts or law that might bear on the propriety of reconstituting a dismissed jury. The dissent criticized the majority for "speculating" about the advantages of a mistrial, but itself proposed a series of hypothetical reasons that a lawyer in counsel's circumstances "could have" preferred continued deliberations. App.81-82.

The Circuit also found counsel's failure to object to the burden-shifting statutory scheme was not objectively unreasonable because an Arizona intermediate appellate court previously endorsed an earlier variation of the scheme. App.70-71. The Circuit did not mention this Court's holdings that shifting the burden of proving intent violates due process.

8. The Ninth Circuit Reverses Itself a Year Later and a Judge Dissents

The State moved for panel rehearing. A full year later—March 27, 2020—the divided panel reversed itself, without explaining what facts or law it had overlooked or misconstrued. App.31 n.1; FRAP 40(a)(2). At the outset, the rehearing majority announced it would not discuss in detail the record evidence establishing counsel's thought process (and the matters counsel did not consider):

> Because [counsel]'s failure to object to the resumption of deliberations "falls within the range of reasonable representation," we "need not determine the actual explanation for [his] failure to object." *Morris v. California*, 966 F.2d 448, 456 (9th Cir. 1991).

App.20-21 & n.12. Instead, the majority hypothesized a series of reasons why a lawyer *could have thought* "that sticking with the current trial record and jury would better serve May's interests than would a new trial" and concluded this hypothetical contrary-to-fact strategy would be reasonable. App.20-29. The opinion noted the prosecution's case was weak, riddled with inconsistencies, gaps, and admissions favorable to the defense; the prosecution didn't call an expert; the prosecution didn't argue for an instruction on permissible propensity evidence, which might occur in a retrial; and the prosecution might improve its case in various ways hypothesized by the State—proffered

for the first time *in its rehearing petition*. App.21. Except that on retrial the prosecution would have a transcript of Stephen's testimony, the record evidence belied any actual consideration of these factors by counsel. App.306.

The Circuit Judge who authored the rehearing majority's decision concurred separately to express her "dismay at the outcome of this case." App.30. She noted the evidence against Stephen was "very thin." *Id.* His conviction was "based almost entirely on the testimony of the children," which "had many holes." *Id.* And, the "potential that [Stephen] was wrongly convicted is especially concerning because he was sentenced to seventy-five years in prison—a term that all but ensures he will be incarcerated for the rest of his life." *Id*.

The dissent stated the panel's original decision affirming habeas relief "was correct then" and "correct now," and stressed that courts need only defer to counsel's "informed strategic decisions." App.31 & n.1, citing *Strickland*, 466 U.S. at 681. The dissent found counsel's split-second surrender of the mistrial was "the antithesis of an informed decision." App.31. The dissent also pointed out that counsel's true thinking was demonstrated by the record evidence: "other than his awareness that the trial transcript would obviously be available at a retrial, he gave no thought whatsoever to the wisdom of allowing the jury to engage in further deliberations after it had been discharged." App.37.

In light of the "long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation," the panel also found no ineffectiveness in counsel's failure to object to the statutory burden-shifting. App.61.

The Ninth Circuit denied rehearing *en banc* but stayed its mandate. App.273, 275.

ARGUMENT: REASONS FOR GRANTING CERTIORARI

I. COURTS ARE SPLIT ON WHETHER TO EVALUATE COUNSEL'S PERFORMANCE BY POSITING HYPOTHETICAL STRATEGIES THAT *COULD HAVE*, BUT DEMONSTRABLY *DID NOT*, MOTIVATE COUNSEL'S CONDUCT

The Ninth Circuit's decision suffers from a fundamental methodological flaw—rather than evaluating the performance of Stephen's actual counsel at Stephen's actual trial, it ignored reality and instead invented a series of considerations that hypothetically *could have*, but demonstrably *did not*, motivate counsel's conduct. This flawed methodology is not a one-time error—it reflects an entrenched, albeit minority, misapplication of *Strickland*.

The minority view ignores the actual judgments of counsel, even where they are established by the record evidence. This is inconsistent with defendants' right

to the effective assistance of their *actual*, not hypothetical, counsel.

