APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN EDWARD MAY, *Petitioner-Appellee/ Cross-Appellant*, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, *Respondents-Appellants/ Cross-Appellees.*	Nos. 17-15603 17-15704 D.C. No. 2:14-cv-00409-NVW OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted March 7, 2019
Phoenix, Arizona

Filed March 27, 2020*

* This case was originally the subject of a memorandum disposition. *See May v. Ryan*, 766 F. App'x 505 (Mar. 26, 2019). Subsequently, the State filed a petition for panel rehearing and rehearing en banc arguing that an aspect of the procedural history of the state trial proceedings had been misinterpreted. *See* Fed. R. App. P. 40(a)(2). We issue this revised disposition in response.

Before: Sandra S. Ikuta and Michelle T. Friedland, Circuit Judges, and Frederic Block,** District Judge.

Opinion by Judge Friedland;
Concurrence by Judge Ikuta;
Concurrence by Judge Friedland;
Dissent by Judge Block

SUMMARY***

Habeas Corpus

In an appeal and cross-appeal from the district court's decision on Stephen May's habeas corpus petition challenging his Arizona state conviction on five counts of child molestation, the panel (1) rejected May's claim for habeas relief based on his trial attorney's failure to object to the resumption of jury deliberations; and (2) rejected his other arguments for habeas relief in a concurrently filed memorandum disposition.

After the close of evidence, the jury reported that it was deadlocked, and the judge declared a mistrial. Several minutes later, the jury requested permission to resume deliberations. May's defense lawyer did not object to such a resumption, which the judge then permitted, and the jury convicted May on most counts. May argued in his habeas

** The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

petition that his lawyer's failure to object amounted to ineffective assistance of counsel. The district court accepted the magistrate judge's determination that the lawyer's failure to object was neither deficient performance nor prejudicial. The panel held that counsel's performance was not deficient because, on the facts of this case, it was a reasonable prediction that May had a better chance of a more favorable verdict from the existing jury on the existing trial record than he would from a retrial.

Concurring, Judge Ikuta wrote that in adhering to the limited scope of federal habeas review, the panel upholds the fundamental principles of our legal system.

Concurring, Judge Friedland wrote separately to express dismay at the outcome of the case. She wrote that the evidence of guilt was very thin and the length of his sentence all but ensures he will spend the rest of his life in prison, but given the significant constraints on the scope of review, the panel is not in a position to do more than decide the narrow question whether the proceedings in this case were so egregiously unfair that they violated the Constitution.

Dissenting, District Judge Block wrote that the majority ignores *Strickland v. Washington*'s constitutional underpinning that deference is due only "to counsel's *informed* decisions," and that the facts of this case unequivocally show that counsel's decision was the antithesis of an informed decision.

COUNSEL

Robert A. Walsh (argued), Assistant Attorney General, Criminal Appeals Section; Mark Brnovich, Attorney

General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellants/Cross-Appellees.

Erica T. Dubno (argued), Fahringer & Dubno Herald Price Fahringer PLLC, New York, New York; Robert J. McWhirter, Law Offices of Robert J. McWhirter, Phoenix, Arizona; Michael D. Kimerer, Kimerer & Derrick P.C., Phoenix, Arizona; for Petitioner-Appellee/Cross-Appellant.

Mikel Patrick Steinfeld, Phoenix, Arizona, for Amicus Curiae Arizona Attorneys for Criminal Justice.

J. Thomas Sullivan, Little Rock, Arkansas, for Amicus Curiae National Association for Rational Sex Offense Laws.

OPINION

FRIEDLAND, Circuit Judge:

Appellant Stephen May seeks habeas corpus relief, arguing that he was deprived of his Sixth Amendment right to counsel because the defense lawyer who represented him in his child molestation trial in Arizona state court was ineffective. After the close of evidence in that trial, the jury reported that it was deadlocked, and the judge declared a mistrial. Several minutes later, however, the jury requested permission to resume deliberations. May's defense lawyer did not object to such a resumption, which the judge then permitted. The jury convicted May on most counts. May now argues that his lawyer's failure to object amounted to constitutionally deficient performance. We hold that May's counsel was not ineffective because, on the facts of this case, it was a reasonable prediction that May had a better chance

of a more favorable verdict from the existing jury on the existing trial record than he would from a retrial.[1]

I.

A grand jury in Maricopa County, Arizona indicted Stephen May in 2006 on eight counts of child molestation. The indictment alleged that May had engaged in sexual contact with five children: Taylor (Counts 1 and 2), Danielle (Counts 3 and 4), Sheldon (Counts 5 and 6), Luis (Count 7), and Nicholas (Count 8). May's lawyer, Joel Thompson, subsequently filed a motion to sever, arguing that the count or counts related to each individual child must be tried separately. The motion contended that severance was required under an Arizona rule entitling some defendants to severance of an offense "unless evidence of the other offense or offenses would be admissible" if there were separate trials. *See* Ariz. R. Crim. P. 13.4(b).[2]

The trial court granted the motion in part by severing the count related to Nicholas. Ruling from the bench, the judge made reference to the fact that the count related to Nicholas alleged that he had been molested at a daycare center where May worked in 2001, while the counts related to the other children involved allegations of molestation occurring between 2003 and 2005. Because the timing and other

[1] May presses other arguments for why he is entitled to habeas corpus relief. We reject all those arguments in a concurrently filed memorandum disposition.

[2] This rule provides in full: "A defendant is entitled to a severance of offenses joined solely under Rule 13.3(a)(1) [allowing for joinder of offenses that are of the same or similar character], unless evidence of the other offense or offenses would be admissible if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

"circumstances" of the count related to Nicholas were "different," and there had also "been a loss of evidence" with respect to that count, the judge determined that the evidence concerning the other children would be "more prejudicial than probative on that count."

The court declined to sever any of the other counts. It explained that the evidence concerning each of the remaining children would have been admissible to prove the counts related to the other children if they were tried separately. Under Arizona Rule of Evidence 404(b), such "evidence of other crimes, wrongs, or acts" is admissible for the purpose of proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See* Ariz. R. Evid. 404(b). And under Rule 404(c), such "evidence of other crimes, wrongs, or acts" could additionally be admissible "to show that [May] had a character trait giving rise to an aberrant sexual propensity to commit the offense[s] charged." *See* Ariz. R. Evid. 404(c).

The counts related to Luis, Taylor, Danielle, and Sheldon therefore proceeded to trial in January 2007. At trial, the State's evidence consisted primarily of testimony from the four children and some of their parents.

Luis testified first. Luis attended an elementary school where May was employed for several months. May worked with first graders with special needs who would be integrated into Luis's class for certain activities, including computer lab. Luis testified that one day in computer lab May came over to help him. While May's right hand was holding the computer mouse, May's left hand touched Luis's "private part" over his pants. Luis testified that May did not

move the hand that was touching his genital area.[3] Luis testified that two adults other than May and about twenty children were present when this happened.

Luis testified that he told his mother about May touching him. His mother confirmed this in her testimony at trial, and she further testified that Luis said May touched him on purpose. Luis testified that he never talked to police about May, but a detective who had interviewed Luis soon after the incident testified at trial about that interview. The detective testified that he did not report Luis's allegations to prosecutors after the interview because Luis was unable to provide details about the incident, such as the time frame in which it occurred or the people who were nearby.

Luis testified at one point during trial that May was clean-shaven at the time he worked at Luis's school; at another point, Luis testified that May had a beard. When the prosecutor asked Luis if he saw May, who was in the courtroom at the time, Luis said no. Later, after a recess, the prosecutor showed Luis a photographic line-up. Regarding the photograph of May, Luis testified that it "kind of look[ed] like Mr. May." Luis testified that the other photographs did not depict anyone who looked familiar.

The other children—Taylor, Danielle, and Sheldon—all knew May because they lived at the same apartment complex as him.[4] That apartment complex had a pool where May spent much of his time. May gave swim lessons at the pool, kept an eye on the children playing at the pool for their

[3] When Luis initially told his mother about the alleged incident, Luis said that May did move his hand.

[4] Luis testified that he did not know Taylor, Danielle, or Sheldon.

parents, and attended barbecues hosted at the pool by residents of the complex.

Taylor and Danielle were close friends. Prior to trial, Taylor had told police that May touched her genital area on two occasions in 2005 when she was eight years old, once before a birthday party for Danielle held at the apartment complex's pool and once afterward. Taylor testified at trial that the first time, she was in the pool and swam over to May, who was in the shallow end. Taylor testified that she sat in May's lap, and May touched her "private" over her bathing suit with his hand. She did not recall whether May moved his hand when he touched her. At the time, Taylor thought May "was just being clumsy" and "didn't think he meant it." Taylor also testified that another adult was present when this happened.

When the prosecutor asked Taylor at trial if she recalled telling police about a time she was in the pool "after Danielle's birthday," Taylor responded, "Barely. I kinda remember. I kinda don't." In response to further questioning by the prosecutor, Taylor testified that she remembered telling police that May had touched her genital area over her clothing. But during cross-examination, Taylor testified that she did not recall what had actually happened. Taylor testified that she eventually came to think May's touching was not an accident and therefore stopped going to the pool.

Like Taylor, Danielle had told police about multiple incidents.[5] At trial, Danielle testified that May touched her

[5] Danielle's father testified at trial that, when he spoke to Danielle prior to her interview with police, she recalled only one incident. Danielle stated in the police interview that May touched her every time

genital area over her bathing suit at her eighth birthday party. About forty people, including twenty adults, were present at the pool during the party. Danielle testified that she and May were in the jacuzzi. May "put [her] on his lap," and he touched her "private parts" on top of her bathing suit. The prosecutor asked Danielle if she also remembered "another time earlier in the summer that you had a barbecue and [May] touched you[.]" Danielle replied, "No." The prosecutor further asked Danielle if she remembered telling police about a "barbecue at the beginning of the summer" where May "touched you again with his hand." Danielle responded that she did remember telling police, but indicated that she did not remember the touching.

Finally, Sheldon (who knew Danielle and Taylor) testified that there were two occasions on which May touched his genital area. About a week after July 4, 2005, Sheldon, who was then nine years old, was at the pool with May and at least one other person.[6] Sheldon testified that May "picked me up and he tossed me inside the pool." Sheldon testified that as May did so, one of May's hands was on his back and the other was "in [his] private spot" over his trunks. Sheldon testified that May did not make any movements with the hand on his trunks. Sheldon testified that he moved May's hand to his stomach, but that May moved that hand back down to his genital area. On one prior

they were both at the pool. At trial, when asked if she "remember[ed] telling police that this touching happened every time [she] went to the pool," Danielle responded, "[n]o, it didn't happen every time I went to the pool."

[6] Sheldon testified at one point that his brother was the only other person present. At another point, Sheldon appeared to testify that Taylor, her mother, and a teenager whose name he could not recall were the only other people present.

occasion, Sheldon testified, May had similarly touched his genital area while throwing him in the pool. Sheldon could not recall exactly when this had happened. But he did remember that others were present at the time.

Sheldon testified that he initially thought May touched him by accident, but that he changed his mind after talking to his mother and Taylor's mother. Taylor's mother later testified that, soon after Taylor gave a statement to police, Sheldon "came up to [her] and told [her] what had happened to him." Sheldon's stepfather also testified that he and Sheldon's mother approached Sheldon about May and that Sheldon was initially reluctant to talk but eventually said that May had touched his genital area.

Additional testimony at trial established that the children who lived in May's apartment complex had talked to each other about being touched by May. Taylor and Danielle both testified that they had talked to each other about May touching them. Sheldon testified that he had not talked to Taylor and Danielle about May, but other testimony at trial revealed that when Sheldon was interviewed by police prior to trial, he told them he had talked to Taylor. All three children also spoke to a parent or another adult before telling police that May touched them.

Near the end of trial, May took the stand. May described his teaching background; among other things, he had worked at a Montessori school, as a swim and American Red Cross instructor, and at a child care center. May testified that he has an undiagnosed "neurological condition" and as a result has "nervous tics" and "tend[s] to be clumsy." May explained that "there are very few fine motor things that [he] can do with [his] left hand or [his] left-hand side." May testified that he never intended to touch the children in their

genital areas, and that he never had any sexual interest in the children.