In contrast, the majority view sets aside "*post hoc* rationalizations for counsel's conduct," and instead relies on the "accurate depiction" of counsel's deliberations, where those are reflected in the record evidence. *See Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). This Court should grant certiorari to reject the counterfactual, hypothetical minority approach infecting both federal and state cases.

A. This Court's Decisions Rely on Counsel's Actual, Not Counterfactual, Deliberations

Strickland establishes a two-pronged analysis. The first prong requires an evaluation of counsel's performance. The second prong evaluates whether the defendant was prejudiced by deficient performance. Although the second prong is plainly counterfactual, a close reading of *Strickland* demonstrates the first prong concerns itself with the factual.

In discussing the performance prong, *Strickland* states:

> 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. Because of the difficulties inherent in

> making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). *Strickland* goes on to state that, although irrelevant to the (counterfactual) prejudice prong, the idiosyncrasies of the particular decisionmaker "may have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry." *Id.* at 695. In other words, despite *Strickland*'s reference (quoting *Michel*) to what "might be considered sound trial strategy," under *Strickland*, counsel's *actual* thought process determines the performance prong.[9]

[9] In *Michel*, counsel was deceased, *Michel*, 350 U.S. at 101 n.7, and it did not appear that there was any evidence available in the record regarding counsel's actual evaluation of his challenged course of action. This Court found that the defendant had not rebutted the presumption of effectiveness. 350 U.S. at 101.

This Court's post-*Strickland* decisions confirm that counsel's actual deliberations control the performance prong, where they are demonstrated in the record. In *Wiggins*, the Court approved of the District Court's grant of habeas relief, despite the state court's claim that "trial counsel had made 'a deliberate, tactical decision to concentrate their effort.'" 539 U.S. at 518. The "tactical decision" identified by the state court (based on the testimony of trial counsel) was undermined by the record. "[P]rior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense"—on the eve of sentencing they represented they intended to present mitigation evidence. *Id.* at 526.

This Court dismissed the hypothetical strategies urged in the courts below and by the respondents, stating: "When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations." *Id.* at 526-27.[10]

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[10] Even Justice Scalia's forceful dissent in *Wiggins* (joined by Justice Thomas) supports the view that the true deliberations of counsel control, not hypotheticals: "Wiggins' trial counsel testified under oath, however, that he was aware of the basic features of Wiggins' troubled childhood that the Court claims he overlooked." *Id.* at 538.

Similarly, Justice O'Connor's concurring opinion in *Rompilla v. Beard*, 545 U.S. 374 (2005), is fundamentally inconsistent with a counterfactual approach to evaluating performance. *Rompilla* involved a capital murder case in which the prosecution intended at the penalty phase to read testimony about the details of a prior violent crime Rompilla had committed. *Id.*

This Court found habeas relief was warranted based on counsel's failure to examine the court file on Rompilla's prior conviction. *Id.* at 383-86. Justice O'Connor explained Rompilla's attorneys' "failure to obtain that file would not necessarily have been deficient if it had resulted from the lawyers' careful exercise of judgment about how best to marshal their time and serve their client," but in fact, it was not. *Id.* at 395. Justice O'Connor posited a series of hypothetical considerations that *might have* justifiably motivated counsel's conduct but dismissed them all because they *did not* motivate counsel's conduct: "Rather, their failure to obtain the crucial file 'was the result of inattention, not reasoned strategic judgment.'" *Id.* at 395-96 (quoting *Wiggins*, 539 U.S. at 534). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (distinguishing the ineffectiveness inquiry, which is based on "mistakes committed by the actual counsel," from the inquiry relating to a deprivation of counsel of choice).

Likewise, in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court evaluated counsel's actual motivations and considerations (rather than hypotheticals) in determining that counsel's performance was deficient under *Strickland*'s first prong. *Id.* at 385. The Court explained: "The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence." *Id.* This unawareness, in turn, was due to counsel's failure to conduct discovery because of his "mistaken beliefs" about the law, not strategy. *Id.*

Finally, in *Cullen v. Pinholster*, 563 U.S. 170 (2011), where direct evidence of counsel's considerations was unavailable (one lawyer had died and the other had no recollection), the Court engaged in a modicum of hypothetical analysis, but only after mustering all available evidence to determine the actual considerations of counsel—counsel's statements on the record and billing records, and evidence showing counsel had personal experience with another "psychotic client whose performance at trial hardly endeared him to the jury." *Id.* at 194. Thus, *Pinholster* demonstrates that, where the record is incomplete (because of faded memories or unavailable witnesses), hypothetical analysis can be appropriate, so long as it is used as a tool to infer

counsel's *actual* considerations, rather than to replace them.

Nor does *Harrington v. Richter*, 562 U.S. 86 (2011), endorse the hypothetical approach. Although *Richter* supplemented counsel's explanations by connecting counsel's actions to his strategy, it also reaffirmed that "courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Id.* (quoting *Wiggins*, 539 U. S. at 526-27)).

B. The Minority View Incorrectly Evaluates Performance Based on Imagined Hypothetical Considerations

Despite this Court's clear authority, the decision below joined a persistent minority of cases relying on *post hoc* hypothetical considerations to rationalize counsel's conduct, even where the record evidence demonstrates counsel's actual considerations (or lack thereof).

Here, the record evidence firmly rebutted any presumption that Stephen's counsel acted according to a reasonably informed, competent strategy in acquiescing to the dismissed jurors' request to resume deliberations.

First, counsel had no considered strategy to delay or avoid a mistrial—neither before nor after the judge declared a mistrial did counsel seek to stop it, and counsel made no objection to the mistrial or to the discharge of the jury. App.288.

Second, the record evidence demonstrated counsel's actual considerations in acceding to the request to resume deliberations—counsel testified he consulted with Stephen for 20-30 seconds about the availability at a retrial of a transcript of Stephen's testimony. App.296, 306.

Third, the record evidence specifically confirmed that counsel *did not consider* the law applying to reconstituting a jury, the facts prompting the jury to ask to resume deliberations, or any communications or circumstances contaminating the jury after their discharge. App.306-07.

The Ninth Circuit's decision below disregarded these actual facts, and instead analyzed multiple considerations that *might have* led some other hypothetical lawyer to do what this defendant's counsel did not: make a strategic decision to accede to the discharged jurors' request. Some of the counterfactual considerations identified by the decision below involved potential refinements to the prosecution's case on retrial the State first identified in briefing seeking rehearing. The decision found no deficiency because these imagined considerations could have been reasonable.

The decision below and the case upon which it relied—*Morris v. California*—are part of a persistent strain of minority authority from the First, Ninth, Tenth, and Eleventh Circuits disregarding counsel's actual considerations in favor of hypothetical ones.[11] Thus, in *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000), the Eleventh Circuit, sitting *en banc*, found no inadequacy under *Strickland*'s first prong based on hypothetical considerations, while discounting and disregarding trial counsel's admitted reasons for his action and inaction:

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy. . . . We look at the acts or omissions of counsel that the petitioner alleges are unreasonable and ask whether some reasonable lawyer could have conducted the trial in that manner.

Id. at 1315 n.16.

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[11] The Ninth Circuit has also used the majority position (without citing *Morris*). *See Doe v. Ayers*, 782 F.3d 425, 944-45 (9th Cir. 2015) (stating that "[t]he presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance is inapposite, or at least firmly rebutted, when, as here, we know for sure that defense counsel had no strategy, because he unequivocally said as much.").

Even though trial counsel testified about counsel's assessments and considerations, the Eleventh Circuit stated its hypothetical considerations controlled:

> In this case, when we refer to trial counsel's testimony explaining his personal mental processes (assessing the strengths of the prosecution's case, opining on the value of character witnesses and so on), . . . we are not crediting his testimony as absolutely true; but we point to this lawyer's testimony as illustrating the kinds of thoughts some lawyer in the circumstances *could*—we conclude—reasonably have had.

Id. at 1320 n.27.