The prosecutor's cross-examination focused in part on statements May had made in an interview with a detective. During that interview, the detective had listed the names of several children, and May had responded by stating that he did not even know a half dozen children. But May testified at trial that he knew many children from his work teaching children. He testified that he did not remember what he meant when he told the detective otherwise.

May had also stated in the interview, "I don't know no somebody [sic] named Sheldon." But May testified at trial that he knew a Sheldon from the pool at his apartment complex. May also testified that he was "very frustrated" during the interview: "[The detective] asked me about several other children whose names I do not know, and Sheldon's name came up and [my response] may have been a reflex answer at that point in time."

In all, the jury heard evidence for five days.

During closing statements, the prosecutor highlighted the testimony the four children had given about being touched by May, and May's statements to the detective that he did not know Sheldon or many children at all. The prosecutor also argued that the children's allegations could not have been the product of them "talk[ing] to each other" and "mak[ing] up something." The prosecutor noted that Luis did not even know the other children. And if the children had purposefully made up stories, the prosecutor contended, they would not have testified at trial that they could not remember what had happened.

Defense counsel Thompson emphasized that the children had given inconsistent statements and sometimes could not recall what had happened. He also pointed out that adults were present on many of the occasions when May allegedly touched a child, yet none of those adults ever saw anything. Thompson argued that the children's stories about May touching them were the product of the children's talking to each other or of an adult's suggesting that they had been inappropriately touched.

The trial judge read instructions to the jury and also gave the jury a hard copy of those instructions. One instruction stated: "Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count." The jury sent the judge four notes about this instruction on the second day of deliberations. The most comprehensive of the notes asked:

> The evidence we have heard on certain counts appears to [corroborate] the information on other counts. The instructions say, "[E]ach count charges a separate and distinct offen[s]e. You must decide . . . on any other count[.]" ([P]age 7 of final instructions[.]) Can the evidence provided to support one allegation lend support to a separate allegation?[7]

[7] The other notes asked: "Can we use [corroborating] evidence? Yes or no[?] ([I]n refer[e]nce to [p]age 7 of the final instructions that each count is a sep[a]rate and distinct offen[s]e?)"; "Is the information labelled 'sep[a]rate counts' on page 7 of the final instructions one and the same with the term [corroboration]?"; "All 7 counts are distinct and

The court responded with the following instruction:

> Evidence of other acts has been presented. You may consider this evidence only if you find that the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider this evidence to establish the defendant's motive, opportunity, intent, plan, absence of mistake or accident. You must not consider this evidence to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense.

The instruction tracked Arizona Rule of Evidence 404(b), which provides that "evidence of other crimes, wrongs, or acts . . . may . . . be admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b).[8] The instruction also made clear that the jury could not consider the evidence for the purpose described in Rule 404(c): "to show that the defendant had a character trait

sep[a]rate counts but they all involve the same subject, can we use [corroboration]?".

[8] The Arizona Supreme Court held in *State v. Terrazas*, 944 P.2d 1194 (Ariz. 1997), that "evidence of prior bad acts" is only admissible under Rule 404(b) in a criminal case if there is clear and convincing proof of those acts. *Id.* at 1196, 1198.

giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c).[9]

About an hour after receiving this responsive instruction, the jury reported that it was deadlocked. The jury explained in a note: "We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." The judge called the jury into the courtroom and suggested that the jury "identify areas of agreement and disagreement and discuss the law and the evidence as they relate to those areas of disagreement." Shortly after resuming deliberations, the jury reported that it was still deadlocked. The jury's note stated that "[p]art of the jury believes they have heard sufficient evidence," while "[p]art of the jury believes the quantity and quality of the evidence is not sufficient." The court declared a mistrial and excused the jury.

No more than several minutes later, the judge announced that "[t]he 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." The judge then asked the prosecutor and defense counsel Thompson if either had any objection. Thompson consulted with May for about twenty to thirty seconds. Both Thompson and the prosecutor then said they had no objection. In an interview occurring two years after May's

[9] The prosecutor did not object to the instruction. Nor did the prosecutor attempt to argue during trial that evidence of other acts could be used to show May's propensity to molest children. In fact, any reference to character evidence at trial or in the instruction may have been foreclosed once the trial began, given that the procedures for admitting evidence under Rule 404(c) had apparently not been followed. *See* Ariz. R. Evid. 404(c)(1)(D), (c)(3) (requiring the court to make certain findings and requiring the prosecutor to make disclosures).

trial, one juror stated that all the jurors used their cell phones after being excused, but this fact was apparently not known to Thompson, the prosecutor, or the judge at the time.

The jury reassembled and deliberated for about an hour more before recessing for the weekend. When the jury returned from that recess, it deliberated for several hours and then announced that it had reached a verdict. The jury convicted May on the five counts related to Luis, Taylor, and Danielle. It acquitted him on the two counts related to Sheldon.

Trial on the severed count related to Nicholas was scheduled to begin two days later. But Nicholas's parents represented to the trial court that they had been unable to arrange for counseling, which they wanted Nicholas to have if he was going to go through the traumatic process of testifying. The court therefore dismissed the case without prejudice so that the "State [could] reevaluate it after the victim has had counseling."

For each of the five counts that May was convicted on, Arizona law provided a "presumptive term of imprisonment" of seventeen years. Ariz. Rev. Stat. Ann. § 13-604.01(D) (2007).[10] That presumptive sentence could be "increased or decreased by up to seven years." *Id.* § 13-604.01(F). Sentences for all the counts related to a particular victim could run concurrently. *Id.* § 13-604.01(K). Thus, the minimum sentence for May would have been two ten-year terms running concurrently for the counts related to Taylor, two ten-year terms running concurrently for the counts related to Danielle, and ten years for the count related

[10] All further references to this statute are to the 2007 version that was in effect when May was sentenced.

to Luis—that is, an aggregate minimum sentence of thirty years.

The trial court sentenced May to five consecutive sentences of fifteen years, or seventy-five years total. The court ruled that a "slightly mitigated term" of fifteen years per count was "appropriate." The judge cited May's "social background," "physical impairment," "lack of criminal history," and "extensive family and community support." Noting that Arizona law allowed "discretion to run some of [the sentences] concurrent," the judge declined to do so. The judge stated that, "because of the nature of these offenses, [she didn't] think that would be justice in this case."

On direct appeal, the Arizona Court of Appeals affirmed May's conviction and sentence. The Arizona Supreme Court denied May's petition for review, and the U.S. Supreme Court denied May's petition for a writ of certiorari.

May sought post-conviction relief in Arizona court. Among other claims, May contended that his trial counsel Thompson was ineffective because he had failed to object to the resumption of jury deliberations after the trial court declared a mistrial. May retained a defense strategy expert, who testified at an evidentiary hearing that he believed Thompson was ineffective. May also submitted a declaration from Thompson, in which Thompson stated that, before responding that the defense had no objection to the jury's resuming deliberations, he had a "very brief conversation" with May about the alternative strategies of continuing with the jury or risking a retrial. Thompson further stated that he was "[c]aught in the moment by a circumstance [he] had never before encountered in almost 300 previous felony jury trial [sic]."

The Arizona Superior Court ("PCR court") denied relief. It determined that Thompson's performance was not deficient because "[t]he decision on whether to object to resumption of jury deliberations was a tactical and strategic decision by defense counsel that can't form the basis for a claim of ineffective assistance of counsel." Even if Thompson's performance was deficient, the PCR court concluded that there was "no evidence of any resulting prejudice to" May.

The Arizona Court of Appeals affirmed. With respect to May's claim that Thompson was ineffective for failing to object to the resumption of jury deliberations, the court of appeals "assum[ed], without deciding, that counsel's performance was deficient." The court of appeals held that "May cannot show prejudice," which "is fatal to a claim of ineffective assistance of counsel." Both the Arizona Supreme Court and the U.S. Supreme Court declined review.

In 2014, May filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Arizona. May again argued that Thompson rendered ineffective assistance of counsel by failing to object to the resumption of jury deliberations. The district court accepted the magistrate judge's determination that Thompson's failure to object "was neither deficient performance nor prejudicial." But the district court granted habeas relief on another ground that May had raised: that the Arizona child molestation statute under which May was convicted was unconstitutional.[11]

[11] This is among the issues we discuss in a concurrently filed memorandum disposition. *See supra* note 1. We hold there that because the challenge to the constitutionality of the statute was procedurally

The State appeals the district court's grant of habeas relief. May cross-appeals the district court's decision to the extent it rejected claims in his habeas petition. Repeating his argument that defense counsel was ineffective for failing to object to the resumption of jury deliberations, May contends that the district court erred in denying relief on that claim.

II.

An ineffective assistance of counsel claim requires (1) establishing deficient performance by "show[ing] [that] 'counsel's representation fell below an objective standard of reasonableness,'" and (2) establishing prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Porter v. McCollum*, 558 U.S. 30, 38–39 (2009) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

For the reasons explained below, we hold that May's lawyer did not render deficient performance under the standard outlined in *Strickland* by failing to object to the resumption of jury deliberations after the trial court declared a mistrial. Because we would reach this conclusion regardless of whether we reviewed the performance question de novo (as the dissent does, Dissent at 40–41) or with deference under the Antiterrorism and Effective Death Penalty Act, *see* 28 U.S.C. § 2254(d), we need not decide which standard of review applies here. *See Berghuis v. Thompkins*, 560 U.S. 370, 389–90 (2010). We also need not

defaulted and May cannot show cause and prejudice to overcome that default, the district court erred in granting habeas relief.

decide whether May has satisfied the prejudice prong of *Strickland* because his claim fails on the performance prong.

A.

"The proper measure of attorney performance" when evaluating a claim that the Sixth Amendment right to effective assistance of counsel was violated is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (per curiam) (noting that "constitutional deficiency . . . is necessarily linked to the practice and expectations of the legal community" (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010))). A defense attorney faces "any number of choices about how best to make a client's case." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). Counsel "discharge[s] his constitutional responsibility so long as his decisions fall within the 'wide range of professionally competent assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 690). "[O]nly when [a] lawyer's errors were 'so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment'" has the lawyer rendered constitutionally deficient performance. *Id.* (quoting *Strickland*, 466 U.S. at 687).

The Supreme Court has made clear that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Thus, "[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." *Id.* Put differently, the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation marks omitted).

Under the deferential review required by *Strickland*, we cannot say that Thompson's decision to continue with the current jury rather than risking a retrial—which he reached after briefly consulting with May about the choice—fell outside "the wide range of reasonable professional assistance." *See id.*

B.

There were good reasons to think that sticking with the current trial record and jury would better serve May's interests than would a new trial. When a jury indicates that it is deadlocked, a rational defendant deciding between a mistrial or staying the course with the current jury "would compare the likely consequences of allowing the jury to deliberate longer with the likely consequences of obtaining a mistrial." *Brewster v. Hetzel*, 913 F.3d 1042, 1058 (11th Cir. 2019) (quoting *Lane v. Lord*, 815 F.2d 876, 879 (2d Cir. 1987)); *see also United States v. Beckerman*, 516 F.2d 905, 909 (2d Cir. 1975) (noting that the "report of a jury in deadlock *could* be welcome news to an accused who is fearful of his fate" and therefore welcomes a mistrial, but also contemplating the possibility that the defendant might "ha[ve] an interest in having guilt determined by this particular jury" (emphasis added)). Here, it was objectively reasonable to think that acquittal on some or all counts was a real possibility if May continued with the current jury, while a mistrial likely would have led to a retrial that could well have resulted in conviction on all counts. Because Thompson'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).[12]

The fact that the jury was deadlocked meant that at least one juror wanted to acquit May.[13] And both parties agree that the State's evidence against May was far from overwhelming. All four children testified that other people were nearby when May touched their genital areas. Luis and Danielle testified that May touched them when more than twenty people, including other adults, were in the vicinity—but none of those people claimed to see anything. Luis was also unable to identify May in court. Taylor and Danielle testified that they were unable to remember an incident in which May had touched them that they had previously disclosed to police. And Sheldon testified that he thought that May's touching was accidental until Taylor's mother told him otherwise. The State had not offered any expert testimony to try to explain away these discrepancies in the children's accounts. Based on these and other weaknesses in the State's case, it was reasonable to think that the jury might acquit May if it continued deliberating. Indeed, the

[12] Thus, unlike the dissent, we do not discuss in detail the declaration Thompson prepared during these later habeas proceedings. *See* Dissent at 36–37.