Cases in the Tenth Circuit and First Circuits similarly rely on hypothetical considerations. *See Bullock v. Carver*, 297 F.3d 1036, 1053 (10th Cir. 2002) (finding no deficiency even though counsel labored under a key misunderstanding of Utah evidence law because "a fully informed attorney *could have* concluded that admitting the hearsay statement was to Mr. Bullock's strategic advantage." (emphasis added)); *see also Bucci v. United States*, 662 F.3d 18, 31-32 & n.11 (1st Cir. 2011) (disregarding counsel's testimony that "it didn't occur to [him] to object" and finding no deficiency based on matters counsel "could have" considered).

Certain state courts as well have adopted this counterfactual methodology. *See, e.g., Commonwealth v. Philistin*, 617 Pa. 358, 406 (2012) ("in assessing ineffectiveness claims, instead of limiting ourselves to those strategies counsel says he pursued, we determine whether there was any objectively reasonable basis for counsel's conduct."); *Dorsey v. State*, 448 S.W.3d 276, 295 n.13 (Mo. 2014) (*en banc)* (dismissing testimony of counsel in favor of hypothetical considerations: "his subjective reasoning behind his performance is irrelevant").

C. The Majority View Correctly Evaluates the Actual Considerations of Counsel Revealed by the Record

The Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits decline to engage in *post hoc* hypothetical rationalizations for counsel's conduct and instead evaluate the actual considerations of counsel demonstrated by the record evidence. In *Marcrum v. Luebbers*, 509 F.3d 489 (8th Cir. 2007), the Eighth Circuit starkly rejected the hypothetical approach:

> The Supreme Court has held in several cases that the habeas court's commission is not to invent strategic reasons or accept any strategy counsel could have followed, without regard to what actually happened; when a petitioner shows that counsel's actions actually resulted from inattention or neglect,

> rather than reasoned judgment, the petitioner has rebutted the presumption of strategy, *even if the government offers a possible strategic reason that could have, but did not, prompt counsel's course of action*.

Id. at 502-03 (emphasis added) (citing *Rompilla*, 545 U.S. at 395-96; *Wiggins*, 539 U.S. at 526-27; *Morrison*, 477 U.S. at 385). *See also Tice v. Johnson*, 647 F.3d 87, 104-05 (4th Cir. 2011) (rejecting respondent's "invitation to engage in after-the-fact rationalization of a litigation strategy that almost certainly was never contemplated"; "'courts should not conjure up tactical decisions an attorney could have made, but plainly did not.'" (quoting *Griffin v. Warden, Md. Corr. Adj. Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992))); *Gersten v. Senkowski*, 426 F.3d 588, 610-11 (2d Cir. 2005) ("[t]here was nothing strategic about a decision to concede the physical evidence, with no educated basis for doing so, in favor of uninvestigated and uninvestigatable theories."); *Thomas v. Clements*, 789 F.3d 760, 768 (7th Cir. 2015) ("In many cases, we would chalk such a decision up as strategic or tactical. But we cannot reach such a conclusion because counsel admitted his failure to reach out to an expert was not a conscious decision—he just did not think to do so." (citation omitted)); *Washington v. Hofbauer*, 228 F.3d 689, 704-05 (6th Cir. 2000) (relying on counsel's testimony at post-conviction hearing showing "his silence arose from incompetence and ignorance of the law, rather than strategy."); *cf.*

Government of Virgin Islands v. Vanterpool, 767 F.3d 157, 169 (3d Cir. 2014) (remanding for further fact-finding to determine "if trial counsel's failure to raise a First Amendment challenge is attributable to an ignorance of the law," or a considered decision not to pursue it "from either a merits-based or strategic standpoint").