[13] More specifically, the jury's reporting that it was deadlocked probably meant that at least one juror wanted to acquit on each of the counts. If the jury had reached a verdict on some counts, it apparently could have convicted May on those counts even if it was deadlocked on other counts. *See, e.g.*, *State v. Cummings*, 716 P.2d 45, 46 & n.1 (Ariz. Ct. App. 1985).

jury ultimately did acquit May on the counts related to Sheldon.[14]

There was further reason to think the current trial record was more favorable to May than the record that might result from a retrial. In particular, the trial court gave the jury an instruction that was relatively favorable to May. That instruction permitted the jury to consider "[e]vidence of other acts" to "establish the defendant's motive, opportunity, intent, plan, absence of mistake or accident" in accordance with Arizona Rule of Evidence 404(b). *See* Ariz. R. Evid. 404(b). But, significantly, the instruction expressly forbade the jury from considering "[e]vidence of other acts" in accordance with Rule 404(c), which permits "evidence of other . . . acts . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." *See* Ariz. R. Evid. 404(c). The instruction admonished the jury: "You must not consider [evidence of other acts] to determine the defendant's character or character trait, or to determine that

[14] The dissent mentions an empirical study of juries that ultimately hang, which found that the final straw poll of such juries is three times more likely to favor conviction than acquittal. Dissent at 45 (citing *Lane*, 815 F.2d at 879, which discusses Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966)). But that study additionally found that juries that do not hang are likewise far more likely to convict than acquit—statistics that bear on what could have been expected from a retrial. *See* Harry Kalven, Jr. & Hans Zeisel, The American Jury*: Notes for an English Controversy*, 48 Chi. Bar Ass'n Rec. 195, 196–97 (1967); *see also* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* The American Jury, 2 J. Empirical Legal Stud. 171, 182 tbl.2 (2005). Thus, to the extent the dissent relies on the study to conclude that the likelihood of conviction with an initially deadlocked jury is reason enough for defense counsel to generally take a mistrial, the study, viewed as a whole, does not support such a conclusion. *See* Dissent at 45.

the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense." In other words, the jury could consider evidence that May had molested one child as, for example, evidence that May had not mistakenly or accidentally touched the other children. But the jury could not consider evidence that May had molested one child as evidence of sexual propensity to molest children generally.

It was a reasonable strategy to move forward with a jury that had specifically been prohibited from considering "evidence of other . . . acts" as proof of May's "aberrant sexual propensity." *See* Ariz. R. Evid. 404(c). At a retrial, the jury might have been allowed to consider other acts as evidence of May's character—which could have increased the risk that jurors would punish May for perceived bad character regardless of whether they were persuaded by the evidence that he had committed all of the alleged crimes. *See, e.g.*, 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5382 (criticizing Federal Rules of Evidence 413 to 415, which are similar to Arizona Rule of Evidence 404(c), because those provisions "[a]llow[] the jury to easily cast the defendant into the category of 'The Other,' as a 'lustful rapist' or a 'depraved child molester'"); *cf. State v. Garcia*, 28 P.3d 327, 334 (Ariz. Ct. App. 2001) (noting that "the potential for unfairness [was] particularly high" in a case where "many very young victims . . . each testif[ied] to multiple uncharged molestations," and where the trial judge admitted the uncharged acts as proof of the defendant's character). The difference between allowing in other acts to prove only May's intent, versus allowing in other acts to prove both May's intent and his character, could reasonably be viewed as a meaningful one by counsel in Thompson's shoes. *See generally State v. Scott*, 403 P.3d 595, 600 n.3 (Ariz. Ct.

App. 2017) (observing that the appropriate "consideration and use by the jury of evidence of a prior crime differs significantly depending upon whether it is admitted . . . under Rule 404(b), or 'to show that the defendant had a character trait giving rise to an aberrant sexual propensity . . .' under Rule 404(c)").

In the trial that happened, the prosecutor had not pursued the admission of character evidence under Rule 404(c) and had never asked the jurors to infer from a finding that May had engaged in any of the charged acts that he had a propensity for aberrant sexual acts. But once the prosecution knew that Thompson's primary strategy at trial had been to argue that May had never inappropriately touched the children at all—a defense that could be particularly undermined by propensity evidence if the jury did not believe that defense as to at least one child—the prosecution would be especially inclined to seek an instruction about propensity evidence at a retrial. And there was reason to think that if the prosecutor had requested use of Rule 404(c) evidence at a retrial, the court would have granted it. At the pretrial hearing on the motion to sever the counts against May, the trial court had expressly contemplated that the evidence with respect to each child could be admissible with respect to the other children under both Arizona Rule of Evidence 404(b) and Rule 404(c). In light of these considerations, it was a reasonable strategic choice for Thompson to allow the existing jury to continue deliberating with the more favorable instruction.

More generally, Thompson could reasonably have concluded that it would be risky to give the State a second bite at the apple because the State would be able to refine in other ways the case it presented at the first trial. *See generally, e.g.*, *United States v. DiFrancesco*, 449 U.S. 117,

128 (1980) ("[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."); *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (noting that the prosecution may "learn from its mistakes and put [on] a more persuasive case the second time around" (quoting *United States v. Moran*, 393 F.3d 1, 10 (1st Cir. 2004))). For example, the State argues that the prosecution could have "revis[ed] its cross-examination of May and other defense witnesses," "call[ed] new witnesses," and sought to reconsolidate the count related to Nicholas with the counts related to the other children. The State also could have sought to address inconsistencies and gaps in the children's testimony by retaining an expert witness who might testify that "children's memories tend to be more simplistic and less rich in detail" and that "children do not tend to recall time[lines] and dates." *See Kurtz v. Commonwealth*, 172 S.W.3d 409, 413 (Ky. 2005). May's own defense strategy expert admitted that the State would benefit at any retrial from having a record of the first trial.

Of course, May would also profit from having that record at a retrial. But it was reasonable to think the State would profit more. Due to asymmetries in disclosure obligations, defense counsel was probably able to learn more about the prosecution's case before trial began than the other way around. *Compare* Ariz. R. Crim. P. 15.1 (listing the State's relatively broader disclosure obligations), *with* Ariz. R. Crim. P. 15.2 (listing the defendant's relatively narrower disclosure obligations); *see also generally State v. Helmick*, 540 P.2d 638, 640 (Ariz. 1975) (observing that "discovery in a criminal case is not really a two-way street" because "[t]he constitutional protections of the Fifth and Fourteenth Amendments deny to the prosecution full disclosure of information from the defense" (quoting *Wright v. Superior*

Court, 517 P.2d 1261, 1264 (Ariz. 1974))). At a retrial, any informational advantage the defense had prior to the first trial would be diminished. *See* Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 506 (1977) ("The government may be aided upon retrial merely by having observed defense counsel's tactics on cross-examination or by having learned the nature of any substantive defense. These possibilities are particularly important because . . . the prosecution generally lacks the opportunity to learn much prior to trial.").

The dissent contends that "any reasonable lawyer would have asked the court for some opportunity to investigate the facts and law" before acquiescing to the jury resuming deliberations. Dissent at 43. In support, the dissent argues that "[a]uthorities teaching that defendants benefit when hung juries result in mistrials are legion," and that Thompson "should have at least considered that the prevailing professional norm would counsel against rejecting a mistrial." Dissent at 44, 46. But, to the extent the dissent's cited authorities are on point, they are actually consistent with the notion that sometimes a reasonable strategy is to proceed with the current jury rather than risking a heightened chance of conviction at a retrial. *See, e.g.*, *Lane*, 815 F.2d at 879 (recognizing that there is "some risk of facing what might be an enhanced prospect of conviction at a retrial"); Massachusetts Superior Court Criminal Practice Manual, Special Trial Issues § 18.2.2 (indicating that if "substantial issues of reasonable doubt have been raised by the defense," seeking a mistrial may not be the best strategy). Even May's expert—who emphasized that "normally" defense counsel would object to the resumption of jury deliberations—seemed to recognize that there could be "pros" and "cons" to doing so.

The dissent's argument that Thompson should have attempted to ascertain the facts about "what may have occurred after the jury was discharged" fares no better. Dissent at 50. Investigation of the facts would have required questioning jurors in open court, in front of the judge and the prosecutor. The jurors presumably would have described using their cell phones after being excused. Even in the absence of evidence that jurors' use of their cell phones had prejudiced them—and we take this opportunity to note that the record before us is devoid of any such evidence—this could have prompted the judge to disallow further deliberations. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016) (explaining that "courts should . . . ask to what extent just-dismissed jurors accessed their smartphones or the internet" when deciding whether to reempanel a jury); *State v. Crumley*, 625 P.2d 891, 895 (Ariz. 1981) ("It is simply too dangerous a practice to discharge the individual jurors . . . , send them back into the community . . . , and then recall those same jurors.").[15]

Whether refraining from questioning the jurors was deficient performance is ultimately the same question as whether failing to object to the resumption of deliberations was deficient performance. Having the jury sent home would have cost May any strategic advantage that could be gained by proceeding with the existing jury and the existing trial record. Given how the trial had played out, Thompson could reasonably have thought that there was such an

[15] The dissent speculates about other issues, such as the nature of "communications between the bailiff and the jurors" after the jurors were discharged, and whether "there were individual pressures applied by some of the jurors to others." Dissent at 50. But the dissent does not cite anything in the record indicating prejudice to May from any such interactions.

advantage to continuing with the existing jury. It was therefore also reasonable for Thompson to refrain from initiating an investigation that could have caused that jury to be dismissed for good. Put simply, it was a strategic choice to not sacrifice the benefits of proceeding with the existing jury in pursuit of more information. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary." (emphasis added)).[16]

In sum, on the facts of this case, a mistrial was not plainly more advantageous than continuing with the current jury, such that a lawyer who failed to object should be found ineffective. It was reasonable to conclude that May's best interest was served by continuing with the current jury—which had indicated that at least one of its members was inclined to acquit, had received an instruction prohibiting it from considering certain evidence as proof of May's sexual propensity, and had been presented with the State's relatively weak case-in-chief.[17]

[16] The dissent also argues that Thompson could have performed research into caselaw about discharged juries not being able to be reconstituted. Dissent at 46. But the Arizona Court of Appeals held that May failed to raise his claim "that counsel was ineffective for failing to raise a jurisdictional challenge to the continued deliberations," and the dissent does not explain how May has shown cause and prejudice such that we could consider this issue. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

[17] May argues in his briefing that "[t]here is a difference between deciding whether to seek a mistrial and taking the radical, and highly unusual, step of reconstituting the jury to allow previously discharged jurors to begin their deliberations anew." We agree that the particular situation counsel faced was unusual. But May does not explain how that

Even if Thompson may not have made the best decision or the one that most defense lawyers would make, the Sixth Amendment requires no more than objectively competent performance. Under that standard, we are compelled to conclude that Thompson's performance was not constitutionally deficient.

III.

For the foregoing reasons, we reject May's claim for habeas relief based on Thompson's failure to object to the resumption of jury deliberations. Because, in a concurrently filed memorandum disposition, we also reject May's other arguments for habeas relief, the district court's grant of habeas relief is **REVERSED**.

would or should alter defense counsel's calculus in weighing the risks of a retrial after mistrial against proceeding with the current jury.

IKUTA, Circuit Judge, concurring:

It is our duty to impartially follow and apply the law. Here, as required to "reflect our enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system," *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (internal quotation marks omitted), we adhered to the limited scope of federal habeas review. In doing so, we uphold the fundamental principles of our legal system. I do not hesitate to concur.

FRIEDLAND, Circuit Judge, concurring:

I write separately to express my dismay at the outcome of this case.

While I certainly recognize the seriousness of child molestation, the evidence that May was actually guilty of the five counts of molestation he was convicted on was very thin. May's conviction on those counts was based almost entirely on the testimony of the children who were the alleged victims. Yet, as described in the opinion, that testimony had many holes. The potential that May 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. *See* Ariz. Rev. Stat. Ann. § 13-604.01(G) (2007) (providing that "a person sentenced for a dangerous crime against children in the first degree . . . is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis . . . until the sentence imposed by the court has been served or commuted").

Given the significant constraints on the scope of our review, we are not in a position to do more than decide the narrow question whether the proceedings in this case were so egregiously unfair that they violated the Constitution. But I agree with the dissent that this case, and in particular May's sentence, reflects poorly on our legal system.

BLOCK, Senior District Judge, Dissenting:

The majority holds that "we cannot say that [May's lawyer's] decision to continue with the current jury rather than risking a retrial—which he reached after briefly consulting with May about the choice—fell outside 'the wide range of reasonable professional assistance'" under the constraints of *Strickland v. Washington*, 466 U.S. 668 (1984).

In so holding, the majority ignores *Strickland*'s constitutional underpinning that deference is due only "to counsel's *informed* decisions." *Strickland*, 466 U.S. at 681 (emphasis added). The facts of this case unequivocally show that counsel's decision was the antithesis of an informed decision. Therefore, I must dissent.[1]

[1] The panel majority decides this case after taking the extraordinary step of granting Appellee's motion for rehearing. Rehearing is reserved only for cases in which "[a] material point of fact or law was overlooked" or a "change in the law occurred after the case was submitted [and] which appears to have been overlooked" by the court's initial decision. *Adamson v. Port of Bellingham*, 907 F.3d 1122, 1136 (9th Cir. 2018) (citing FRCP 40 and 9th Cir. Rule 40-1). Rehearing is not appropriate "merely to reargue the case." *Id.* The initial majority decision, from March 2019, held that May was entitled to habeas relief. I believed that decision was correct then, and I believe it is correct now.

I.

A.

I start with the unimpeachable official trial transcript. It tells us that at 2:58 p.m. on Friday, July 12, 2007, the jury rendered a note, after deliberating for two days, reporting that "we are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." The court then gave the jury the Arizona-equivalent of an *Allen* charge and recessed from 3:00 until 3:26 p.m., when it received a second note, filed at 3:30 p.m., of the same import, but adding: "We do not have significant dispute over the facts or the elements of law, or how to apply the law to the facts. We feel we need some guidance to 'proof beyond reasonable doubt.'"

The following then transpired:

> THE COURT: Let's bring in the jury.
>
> (Jury enters the courtroom.)
>
> THE COURT: Please be seated. The record will show the presence of the jury, counsel and the defendant.
>
> Ladies and gentlemen, I have received your most recent note and based upon the information contained in that note after discussing it with the attorneys, I'm going to declare a mistrial. I know you are disappointed not to be able to reach a verdict, but sometimes that happens. Some cases are more difficult to resolve than others.

> On behalf of the members of the participants in this trial, I want to thank you for your service to the community. You have gone above and beyond what we typically ask jurors to do and most grateful for your time and attention. The attorneys indicated that they may wish to speak with you. You are certainly under no obligation to do so. If you are willing to speak with the lawyers, I would ask that you wait back in the jury room and they will be in shortly.
>
> Again, thank you very much for your time and attention. You are excused. Have a good weekend.

After the jury exited, the court set the case down for retrial on April 2, 2008 (just about eight months later) and advised the defendant—who was at liberty—that he had to be back in court on that date. It did not impose any additional terms and conditions of release and wished everyone "a good weekend."

The following colloquy then occurred after an unexplained "Off the record" notation:

> THE COURT: Well, we're back on the record. 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.
>
> Any objection from the State?
>
> MR. BEATTY: Not from the State.

> THE COURT: Any objection [from May's counsel], Mr. Thompson?
>
> MR. THOMPSON: No, your Honor.
>
> THE COURT: All right. I'm going to then advise the bailiff to communicate with the jury that they may continue deliberating and to let us know.

The record reflects that "Recess [was] taken at 3:32 p.m." Thus, six minutes had transpired from the time the jury was discharged until the bailiff was instructed to advise the jurors that they could "continue deliberating."

What transpired during that brief interregnum after the jurors were discharged—where they each were, and what they were doing or saying—is unknown from the trial transcript. Moreover, it is not known what the bailiff may have said to the jurors once they were discharged, or what the bailiff may have said to the jurors when instructing them that they could continue with their deliberations. Nor is there any information as to what had transpired or how much time elapsed "Off the record."

What is known, however, is that the court used the bailiff as its surrogate to give instructions to the jury rather than to call the jurors back into the courtroom and that, tellingly, May's counsel's response when asked if he had any objection to continued deliberations was instantaneous. What is perfectly clear from the trial record, therefore, is that Thompson never asked the court to give him any time to

think about this most critical decision or even to speak to his client.[2]

The majority's conclusion that May's counsel briefly consulted with him before agreeing to the continued deliberations, consequently, is not supported by the trial transcript; rather, it comes from the post-conviction relief ("PCR") hearing on September 7, 2011—over four years after the trial. The record of that hearing consists of Thompson's testimony; his Declaration sworn to March 23, 2010; May's Affidavit sworn to February 22, 2010; the testimony of a *Strickland* expert; and the unchallenged transcript of a post-trial investigative interview of one of the jurors.

From all of that, the majority acknowledges simply that "May hired a defense strategy expert, who testified . . . that he believed Thompson was ineffective," and reports only the following snippet from the PCR record—taken from Thompson's Declaration: "[B]efore responding that the defense had no objection to the jury's resuming deliberation, he had 'a very brief conversation' with May about the alternative strategies of continuing with the jury or risking a retrial," and "further stated that he was 'caught in the

[2] If Thompson had asked for a pause, or for the opportunity to speak to his client, the record surely would have reflected as much. *See, e.g.*, Trial Tr. at 35 (Jan. 10, 2007) (reflecting Thompson's request to "have a minute" to check on an exhibit); Trial Tr. at 87–88 (Jan. 4, 2007) (reflecting Thompson's request to "approach" the bench); Trial Tr. at 65 (Jan. 3, 2007) (reporting that a discussion was held off the record between "state and witness' husband").

moment by a circumstance [he] had never before encountered in almost 300 previous felony jury trial [sic].'"[3]

But in cherry-picking from the record, the majority chose not to report other relevant portions of the record.

1. Thompson testified that his "brief conversation" with May lasted about 20 to 30 seconds, and as explained in his Declaration, centered on the issue of "go[ing] through another complete trial with the prosecution then in possession of a complete transcript of his testimony from the mistried case." In other words, during those seconds, there was no mention of any of the concerns that the majority meticulously details about the supposed weaknesses of the prosecution's case.

2. Thompson's Declaration explains that when the bailiff returned to the courtroom after the jury had been discharged, the bailiff "whispered" to the judge. Presumably, the bailiff told the judge that the jury had told him that it wanted to continue deliberating. Thompson confirmed that nothing was in writing. As he explained: "I do not recall being aware of any written communication on this subject from the jury to the judge or from the judge back to the jury, nor do I recall being given the opportunity to see any note from the jury to the judge or having any discussion of any written response being sent back to the jury."

3. Thompson's Declaration states that "[a]t the moment Judge Stephens informed the courtroom of the jury's desire

[3] Thompson presumably got carried away with himself by claiming that he had "almost 300 previous felony trials." Since Thompson was admitted to the Arizona bar in 1975, he would have had to average approximately 10 felony trials per year to reach 300 by the time of May's trial 32 years later.

to continue deliberating, [he] was standing at counsel table, where Mr. May was sitting." Apparently, this is when Thompson had that "brief" conversation with May, although the official trial transcript makes no mention of what had then transpired aside from Thompson's instantaneous response that he had no objection to the continued deliberations.

4. Although the majority accurately reports that Thompson was "[c]aught in the moment," it fails to mention that Thompson then acknowledged that he "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 admonitions—could even be reconstituted." In other words, Thompson was the veritable "deer in the headlights" and, 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.

5. May's Affidavit stated:

> The judge then suddenly said that the jury wanted to keep deliberating. After the judge said that, Mr. Thompson and I conferred at the counsel table for a very short time, no more than twenty seconds, before he informed the court that he did not object to the jury continuing deliberations. Mr. Thompson did not discuss with me any of the legal issues underlying this decision, nor did he discuss with me the risks and possible consequences of this decision.

6. At the post-conviction hearing, May's *Strickland* expert explained the prevailing professional norm:

> [W]hen you get a mistrial . . . you close up your file and get out of the courtroom as fast as you can. . . . [B]y all defense standards, you have won not with an acquittal, but you leave with your client . . . to live and fight another day.

The expert then testified that:

> [M]inimal standards require that if you were going to even consider that option of continuing on, to get the information, to find out what went on so you can analyze the information and, importantly, advise your client of all the risks and rewards and what, given your recommendation, and come to a collective decision as to what's the best course to follow.
>
> Here, a decision was made without the benefit of information. It was a decision to continue on, . . . all your nerve endings are telling you not to and you don't have sufficient information and . . . you have a jury that has sat outside the courtroom, who had been released doing who knows what went on there, and you are making a decision to carry on with insufficient information.

The expert then opined on what the "reasonable objective standards would require":

> Well, what reasonable objective standards would require is that, one, first you gather whatever information is available about what just went on, either through the bailiff advising on the record, the Court advising on the record so you have the information—whatever information is available you have. It might even require a voir dire of certain members of the jury, and then after you gather the information, you take whatever time is necessary and you ask the Court's indulgence . . . to explain to your client what just happened, here are the pros, here are the cons, here's my recommendation to you, here's the risks, here's the rewards, and then you and the client come to a collective decision.[4]

7. Finally, the transcript of the unchallenged interview with one of the jurors conducted by the post-conviction investigator disclosed what had transpired as soon as the jurors returned to the jury room after they were discharged:

> Ruggiero: Last question. When you guys were back in the jury room between the time

[4] The majority states that the *Strickland* expert "recognize[d] that there could be 'pros' and 'cons' to" to resumed jury deliberations. However, reading his testimony in context, the expert was *not* "recogniz[ing]" any "pros" of allowing a discharged jury to resume deliberations. To the contrary, his testimony outlined the bare minimum of what defense counsel should do when the possibility of reconvening a discharged jury arose—such as investigate possible juror contamination—and the myriad ways in which Thompson failed to satisfy "reasonable objective standards" by blithely acquiescing to resumed deliberations.

> the mistrial was declared and the time you came back, did anyone make any phone calls, get on their cell phones?
>
> Proeber: Absolutely every one of us.
>
> Ruggiero: Did you call out?
>
> Proeber: I'm sure I did.
>
> Ruggiero: Who did you call?
>
> Proeber: I don't remember.
>
> Ruggiero: Did you talk about the trial?
>
> Proeber: My friend, something, saying oh my God it's over.
>
> Ruggiero: Did you–
>
> Proeber: Thank God I'm coming back to work now. I mean, I'm sure.
>
> Ruggiero: Did others make calls?
>
> Proeber: Every one of us was on our cell phones walking out.

B.

Because the majority holds against May on the deficiency prong, I analyze that prong first. Although the majority concluded that it "need not decide which standard of review applies," it is clear to me that it is *de novo.* Under

AEDPA, if a state court's last-reasoned decision addressed the merits of an issue, then habeas relief is only available if that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). However, where "the state court has not decided an issue, we review that question *de novo*." *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006).

Here, the last reasoned state court decision was the Arizona Court of Appeals' affirmance of the denial of PCR. That decision held only that May was not prejudiced by his counsel's performance; therefore, it did not resolve the issue of whether Thompson's performance was objectively deficient. Accordingly, *de novo* review of *Strickland*'s deficiency prong is the proper standard of review. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."). That standard calls upon us to perform an independent review of the record before the Arizona Court of Appeals. *See Reynoso*, 462 F.3d at 1109 ("[When] no reasoned state court decision denying a habeas petition exists, this court must . . . perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable." (internal citation omitted)); *see also Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967, 970 (9th Cir. 2003) ("When *de novo* review is compelled, no form of appellate deference is acceptable." (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991))).