D. This Case Is an Appropriate Vehicle to Repudiate the Use of Counterfactuals to Evaluate Performance

The convoluted history of this case and the Ninth Circuit's about-face a year after affirming habeas relief starkly demonstrate the danger of the persistent hypothetical approach to evaluating counsel's performance—it is limited only by the "ingenuity" of judges and prosecutors in imagining *post hoc* rationalizations for counsel's performance.[12]

As noted, the Ninth Circuit affirmed habeas relief, and one year later, denied it. Nothing about Stephen May's trial, his counsel's performance, or the factual record changed in the interim. Rather, the difference between the respective majority opinions is that in the first, the majority could conceive of no benefits to giving up a declared mistrial, and in the second, the majority was able to posit several. Some of those considerations were raised by the State for the first

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[12] Petition for a Writ of Certiorari, *Garner v. Colorado*, No. 16-857, 2017 WL 75458, at *22 (Jan. 4, 2017), *cert. denied*, 137 S. Ct. 1813 (2017).

time in its rehearing brief. None of these *post hoc* rationalizations played any part in Stephen's actual trial or in his actual lawyer's performance. His actual lawyer had no strategy to avoid a mistrial—he accepted it without objection or comment when it was declared. And he had no strategy to pursue continued deliberations—he accepted them without objection or comment after the briefest consideration of a factor having no bearing on any jurors' change of heart.

The hypothetical approach does violence to *Strickland* and the Sixth Amendment right to counsel. As *Strickland* explained,

> That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685. A hypothetical lawyer appears only in imaginations and on paper and plays no role in ensuring the *actual* defendant's trial is fair.[13]

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[13] Of course, there is a place for counterfactuals in *Strickland*'s analysis—it is in the prejudice prong, which requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Despite this Court's clear guidance, the minority counterfactual approach persists. Indeed, this very question has been presented in at least one petition for certiorari to this Court, supported by an *amicus* brief from the National Association of Criminal Defense Lawyers ("NACDL"), which stated: "Resolution of this split is urgently needed."[14] Years later, this flawed methodology has deprived Stephen of habeas relief.

II. WHETHER AN UNINFORMED DECISION ON A CRUCIAL ISSUE IS ENTITLED TO DEFERENCE IS AN IMPORTANT FEDERAL QUESTION

This case also presents an important and recurring question: whether an attorney's wholly *uninformed* actions, made without any consideration of relevant and available facts or law—are entitled to deference.

As recognized in *Strickland*, "[r]epresentation of a criminal defendant entails certain basic duties." 466 U.S. at 688. These include, but are not limited to, the "duty to investigate."[15] While counsel is not required to investigate every possible issue, "counsel has a duty

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[14] Amicus Brief in Support of Petitioner, *Garner v. Colorado*, No. 16-857, 2017 WL 526563 (Feb. 6, 2017).

[15] *See* ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3d ed. 1993) ("ABA Standards"): "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

The Ninth Circuit reversed the habeas grant by inventing a strategy choice (avoiding a mistrial), and then, in a circular fashion, determined it could be reasonable to eschew factual or legal investigations that potentially thwart it. This analysis "ignores *Strickland*'s constitutional underpinning that deference is due only 'to counsel's *informed* decisions.'" App.31 (Block, J. dissenting) (quoting *Strickland*, 466 U.S. at 681). When confronted by the court's surprising consideration of the discharged jurors' equally surprising request to restart the trial, counsel's "blind acquiescence to continued deliberations was anything but an informed decision." App.42. Counsel did not—either in the moment or in the ensuing four days—seek any additional facts or perform any research on whether a discharged jury that requests to reconvene is even a jury at all. As recently explained by Justice Thomas, at common law the answer is a clear "no." *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting).[16]

[16] We recognize jury practice "no longer follows the strictures of the common law." *Dietz*, 136 S. Ct. at 1895. Nevertheless, "old rules often stand the test of time because wisdom underlies them." *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting).

By affording deference to uninformed "blind acquiescence," the Ninth Circuit decision contravenes *Strickland* and contradicts other courts.

A. The Ninth Circuit's Decision Conflicts with Other Courts of Appeals

The Ninth Circuit previously observed—correctly—that an "uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008). Nevertheless, as recognized by the dissent, the panel decision below found that a wholly uninformed "strategic" decision on a material issue was reasonable and entitled to deference. App.31.