As identified in Part I.A., *supra*, the relevant record includes the trial transcript, the PCR hearing transcript, Thompson's Declaration, May's Affidavit, and the juror interview.

C.

The majority has devoted its entire opinion to a detailed analysis of the trial testimony and evidence, yet that is beside the point unless we were to hold that counsel's mindless acquiescence to resumed deliberations was an irrelevancy.

But that is not the law, and there is no Supreme Court support for such a novel notion. Rather, *Strickland* requires that counsel make "*informed* strategic choices"—often requiring a "thorough investigation of law and facts." *Strickland*, 466 U.S. at 690–91 (emphasis added). Thompson's blind acquiescence to continued deliberations was anything but an informed decision. At the very least he had an obligation to put some thought into his thoughtless decision.

He also had an obligation "to consult with the defendant on important decisions." *Strickland*, 466 U.S. at 688. Certainly, this was an important decision.[5] At best, the record reflects a 20- to 30-second conversation between counsel and client where apparently all that was mentioned was the obvious—that the trial transcript would be available at a retrial. This is hardly a meaningful consultation. *See, e.g.*, *U.S. ex rel. Washington v. Maroney*, 428 F.2d 10, 12–

[5] To be sure, a lawyer has no duty to consult with his client during the course of a trial before moving for a mistrial. *See United States v. Chapman*, 593 F.3d 365, 367–68 (4th Cir. 2010) (citing cases). But allowing a jury to deliberate *after* a mistrial has been declared is a far different issue, and is obviously an "important," if not critical, decision.

13 (3rd Cir. 1970) (commenting on an ineffective conference between counsel and defendant that lasted between one to ten minutes: "This brief encounter between Washington and counsel took place in open court . . . . It was in no respect a private discussion, but was a hurried, whispered meeting in an atmosphere where a genuine opportunity for disclosure of information or a discussion of defense was impossible."). Nor could it be a meaningful conversation if Thompson had not acquired basic facts and had not taken a modicum of time to explore the law. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney'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 under *Strickland*." (emphasis added)).

Given the uniqueness of this case—which Thompson acknowledged he had never before encountered in his many years of representing criminal defendants in felony trials—any reasonable lawyer would have asked the court for some opportunity to investigate the facts and law. There was simply no rush to judgment. It was late Friday afternoon. The court could simply have instructed the jurors to return after the weekend and admonish them not to discuss the case with anyone. Thompson should at least have asked for the opportunity to check out the law over the weekend and to reflect on what had transpired during the course of the trial. It would also have given him time to think about what additional facts should be ascertained before he could make an informed decision and effectively consult with May.

If Thompson had investigated the law and facts, here's what he would have found:

1. The Law & Prevailing Professional Norm

The Supreme Court instructs that the first prong of the *Strickland* standard, "constitutional deficiency—is necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Thus, "[t]he proper measure of attorney performance remains simply reasonableness *under prevailing professional norms.*" *Id.* (emphasis added) (quoting *Strickland*, 466 U.S. at 688).[6]

Prevailing professional norms are, therefore, valuable "guides to determining what is reasonable." *Strickland*, 466 U.S. at 688. As acknowledged in our Memorandum, the "'prevailing professional practice at the time of the trial,'" *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam), "provide[s] the background" for assessing Thompson's performance. Thompson should have thought about what the prevailing professional norm was when the opportunity for a mistrial was extant.

Authorities teaching that defendants benefit when hung juries result in mistrials are legion. Such authorities vary in time and format and abound in criminal defense manuals, reported cases, and legislative debates from across the country. *See, e.g.*, Blue's Guide to Jury Selection § 28:5; Criminal Trial Techniques § 66:11 ("Even where the case is perceived to be progressing well for the defense, the potential waiver of an applicable issue by the failure to seek a mistrial almost always warrants the motion."); Massachusetts Superior Court Criminal Practice Manual,

[6] Consequently, in *Padilla* the Supreme Court held that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 367.

ch. 18, CRIMP MA-CLE 18-1 ("Defense counsel who oppose mistrial [when a jury is deadlocked] should have very strong reasons to hope for acquittal; the wiser course usually is to seek the mistrial and return to fight another day.").[7]

This common understanding is not simply the product of arbitrary tradition; a mistrial is favored for many concrete reasons. For example, the Second Circuit has cited an empirical study finding that "the last vote of deadlocked juries favors conviction nearly three times as often as acquittal." *Lane v. Lord*, 815 F.2d 876, 879 (2d Cir. 1987). Thus, if an opportunity for a mistrial is available when there is a hung jury, a defense attorney would generally be well-advised to take it.

Apart from that, a mistrial means more time for negotiations, potential witness unavailability, new evidence, and so forth. *See, e.g.*, *United States v. Diggs*, 522 F.2d 1310, 1321 n.24 (D.C. Cir. 1975) ("[A] mistrial need not

[7] *See also People v. Rundle*, 180 P.3d 224, 304 (Cal. 2008) (characterizing a mistrial ruling as "a more favorable outcome"), *rev'd on other grounds*, *People v. Doolin*, 198 P.3d 11 (Cal. 2009); *State v. Taylor*, 142 P.3d 1093, 1098 (Or. Ct. App. 2006) (quoting a colloquy between a trial judge and a defendant in which the judge describes "a hung jury on" a "felony count was a pretty good result"); 1 Proceedings and Debates of the Constitutional Conventions of the State of Ohio 180 (1912) (statement of Humphrey Jones) ("Two things are always kept in view. One is to get a jury to acquit, and if you can't do that the next best thing is to get one that will fail to agree. And it is a matter of common knowledge that every means is adopted that is available within the limits of the ethics of the profession to secure at least a jury that will not convict."); *id.* (statement of James C. Tallman) ("[T]he prosecution adopts all means it can to secure a conviction, but the prosecution does not want a hung jury. A hung jury doesn't do the prosecution any good.").

'require' a retrial. Witnesses disappear; other considerations often affect the prosecutor's discretion."); *see also* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 Cardozo L. Rev. 1417, 1417 n.2 (1997) (explaining that trials ending in hung juries are beneficial for criminal defendants in part because not every hung jury results in a retrial). In May's case, a mistrial also meant guaranteed time out of jail, since he was out on bond.

In other words, well-known defense strategies clearly supported preserving a mistrial here. Thus, Thompson should have at least considered that the prevailing professional norm would counsel against rejecting a mistrial.

Moreover, in addition to being cognizant of the prevailing professional norm, some simple research would have informed Thompson that there was caselaw applying the then-prevailing common law rule that once a jury has been discharged it could not be reconstituted. *See, e.g.*, *Blevins v. Indiana.* 591 N.E.2d 562, 563 (Ind. App. 1992) ("Any action of the jury after its discharge is null and void."); *Michigan v. Rushin*, 194 N.W.2d 718, 721–22 (Mich. App. 1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green*, 995 S.W.2d 591, 614 (Tenn. 1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia*, 111 S.E. 291, 294 (Va. 1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court").[8]

[8] Generally, these criminal cases have involved juries that were discharged after rendering a verdict. However, *Blevins* considered the

Justice Thomas has explained the rationale for this "prophylactic rule"—which was applicable to both civil and criminal cases:

> Even without full sequestration, the common-law rule remains sensible and administrable. After discharge, the court has no power to impose restrictions on jurors, and jurors are no longer under oath to obey them. Jurors may access their cellphones and get public information about the case. They may talk to counsel or the parties. They may overhear comments in the hallway as they leave the courtroom. And they may reflect on the case—away from the pressure of the jury room—in a way that could induce them to change their minds. The resulting prejudice can be hard to detect. And a litigant who suddenly finds himself on the losing end of a materially different verdict may be left to wonder what may have happened in the interval between the jury's discharge and its new verdict. Granting a new trial may be inconvenient, but at least litigants and the public will be more confident that the verdict was not contaminated by improper influence after the trial has ended. And under this bright-line rule, district courts would take greater care in discharging the jury.

specific factual circumstance of a jury discharged after the declaration of a mistrial, as in May's trial. 591 N.E.2d at 563.

Dietz v. Bouldin, 136 S.Ct. 1885, 1898 (2016) (dissenting opinion).

2. The Facts

Although not embracing the common-law rule in *Dietz*, the Supreme Court's majority opinion serves as a template for the common-sense facts that Thompson should have considered. There, the Court announced that trial courts have an inherent power to rescind a discharge order in civil cases. It cautioned, however, that the power "must be carefully circumscribed, especially in light of the guarantee of an impartial jury that is vital to the fair administration of justice." *Dietz*, 138 S.Ct. at 1893. Therefore, it held that "[a]ny suggestion of prejudice in recalling a discharged jury should counsel a district court not to exercise its inherent power." *Id.* at 1894. Thus, "for example," an inquiry should be made as to "whether any juror has been directly tainted." *Id*.

The Court explained that a trial court "should also take into account at least the following additional factors that can indirectly create prejudice in this context, any of which standing alone could be dispositive in a particular case." *Id.*

"First, the length of delay between discharge and recall." The Court imposed no bright-line rule, but commented that the delay "could be as short *as even a few minutes*, depending on the case." *Id.* (emphasis added.).

"Second, whether the jurors have spoken to anyone about the case after discharge." The Court explained that "[e]ven apparently innocuous comments about the case *from someone like a courtroom deputy s*uch as 'job well done' may be sufficient to taint a discharged juror who might then resist reconsidering her decision." *Id.* (emphasis added).

"Third, the reaction to the verdict." As examples, the Court stated that "[s]hock, gasps, crying, cheers, and yelling are common reactions to a jury verdict—whether as a verdict is announced in the courtroom or seen in the corridors after discharge."

Tellingly, the Court then concluded:

> In considering these and any other relevant factors, *courts should also ask to what extent just-dismissed jurors accessed their smartphones* or the internet, which provide other avenues for potential prejudice. It is a now-ingrained instinct to check our phones whenever possible. Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. *Prejudice can come through a whisper or a byte.*

Id. at 1895 (emphases added).

Finally, the Court "caution[ed] that our recognition here of a court's inherent power to recall a jury is limited to civil cases only" and did not address, therefore, "whether it would be appropriate to recall a jury after discharge in a criminal case."[9]

[9] While the Supreme Court may someday take up the issue, it will not be able to do so in this case since May's counsel has never preserved the issue as one invoking federal constitutional law. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (holding that to preserve federal claim for habeas review, "the federal claim must be fairly presented to the state courts"); *Madrid v. Gregoire*, 187 F.3d 648 (9th Cir. 1999) ("Absent the

D.

I have made my own full independent review of the entire record before the Arizona Court of Appeals and cannot conclude that it reflects that Thompson made an "informed" decision to allow the jury to continue to deliberate after it had been discharged. It is painfully clear that the opposite was the case. And it is also painfully clear that Thompson could not have effectively counseled his client—let alone in 20 to 30 seconds—without first ascertaining what may have occurred after the jury was discharged.

Indeed, a number of questions jump off the pages: (1) What were the precise communications between the bailiff and the jurors both before and after the judge discharged the jurors? In particular, what instructions did the bailiff give the jurors as the judge's surrogate? (2) Was there any communication in the hallway between some of the jurors—let alone with the bailiff—before they all returned to the jury room? (3) Were there individual pressures applied by some of the jurors to others outside the jury room to continue deliberations? (4) Since the record contains the unchallenged report from one juror that "everyone was on our cellphones walking out," to whom were the jurors talking, and what was said?

I have profound respect for the candor expressed by my colleague in her concurring opinion, and for her humanity in recognizing that "[t]he potential that May was wrongly convicted is especially concerning because he was sentenced to seventy-five years in prison—a term that all but ensures

requisite specificity of a federal claim, [petitioner] did not preserve his claim for federal habeas review.").

he will be incarcerated for the rest of his life,"[10] and that his sentence "reflects poorly on our legal system."[11] But I cannot agree with her that there were "significant constraints on the scope of our review." The majority simply limited its review to an extensive analysis of those parts of the record that apparently played a large part in the jurors' inability to reach a verdict before the mistrial was declared. But May's counsel never indicated that he had reflected for one moment about the weaknesses of the prosecution's case—let alone discussed them with his client.