The approach adopted below conflicts with decisions of other Circuits. The Third, Sixth, Eighth, and Tenth Circuits agree "[a] decision not to investigate cannot be deemed reasonable if it is uninformed." *Heard v. Addison*, 728 F.3d 1170, 1180 (10th Cir. 2013); *see Rolan v. Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006) (counsel's "decision not to present the defense cannot be accorded the normal deference to strategic choices because it was uninformed"); *United States v. Arny*, 831 F.3d 725, 734 (6th Cir. 2016) (counsel's failure to investigate "was an unreasonable decision, which led to the uninformed decision"); *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005) (where counsel failed to investigate critical witnesses, any "presumption of sound trial strategy founders" on the "rocks of ignorance").

B. This is a Recurring Issue

Whether uninformed actions are entitled to deference is of considerable importance to prosecutors, defense attorneys, and legal scholars who have been calling for review.

For example, in 2013 this Court declined to review a nearly identical question: "Whether defense counsel's failure to act due to ignorance of the applicable law should be assessed under *Strickland*'s highly deferential standard of review for 'strategic choices.'" Petition for Certiorari, *Long v. United States*, No. 12-1452, 2013 WL 2726810, at *1 (June 12, 2013). That petition demonstrated the "lower courts[']. . . conflict regarding the applicability of [*Strickland*'s] deferential standard when defense counsel did not in fact make a strategic decision." *Id.*; *see* Amicus Brief of the Constitution Project in Support of Petitioner, *Long v. United States*, No. 12-1452, 2013 WL 3754812 (July 15, 2013), *5. This conflict should be resolved.

C. This Case Presents an Appropriate Platform for Resolving this Question

This case is an appropriate vehicle for resolving this recurring question. The issues are clearly defined and the consequences of failing to grant review are grave. The Ninth Circuit originally granted habeas on this issue, recognizing "competent counsel would have objected" to the discharged jurors resuming deliberations. App.74, Nevertheless, upon rehearing,

the court (2-1) reversed itself, applying the deferential review required by *Strickland*." App.20; *see also* App.31 (Friedland, J. concurring) (lamenting "*significant constraints on the scope of our review.")* (emphasis added).[17]

Stephen May has already served 10 years' imprisonment after *a mistrial*. Unless this Court grants review, Stephen may well be ordered back to prison for another 65 years because, "[c]aught in the moment" by circumstances counsel never previously encountered, counsel agreed to allow discharged jurors to reach a verdict without any effort to be informed on the law or the factual circumstances prompting the change. App.306.

Deference to this action not only harms Stephen, but it erodes the foundation of a fair "jury." In *Dietz*, the Court—sharply divided—held that in a civil trial a federal court has "inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict," but stated this authority is "limited in duration and scope and *must* be exercised carefully to avoid *any* potential prejudice" because of the "extraordinarily high" potential for taint when jurors

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[17] Unlike many ineffectiveness claims raised in habeas proceedings, the federal courts here were *not* constrained by AEDPA deference because the Arizona court assumed "*without deciding*, that counsel's performance was deficient." *See* App.41. *Compare Shinn v. Kayer*, 141 S. Ct. 517, 522 (2020).

are discharged. 136 S. Ct. at 1890 (emphasis added). The Court enumerated factors judges should consider before reinstating dismissed jurors, including to "what extent just-dismissed jurors access their smartphones or the internet," and "whether the jurors have spoken to anyone about the case after discharge" including "court staff." *Id.* at 1894-95. The jurors here did both, but neither the judge nor defense counsel made *any* inquiry into possible contamination.

Because of "additional concerns in criminal cases," *Dietz* expressly limited its finding to civil cases. *Id.* at 1895. More than just double jeopardy concerns, the stakes in criminal cases are markedly different than those of civil cases. *See Addington v. Texas*, 441 U.S. 418, 423 (1979). This is powerfully illustrated here: In *Dietz* the reconstituted civil jury reached a verdict of $15,000 in connection with a car accident, as opposed to the $0 which they previously awarded. In stark contrast, the reconstituted criminal jury reached a verdict resulting in Stephen's immediate remand and eventual sentence to 75 years' imprisonment, as opposed to walking out of the courthouse.

Stephen has been condemned to die in prison based on counsel's uninformed consent to discharged jurors' request to rescind a declared mistrial and resume deliberations. These circumstances "undermine confidence in the outcome," *Strickland*, 466 U.S. at 703, and the petition should be granted.

III. WHETHER COUNSEL IS DEFICIENT FOR FAILING TO PRESERVE A FEDERAL CONSTITUTIONAL CHALLENGE TO AN "OBVIOUSLY" UNCONSTITUTIONAL STATUTE IS AN IMPORTANT QUESTION

The Ninth Circuit's memorandum decision found counsel's failure to lodge a due process objection to Arizona's burden-shifting statutory scheme was consistent with "prevailing professional practice at the time of the trial" because that scheme had been on the books for years as a matter of Arizona law. App.61. Yet counsel's failure even to lodge a simple objection resulted not from any strategy—he admitted being aware of the Constitutional defect but *assumed* there were no legal authorities to be brought to bear by research or briefing.[18]

The applicable burden-shifting scheme is anomalous. App.340. Arizona presumed that anyone who knowingly or intentionally touches a child's genitals is a child molester—regardless of whether it was for bathing, diapering, having his son circumcised, or carrying the child on the parent's shoulders. As recognized by the District Judge, Arizona took "what was for decades an element of the crime (sexual intent) and relabel[ed] the denial of it as

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[18] Counsel explained that "[b]eyond my fundamental belief that this shift in the burden of proof was fundamentally wrong, I was not aware of any supporting legal authorities, other than the Constitution, that might have been used in written briefing on the issue." App.305.

an affirmative defense, thereby freeing the state from having to prove it and making the accused disprove it instead." App.99-100.

The Ninth Circuit's finding of no deficiency because this scheme was "long-standing" (App.61-62) was contrary to *Strickland*, but even if it was not, Stephen is entitled to relief. First, failing to lodge a due process objection, or to research the viability of such an objection, fell short of prevailing professional practice. A basic duty of counsel is to familiarize himself with the applicable law: "*After informing himself or herself fully on the facts and the law*, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." ABA Standards 4-5.1(a); *see Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (identifying ABA Standards as a "guide[]" to "prevailing norms of practice"); *see also* ABA Standard 4-8.2(b) ("Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal.").

It falls short of these prevailing professional norms to conduct no research or to defer to a state statute based on its age. Typical constitutional objections are lodged against statutes that are not "new"—the very nature of legislative processes, combined with *ex post facto* requirements, means most statutes will be on the books for a significant period of time before they are challenged by a defendant. And, even basic research would reveal that

the State's approach conflicted with Supreme Court precedent, including *Patterson*, 432 U.S. at 215 (a state may not "shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (plurality opinion) (same); *Sandstrom*, 442 U.S. at 524; *Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000) ("intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element'").

Even if the Ninth Circuit correctly decided that prevailing practice called for making no constitutional objection, Stephen would still be entitled to relief. This is because the Ninth Circuit's decision merely establishes "cause" excusing the procedural default and permit this Court to consider the scheme's unconstitutionality. *See Reed v. Ross*, 468 U.S. 1, 15-18 (1984) (finding counsel had "cause" excusing procedural default (prejudice was conceded), where the due process limits on burden-shifting schemes were a nascent development in the law). In other words, if the long-established nature of Arizona's statutory scheme meant that, at the time of trial, it "did not offer a reasonable basis" on which to object on due process grounds, pursuant to *Ross*, there would be "cause" excusing the procedural default and permitting federal court review of the issue. *Id.* at 16-17.

This Court should send a clear message that there are "obviously constitutional limits beyond which the States may not go" in reallocating burdens of proof by labeling elements of crimes as affirmative defenses. 432 U.S. at 210. Arizona went too far and Stephen is entitled to relief.

CONCLUSION

For all of these reasons, this Court should issue a writ of certiorari.

Dated: January 29, 2021

Respectfully submitted,

ERICA T. DUBNO
Counsel of Record
FAHRINGER & DUBNO
43 West 43rd Street, Suite 261
New York, NY 10036
(212) 319-5351
erica.dubno@fahringerlaw.com

JUSTIN S. WEDDLE
WEDDLE LAW PLLC
250 West 55th Street, 30th Floor
New York, NY 10019
(212) 997-5518
jweddle@weddlelaw.com

Counsel for Petitioner