[10] Unlike New York, the federal system has yet to embrace the concept that "principles of justice" can, *and should*, transcend common or codified law. *See* N.Y. Crim. Proc. Law § 210.40 (conferring authority on courts to dismiss indictments, or counts thereof, "as a matter of judicial discretion" where a "compelling factor, consideration or circumstance clearly demonstrate[s] that conviction or prosecution . . . would constitute or result in injustice"); *People v. Clayton*, 342 N.Y.S.2d 106, 109 (N.Y. App. Div. 2d 1973) (finding the use of § 210.40 "depended only on principles of justice, not on the legal or factual merits of the charge or even on the guilt or innocence of the defendant"); Frederic Block, *The Clayton Hearing*, N.Y. State B.J., Oct. 1973, at 412 (commenting that *Clayton* and § 210.40 "set in motion new machinery to allow for the screening of criminal cases . . . for reasons transcending the defendant's guilt or innocence").

[11] Judge Friedland might also have noted that it also reflects "poorly on our legal system" that Arizona is the only state that places the burden of proving lack of intent on the defendant, and that it may well be that if the issue ever reached the Supreme Court, it would agree with Judge Wake that it is unconstitutional. *See May v. Ryan*, 245 F. Supp. 3d 1145, 1149 (D. Ariz. 2017) ("Arizona stands alone among all United States jurisdictions in allocating the burden of proof this way."); *Schad v. Arizona*, 501 U.S. 624, 640 (1991) ("[A] freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions" may signal constitutional infirmity.). However, as explained in our Memorandum, Thompson could not be faulted for failing to object on that ground.

The majority has not made a full independent review of Thompson's performance—which is the true "scope of our review." If it did, it could not conclude that his mindless assent to continued deliberations was truly an informed decision.

II.

A.

Although not critical to the dispositive conclusion that Thompson's performance was objectively deficient because of his failure to make an informed decision—which also prevented him from effectively consulting with his client—I also take issue with the majority's conclusion that "[t]here were good reasons to think that sticking with the current trial record and jury would better serve May's interests than would a new trial." While the majority has finely combed the record in its effort to support its conclusion, its principal rationales are that May's counsel could have reasonably wanted to avoid a second trial because (1) "the State would be able to refine in other ways the case it presented at the first trial," and (2) a less favorable jury instruction might have been given at a second trial. Against the available evidence, these conclusions are subjective, speculative, and unsupportable.

The first rationale simply makes no sense. It would render nugatory the entire body of law extolling the virtues of a mistrial since the record of any prior trial would always be available to the government at a retrial. In any event, I see nothing in the record explaining what the State could have meaningfully done better if it got a second bite at the apple. The State makes several arguments, which the majority presumably credits. For example, at oral argument the State argued that May's demonstrably false statements

that he did not know one of the victims, or even "half a dozen children," were particularly damaging to his defense and would have been used against him in a second trial. Yet those statements were made in a pretrial police interview and had been admitted in the first trial. They would not be more damaging in some future proceeding. In addition, May had vigorously proclaimed his innocence at trial, and it is unclear what benefit the State could have derived from having a copy of that testimony. In short, the majority's conclusory argument that the State could have refined its case at a second trial rings hollow.[12]

The remaining rationale stands on no better footing. Having consolidated seven of the eight counts, the trial judge instructed the jurors that they could collectively consider them under Arizona Rule of Evidence 404(b) to establish, *inter alia*, intent, which was the what the trial was all about. She pointedly told the jury not to consider the seven counts as evidence of propensity. It is pure speculation to surmise that the judge would change her mind and give a propensity instruction at a second trial. Moreover, given the powerful collective impact of the 404(b) charge, it is unrealistic—and, once again, purely speculative—to surmise that a propensity charge would have made a defining difference.

B.

To allow all this speculation by two of the three judges on this particular panel to trump the body of law supporting a retrial, especially in light of the prevailing professional

[12] Of course, a retrial also affords the defense the opportunity to refine its case. Thus, an acquittal following a retrial is entirely possible and does indeed occur. *See, e.g.*, Frederic Block, *Crimes and Punishments: Entering the Mind of a Sentencing Judge* ch. 2 (2019).

norm and the unimpeached expert testimony, would be a miscarriage of justice.

Notably, the majority ignores that prevailing professional norms are valuable guides to determining what is reasonable; and since *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind," a reviewing court must identify the prevailing professional norm *before* it decides whether a potential justification for counsel's performance is objectively reasonable. *Harrington v. Richter*, 562 U.S. 86, 105, 110 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms.'"). Otherwise, there is no anchor to guard against decisions pegged on the predilections of judges.

Justice Cardozo famously taught that judges are "not to innovate at pleasure. [A judge] is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles." Benjamin N. Cardozo, The Nature of the Judicial Process 141 (17th prtg. 1957) (1921). In more recent times, jurists across the political spectrum have cautioned against judges relying on their own personal judgment, hunches, or preferences over concrete evidence. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (plurality opinion of Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.) ("After all, judges are most likely to come to divergent conclusions when they are least likely to know what they are doing."); *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"). Objective evidence is the antidote to the vagaries of a random panel-

selection process that draws from a pool of judges who may not even have had first-hand experience with the criminal justice system.

The majority also fails to credit the testimony of the *Strickland* expert, who testified to the standards to which defense attorneys are held—precisely the "prevailing professional norm" against which *Strickland* directs us to measure counsel's performance. The *Strickland* expert testified that, with a mistrial, "by all defense standards, you have won[,] not with an acquittal, but you leave with your client to go out with you, to live and fight another day." *Strickland* expert testimony is routinely accepted as reliable evidence of pertinent professional norms. *See, e.g.*, *Hamilton v. Ayers*, 583 F.3d 1100, 1130 (9th Cir. 2009) ("The district court clearly erred in relying on the testimony of Hamilton's trial counsel as to the 'standard capital practice' at the time of trail and rejecting the testimony of Hamilton's *Strickland* expert.").

Thus, these failings—apart from the failure to make an informed decision—also compel the conclusion that Thompson's performance was objectively deficient under the first prong of *Strickland.*

III.

Since I would find in May's favor on objective deficiency grounds, I must also analyze prejudice. Because the state PCR court resolved the prejudice issue "on the merits," I review that decision under AEDPA's "contrary to, or an unreasonable application of clearly established law" standard. I conclude that the Arizona Court of Appeals decision as to the prejudice prong of May's ineffective-assistance claim was "contrary to" clearly established law as

dictated by *Strickland*, and I would find that May is entitled to habeas relief.

The Arizona Court of Appeals denied May's claim on the ground that "May [could not] show prejudice because [the court] rejected the underlying claim of error on [direct] appeal." *State v. May*, 2012 WL 3877855, at *4 (Sept. 7, 2012). On direct appeal, the Court of Appeals considered whether the trial court committed *fundamental error* "by allowing the jury to reconvene." *State v. May*, No. 1 CA-CR 07-0144, 2008 WL 2917111, at *2–3 (Ariz. Ct. App. July 24, 2008). Arizona courts define "fundamental error" as any "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) (quoting *State v. Hunter*, 688 P.2d 980, 982 (1984)). Of course, the standard for prejudice under *Strickland* is different; requiring only that a petitioner establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

Asking whether it constitutes fundamental error to "allow[] the jury to reconvene" (as the Court of Appeals did on direct review) is different than asking whether there was a "reasonable probability" that the trial judge would have sustained an objection to resumed deliberations *if* one had been made (which was the question posed to the Court of Appeals in the PCR proceeding). *Cf. United States v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984) (assessing prejudice based upon "[w]hether the trial court would have sustained the objection"). When the PCR court relied on the direct-review decision to hold that May had not shown prejudice, it committed a non sequitur: That May had not

shown prejudice under a "fundamental error" standard did not mean that he failed to show prejudice under *Strickland*.[13]

By incorporating a fundamental error standard in its decision, the state court rendered a judgment "that was contrary to . . . clearly established Federal law, as determined by the Supreme Court" in *Strickland*. 28 U.S.C. § 2254. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy, Thomas, and Scalia, JJ.) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.").

Moreover, under a correct application of *Strickland*, there can be no doubt that Thompson's deficient performance prejudiced May. *Cf. Williams*, 529 U.S. at 396 (plurality opinion of Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.) (applying *Strickland* to ineffective-assistance claim after holding state-court decision was "contrary to" clearly established law). By the time the jury resumed deliberations, the trial judge had declared a mistrial, discharged the jury, and set a new trial date. The trial also was of relatively short duration. Given

[13] This distinction is also clear in light of the procedural history in the state courts. Appellate counsel had no choice but to argue fundamental error since trial counsel failed to object and appellate counsel was not allowed to argue ineffective assistance of trial counsel. *See State ex rel. Thomas v. Rayes*, 153 P.3d 1040, 1044 (Ariz. 2007). Thus, on direct review, the Court of Appeals could *only* analyze the waived objection to resumed deliberations for fundamental error. On collateral review, May is able to argue ineffective assistance of trail counsel, and May's point is that the objection would have been analyzed by the trial court on a clean slate. That is clearly a different inquiry than fundamental error.

those considerations, there was "a reasonable probability" that if trial counsel had objected to reconstituting the jury, the trial judge would have sustained the objection and maintained the mistrial. *Strickland*, 466 U.S. at 694. Indeed, the trial judge might well have granted such an objection simply to prevent the possibility or perception of juror contamination, or out of a concern that a decision to allow resumed deliberations would be erroneous (even if such error did not rise to the heights of a "fundamental error"). Under *Strickland*, no more is needed to show prejudice.

CONCLUSION

Because I would find that May's counsel was objectively deficient in not objecting to resumed jury deliberations, and because there was a reasonable probability that an objection would have been sustained, I would affirm the grant of *habeas* relief.[14] Regrettably, the majority returns a man to prison—probably for the rest of his life—under the severe strictures of Arizona's sentencing regime.[15] May has

[14] In our Memorandum, we rejected May's argument that his counsel was ineffective for failing to consult with him because May has not shown *prejudice*. However, the failure to effectively consult with May was a component of Thompson's objectively deficient *performance*, and the prejudice prong is otherwise satisfied.

[15] Although May has raised a claim that the Eighth Amendment rendered his harsh sentence unconstitutional, I concurred with the majority in our Memorandum that the claim was procedurally barred. In any event, the Supreme Court has foreclosed that argument. *See Ewing v. California*, 538 U.S. 11, 30–31 (2003). While I am mindful of that precedent and the seriousness of May's offenses, I cannot help but agree with the dissenters in that case, two of whom are still sitting Justices. A common-sense proportionality review, which would weigh May's criminal conduct against his otherwise clean record and all-but-life sentence, would doubtless suggest that the punishment is cruel and

already served ten years based on his counsel's ineffectiveness, and has been at liberty since March 2017, without incident, ever since Judge Wake granted his *habeas* petition based on a statute of dubious constitutionality.[16]

unusual, especially taking into account sentencing patterns in other jurisdictions. *See id*. at 35 (Breyer, J., dissenting).

[16] Judge Wake raised compelling reasons why the statute placing the burden of proving lack of intent on the defendant may well be unconstitutional. However, as explained in our Memorandum, "[g]iven the long-standing Arizona rule that the State is not required to prove sexual intent . . . we cannot conclude that trial counsel's failure to object to the constitutionality of the statute[] . . . 'fell below an objective standard of reasonableness.'" Therefore, any review by the Supreme Court of the statute's constitutionality will have to await another day.

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN EDWARD MAY, Petitioner-Appellee, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellants.	No. 17-15603 D.C. No. 2:14-cv-00409-NVW MEMORANDUM*

STEPHEN EDWARD MAY, Petitioner-Appellant, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 17-15704 D.C. No. 2:14-cv-00409-NVW

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted March 7, 2019
Phoenix, Arizona

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: IKUTA and FRIEDLAND, Circuit Judges, and BLOCK,[**] District Judge.

The government appeals the district court's grant of habeas corpus. We hold that Stephen May is not entitled to habeas relief on any of the grounds he raises and thus reverse.[1]

1. As the State properly conceded at oral argument, we review de novo under *Strickland v. Washington*, 466 U.S. 668 (1984), whether counsel's ineffectiveness constitutes cause and prejudice to excuse procedural default of a claim, even where the state court considered the same allegations of deficient performance. *See Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2017). Reviewing de novo, we conclude that May's trial counsel was not ineffective for failing to object to the constitutionality of the child molestation statute. Given the long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, *see State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995), which provided the background for the "prevailing professional practice at the time of the trial," *see Bobby v. Van Hook*,

[**] The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

[1] A concurrently filed majority opinion resolves May's claim that his lawyer rendered ineffective assistance of counsel by failing to object to the resumption of jury deliberations. Judge Block dissents from that decision.

558 U.S. 4, 8 (2009) (per curiam),[2] we cannot conclude that trial counsel's failure to object to the constitutionality of the statute's placing the burden of proving lack of intent on the defendant "fell below an objective standard of reasonableness," *see Strickland*, 466 U.S. at 688. The district court erred in holding otherwise. Because we do not reach the constitutionality of the Arizona child molestation statute, we vacate the district court's judgment in that respect. *See C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 988-89 (9th Cir. 2011); *see also Camreta v. Greene*, 563 U.S. 692, 713-14 (2011).[3]

2. May's remaining claims fail on the merits or are procedurally barred.

May contends that his lawyer objectively and unreasonably erred by failing to further confer with May when the jury requested to resume deliberations after the trial judge declared a mistrial. In May's view, the decision whether to accept a mistrial fundamentally belongs to the defendant. But the record shows that May's

[2] Two Arizona decisions issued after May's trial confirmed that Arizona courts approved of the approach taken by the statutory scheme under which May was prosecuted, which required the defendant to prove any affirmative defense, including lack of sexual intent, by a preponderance of the evidence. *See State v. Holle*, 379 P.3d 197, 202 (Ariz. 2016); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007).

[3] To the extent May also argues on appeal that he received ineffective assistance of counsel because his trial counsel failed to challenge the constitutionality of the child molestation statute, that claim fails. Because May's argument that he received ineffective assistance of counsel fails on de novo review, it follows, a fortiori, that the state court did not unreasonably apply *Strickland* in rejecting this argument. *See Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010).

lawyer briefly conveyed the options to him before deciding not to object to the jury continuing with deliberations, and May has not produced an affidavit or testified during postconviction proceedings that he would have asked for his lawyer to object if he had been consulted more extensively. The Arizona Court of Appeals therefore did not unreasonably conclude that any failure to further confer did not result in prejudice.

May argues that his lawyer was ineffective for failing to call any experts to discuss May's neurological condition or introduce medical records pertaining to that condition. As the state court found, the medical evidence that May's lawyer allegedly could have obtained and introduced was not very helpful to May's claims—the evidence primarily tended to show that May was generally in control of his body and that his condition has improved since birth. Furthermore, the jury already heard May's testimony that he had difficulty using his left side. As such, May cannot show that the state court unreasonably applied *Strickland* in concluding that there was no prejudice from the failure to call a medical expert or admit May's medical records.

May asserts that his lawyer also was ineffective by failing to consult with or call an expert about the malleability of children as witnesses. The Arizona Court of Appeals' ruling on postconviction review, which incorporates the trial court's ruling, is the last reasoned decision on this claim. We conclude that the court

reasonably applied *Strickland* in evaluating May's counsel's decision to raise issues with the children's testimony through his own cross-examination rather than through an expert witness.

We reject May's contention that his counsel's cumulative errors "rendered [his] trial fundamentally unfair and doomed him to conviction." May's lawyer's tactical decisions were not objectively deficient separately, and May has not sufficiently demonstrated how that analysis changes when the errors are viewed cumulatively.

Even assuming that an actual innocence claim is cognizable in a federal habeas proceeding in the non-capital context, May has not made a sufficient showing to meet that "extraordinarily high" bar. *See Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997)).

The remainder of May's claims were procedurally defaulted because of his failure to properly raise them in state court. To be an adequate bar to federal habeas review, a state procedural rule must be "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984) (stating the rule must be "firmly established and regularly followed"). "Arizona's waiver rules are independent and adequate bases for denying relief."

Hurles v. Ryan, 752 F.3d 768, 780 (9th Cir. 2014) (citing *Stewart v. Smith*, 536 U.S. 856, 859-60 (2002) (per curiam)); *see* Ariz. R. Crim. P. 32.2.

May asserts that his lawyer was objectively deficient for failing to object to the admission of a video that involved prejudicial conversations about an unrelated New York investigation. The Arizona Court of Appeals held that this claim was waived because May only raised the issue briefly in his petition for post-conviction relief and during the evidentiary hearing. This ruling is an independent and adequate bar to federal review, and May has not shown cause and prejudice to excuse the procedural bar.

The Arizona Court of Appeals on direct appeal and collateral review also held that five other claims were procedurally barred: that (1) the jury lacked jurisdiction to return a verdict after the mistrial was declared; (2) the jury inappropriately considered extrinsic evidence; (3) the prosecutor vindictively obtained a new indictment after May successfully moved for a remand; (4) the prosecutor improperly coached one of the witnesses during a recess in his trial testimony; and (5) May's sentence constituted cruel and unusual punishment under the Eighth Amendment. The state court's determinations that the arguments were procedurally barred constitute an adequate and independent bar to our review, *see Stewart*, 536 U.S. at 860-61, and May has not demonstrated cause and prejudice to excuse the defaults.

REVERSED.[4]

[4] We disagree with May that this appeal is moot. We also deny May's motion to strike the State's notices of authorities.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

STEPHEN EDWARD MAY, Petitioner-Appellee, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellants.	No. 17-15603 D.C. No. 2:14-cv-00409-NVW District of Arizona, Phoenix ORDER

STEPHEN EDWARD MAY, Petitioner-Appellant, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 17-15704 D.C. No. 2:14-cv-00409-NVW

Before: IKUTA and FRIEDLAND, Circuit Judges, and BLOCK,* District Judge.

The memorandum disposition filed March 26, 2019 is withdrawn. An authored opinion by Judge Friedland, an authored dissent by Judge Block, and a memorandum disposition are filed concurrently with this order.

* The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

Respondents-Appellants' petition for panel rehearing and rehearing en banc is **GRANTED** with respect to its request for panel rehearing and **DENIED** as moot with respect to its request for rehearing en banc. Petitioner-Appellee's petition for panel rehearing and rehearing en banc is **DENIED** with respect to its request for panel rehearing and **DENIED** as moot with respect to its request for rehearing en banc.

Future petitions for rehearing will be permitted under the usual deadlines outlined in Federal Rules of Appellate Procedure 35(c) and 40(a)(1).

Case: 17-15603, 03/26/2019, ID: 11242176, DktEntry: 92-1, Page 1 of 9

NOT FOR PUBLICATION

FILED

MAR 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN EDWARD MAY, Petitioner-Appellee, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellants.	No. 17-15603 D.C. No. 2:14-cv-00409-NVW MEMORANDUM*

STEPHEN EDWARD MAY, Petitioner-Appellant, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 17-15704 D.C. No. 2:14-cv-00409-NVW

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted March 7, 2019
Phoenix, Arizona

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: IKUTA and FRIEDLAND, Circuit Judges, and BLOCK,** District Judge.

The government appeals the district court's grant of habeas corpus. Familiarity with the facts and procedural history is presumed.

1. As the State properly conceded at oral argument, we review de novo under *Strickland v. Washington*, 466 U.S. 668 (1984), whether counsel's ineffectiveness constitutes cause and prejudice to excuse procedural default of a claim, even where the state court considered the same allegations of deficient performance. *See Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016). But, even reviewing de novo, we reach the same conclusion as did the state court with respect to May's claim that trial counsel was ineffective for failing to object to the constitutionality of the child molestation statute. Given the long-standing status of the law in Arizona that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, *see State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995), which provided the background for the "prevailing professional practice at the time of the trial," *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam),[1] we cannot conclude that trial counsel's failure to

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** The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

[1] Two Arizona decisions issued after May's trial confirmed that Arizona courts approved of the approach taken by the statutory scheme under which May was prosecuted, which required the defendant to prove any affirmative defense by a preponderance of the evidence, including lack of sexual intent. *See State v.*

object to the constitutionality of the statute placing the burden of proving lack of intent on the defendant fell "below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688. The district court erred in holding otherwise. Because we do not reach the constitutionality of the Arizona child molestation statute, we vacate the district court's judgment in that respect. *See C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 988-89 (9th Cir. 2011); *see also Camreta v. Greene*, 563 U.S. 692, 713-14 (2011).

2. To evaluate May's claim that trial counsel was ineffective for failing to object to reconstituting the jury after a mistrial was declared, the Antiterrorism and Effective Death Penalty Act instructs us to "look to the last reasoned state-court decision" analyzing that claim. *Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). We will accord deference to that state court decision unless it "(1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). But, where the state court has not ruled on the merits of the claim, we review the claim de novo. *See Stanley v. Cullen*, 633 F.3d 852, 859-60 (9th Cir. 2011). In the ineffective assistance of counsel context, if the state court resolved the claim on one prong of *Strickland* without reaching

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Holle, 379 P.3d 197, 202 (Ariz. 2016); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007).

the other, we assess the merits of the unaddressed prong de novo. *See Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) (discussing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), and *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam)).

The "last reasoned state-court decision" on this claim comes from the Arizona Court of Appeals on postconviction review. *See State v. May*, No. 2 CA–CR 2012–0257, 2012 WL 3877855, at *4 (Ariz. Ct. App. Sept. 7, 2012). Because the Court of Appeals "assum[ed], without deciding, that counsel's performance was deficient," *id.*, we review de novo whether May's counsel was objectively deficient for failing to object to the continued deliberations.

Given the trial record of this particular case, counsel's failure to object to permitting the jury to resume its deliberations after the trial judge declared a mistrial and discharged the jury constituted objectively deficient performance. It was not "sound trial strategy," *see Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)), for May's lawyer 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 May. The State's case turned entirely on the jury's believing the testimony of several child victims who all had struggled to provide details of the alleged molestation on the stand, including failing to remember whether some of the incidents even took place. The transcripts

memorializing the witnesses' failure to remember during the first trial would have been available to May in any second trial. May's counsel also had good reason to believe that, if the case had to be reset for a new trial, the victims might decide not to testify again. One of the counts had already been dismissed prior to the first trial because the victim's parents preferred that the victim receive counseling rather than testify, and the father of one of the other victims made statements at the pre-trial motions conference reflecting frustration with the length of proceedings and thereby suggesting a possibility that more victims might refuse to participate in a second trial. There was therefore 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 May.

When pressed at argument about how May would have been worse off in a second trial, the State could only posit that May's counsel did not want the State to have an opportunity to prepare for a second trial with a copy of May's testimony from the first trial at hand. But May had vigorously proclaimed his innocence at trial, so it is unclear what benefit the State could have derived from having a copy of that testimony. The State contended at oral argument that May's demonstrably false statements that he did not know one of the victims or even "half a dozen children" were particularly damaging to his case and would have been used against him in a second trial. But those statements were made in a pre-trial police

interview and had already been admitted in the first trial—they would not be more damaging in some future proceeding, so the way they were introduced and responded to in the first trial did not make a second trial riskier for May.[2]

In light of these particular circumstances, when the trial judge asked if either party objected to the jury resuming deliberations after the court had already declared a mistrial and discharged the jury, competent counsel would have objected. The decision not to object was "completely unsupportable" on this record and therefore, "under the circumstances, could not have been considered a 'sound trial strategy.'" *Reynoso v. Giurbino*, 462 F.3d 1099, 1114 (9th Cir. 2006) (quoting *Strickland*, 466 U.S. at 689).

3. We also review de novo the prejudice prong of May's claim that trial counsel was ineffective for failing to object to reconstituting the jury after a

[2] Despite these facts, the dissent agrees with the State that the prosecution's possession of the transcript would have disadvantaged May in a second trial because "the prosecutor would be able to refine his case and improve the chances of obtaining a conviction if he got a second bite at the apple." That may be true in some cases, but there is no evidence it is true on this record. We further note that the only expert to opine on May's counsel's decision concluded that failing to pursue the mistrial fell far short of reasonable professional judgment. The expert testified in the postconviction evidentiary hearing that, in his view, taking the mistrial would be the best defense strategy in all cases, but was especially so in this one because of a trial record that only advantaged May. Consequently, we do not believe that May's counsel's refusal to object to the resumption of deliberations was a "reasonable on-the-spot calculation," even under the strong deference of *Strickland*. The dissent accuses us of improperly engaging in hindsight, but every fact we have pointed to was available to May's counsel at the time the trial judge asked whether either side objected to the jury resuming deliberations.

mistrial was declared, because the Arizona Court of Appeals' explanation of why there was no reasonable probability that an objection would have resulted in a different outcome was either contrary to or an unreasonable application of *Strickland*. In addressing whether May was prejudiced by his counsel's failure to object to the resumed deliberations, the Court of Appeals concluded that "May [could not] show prejudice because [the court] rejected the underlying claim of error on appeal." *State v. May*, 2012 WL 3877855, at *4. On direct review, however, the Court of Appeals had analyzed whether the jury was improperly reconstituted solely for *fundamental error*, *State v. May*, No. 1 CA-CR 07-0144, 2008 WL 2917111, at *2-3 (Ariz. Ct. App. July 24, 2008), which asks the court to analyze whether (1) there was error, (2) the error was fundamental, and (3) the error prejudiced the defendant. *State v. Henderson*, 115 P.3d 601, 608 (Ariz. 2005). Arizona courts define "fundamental error" as "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at 607 (quoting *State v. Hunter*, 688 P.2d 980, 982 (1984)). Asking whether the trial judge's failure to sua sponte maintain the mistrial amounted to fundamental error is different than asking whether the trial judge would have sustained an objection to the jury resuming deliberations if one had been made—the judge might have granted such an objection to prevent even the possibility of

juror contamination, or to avoid a ruling that would have been erroneous but that would not rise to the level of fundamental error.

The dissent reads the Court of Appeals' opinion differently, interpreting the decision as holding that there was no prejudice from the lack of objection because there was no error whatsoever in reconvening the jury, let alone fundamental error. Even under a charitable reading, the Court of Appeals did not hold that there was no error in how the jury reconvened here. As the dissent notes, the court instead held there was no per se rule that the jury could not be reconvened after discharge, so there was no "structural error requiring reversal." The use of the phrase "structural error requiring reversal" connotes that the court was concluding any error was not fundamental, not that there was no error in the first place.[3] The Court of Appeals' complete reliance on its prior analysis was therefore misplaced and either did not apply *Strickland* whatsoever or applied it in an unreasonable manner.

Reviewing prejudice de novo, therefore, we conclude that the prejudice

[3] The dissent fails to properly account for the fact that the Court of Appeals based its conclusion on direct appeal that there was no fundamental error in part on the premise that there was no evidence in the record that jurors had "reach[ed] for their cell phones to call friends or family immediately upon discharge." *May*, 2008 WL 2917111, at *3. On postconviction review, however, May had introduced this exact evidence, with one juror averring that "every one of" the jurors went on their phones after returning to the jury room. The Court of Appeals' opinion on direct review in no way suggests that this addition to the record evidence before it would have been meaningless to the court's analysis, particularly if it had been assessing whether there was a reasonable probability that an objection would have been sustained rather than whether fundamental (or structural) error occurred.

prong of *Strickland* is satisfied here. Given that the trial judge had declared a mistrial, had discharged the jury, had set a new trial date, and that the trial was of relatively short duration, there was "a reasonable probability" that had trial counsel objected to permitting the jury to continue its deliberations, the trial judge would have sustained the objection and maintained the mistrial. *Strickland*, 466 U.S. at 694; *see also United States v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984) (assessing prejudice based on "[w]hether the trial court would have sustained the objection").

4. Accordingly, because we can grant relief on alternative grounds, *see Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc), the judgment of the district court is **AFFIRMED**. We need not reach May's other arguments for affirmance.[4]

[4] We deny May's motion to strike the State's notices of authorities.

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MAR 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

May v. Ryan, No. 17-15603, 17-15704
IKUTA, Circuit Judge, dissenting:

The majority makes two crucial errors in analyzing May's claim that trial counsel was ineffective for failing to object before allowing the jurors to resume deliberations after a mistrial.

First, the majority errs by reviewing this claim de novo. AEDPA deference is required because the Arizona Court of Appeals adjudicated this claim on the merits in its September 2012 decision and reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in holding that May's ineffective assistance claim failed. *See* 28 U.S.C. § 2254(d).

The majority holds otherwise by misreading the court's earlier July 2008 decision on direct appeal, on which the court's 2012 decision relies. In its 2008 decision, the court rejected May's argument that the trial court had erred in allowing jury deliberations to continue after a mistrial. *See State v. May*, No. 1 CA-CR 07-0144, 2008 WL 2917111, at *2–3 (Ariz. Ct. App. July 24, 2008). Because May had not raised this objection at trial, the court considered whether an "error occurred, the error was fundamental, and [May] was prejudiced thereby." *Id.* at *2. After reviewing its prior cases—principally, *State v. Crumley*, 128 Ariz. 302 (1981) (in banc)—the court held that there was no error requiring reversal because there was no per se rule that "any verdict rendered after a jury once has

been discharged is null and void." *Id.* at *3. It also held that May had failed to show prejudice because the jurors had not been sent back into the community before reconvening. *See id.* And, "[i]n any event," even if the jurors had interacted with the public in the meantime, the Court knew "that [the jurors] did not have the extended opportunity for contact with the public that occurred in *Crumley*." *Id.*

In post-conviction filings, May subsequently raised the related claim that his attorney was ineffective for failing to object to continuing jury deliberations after mistrial. In September 2012, the Arizona Court of Appeals likewise rejected this claim, stating that even if counsel's performance was deficient, "May cannot show prejudice because we rejected the underlying claim of error on appeal," and "[i]nability to show prejudice is fatal to a claim of ineffective assistance of counsel." *State v. May*, No. 2 CA-CR 2012-0257-PR, 2012 WL 3877855, at *4 (Ariz. Ct. App. Sept. 7, 2012). Reading this ruling under "§ 2254(d)'s highly deferential standard for evaluating state-court rulings which demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (internal citations and quotation marks omitted), we are compelled to conclude that the Arizona Court of Appeals rejected May's claim because the trial court did not err in allowing continuing jury deliberations, and

therefore even if May's attorney had objected to continuing jury deliberations, it was not reasonably probable that the outcome would have been different. This analysis is not an unreasonable application of *Strickland*'s prejudice prong, and therefore we must defer to the state court's decision. *See id.* at 24–25. The majority's decision to the contrary fails to give the state court's decision the deference which is due.[1]

Second, even if we reviewed the deficiency prong de novo, the majority errs in holding that May's counsel was deficient. Under *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. We are precluded from "second-guess[ing] counsel's assistance," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* 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." *Id*. In other words,

[1] The majority fails to recognize that even if the jurors reached for their cell phones after they were discharged (as a single juror testified), Maj. Op. at 9 n.3, the Court of Appeals determined that the jurors "did not have the extended opportunity for contact with the public that occurred in *Crumley,*" *May*, 2008 WL 2917111, at *3; therefore, the court could reasonably conclude that the trial court's resumption of deliberations was not erroneous as a matter of state law.

"defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted).

Here, May's lawyer explained that his decision not to object was a tactical one. He was motivated by a reasonable concern that if the case were retried, the prosecution would have "a complete transcript of [May's] testimony from the mistried case." Further, May's counsel could have reasonably thought that the jury would return acquittals, given that the jury had previously deadlocked and received an impasse instruction. "Reconstruct[ing] the circumstances of counsel's challenged conduct" and "evaluat[ing] the conduct from counsel's perspective at the time," *Strickland*, 466 U.S. at 689, May's counsel made a reasonable on-the-spot calculation that it would better serve his client to go forward with the current jury. There is no basis for concluding that this decision violated prevailing professional norms; a reasonable attorney could conclude that a jury as divided as this one might acquit his client while, on the other hand, the prosecutor would be able to refine his case and improve the chances of obtaining a conviction if he got a second bite at the apple. Exercising the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, we must affirm the Arizona Court of Appeals's determination that there was no deficiency here.

The majority's decision to the contrary makes all the errors *Strickland* warned us against. Relying on "the distorting effects of hindsight," *id.* at 689, the majority speculates that "mistrial here would have been a clearly advantageous result for May." Indulging in armchair quarterbacking, the majority surveys the nature of the State's case, speculates that the victims might have dropped out if there was a second trial, and supposes that should victims drop out, the State would become discouraged and choose not to try May again. In response to May's counsel's reasonable assessment that the prosecutor would have an advantage if offered a mulligan, the majority presents as legal analysis a series of detailed conjectures and predictions about how a second trial would unfold.[2] But pure speculation is insufficient to establish deficient performance, and we should reject such uninformed prognostications. *See Gonzalez v. Knowles*, 515 F.3d 1006, 1014–16 (9th Cir. 2008); *Bragg v. Galaza*, 242 F.3d 1082, 1088–89 (9th Cir. 2001), as amended on denial of reh'g, 253 F.3d 1150 (9th Cir. 2001).

Because AEDPA requires us to defer to the decision of the Arizona Court of Appeals, I would reject May's claim of ineffective assistance of counsel for failing

[2] The majority strangely defers to the post-hoc judgment of *defense counsel's expert*, Maj. Op at 6 n.2, instead of following the Supreme Court's direction that "substantial deference must be accorded to *counsel's* judgment." *Premo v. Moore*, 562 U.S. 115, 126 (2011) (emphasis added).

to object to the resumption of jury deliberations. The majority's conclusion is contrary to AEDPA and binding Supreme Court precedent. Therefore, I dissent.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen Edward May,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-14-00409-PHX-NVW

ORDER

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INTRODUCTION

Petitioner Stephen May was convicted under Arizona's child molestation law, which does not require the state to prove the defendant acted with sexual intent. Rather, once the state proves the defendant knowingly touched the private parts of a child under the age of fifteen, to be acquitted the defendant must prove his *lack* of sexual intent by a preponderance of the evidence. Arizona stands alone among all United States jurisdictions in allocating the burden of proof this way. Arizona is the only jurisdiction ever to uphold the constitutionality of putting the burden of disproving sexual intent on the accused.

Pending before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Michelle H. Burns (Doc. 35) regarding May's Petition for Writ of Habeas Corpus filed pursuant to Title 28, United States Code, section 2254 (Doc. 1). The R&R recommends that the Petition be dismissed with prejudice. The Magistrate Judge advised the parties that they had fourteen days to file objections to the R&R. (Doc. 35 at 118 (citing Rule 72(b), Federal Rules of Civil Procedure; Rule 8(b), Rules Governing Section 2254 Proceedings).) May filed objections on October 20, 2015. (Doc. 38.) Defendants Charles Ryan and Thomas Horne ("the State") filed a response on November 23, 2015. (Doc. 45.) May filed a reply on December 22, 2015. (Doc. 48.)

The parties also submitted supplemental briefing on two cases decided since then. On June 29, 2016, May submitted a supplemental brief in light of the United States Supreme Court's decision in *Dietz v. Bouldin*, — U.S. —, 136 S. Ct. 1885 (2016). (Doc. 54.) The State responded. (Doc. 55.) May then submitted supplemental briefing on the Arizona Supreme Court's decision in *State v. Holle*, 240 Ariz. 300, 379 P.3d 197 (2016), on October 21, 2016. (Doc. 59.) A response and a reply were filed. (Docs. 60, 63.)

The Court has considered all the briefing and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made). May raised numerous claims in his petition, and for the most part

the Court agrees with the Magistrate Judge's determinations, accepts the recommended decision within the meaning of Rule 72(b), and overrules May's objections. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge"). May also raised concern that the R&R appeared to copy large volumes of text "virtually verbatim" from the State's briefing, including several background facts that were incorrect. (Doc. 38 at 13.) While this is concerning, none of the affected portions, including factual errors, make a material difference.

This Court does reject the R&R's conclusions as to two of May's claims and its ultimate recommendation to dismiss his petition with prejudice. The R&R did not entertain May's claim that the burden-shifting statute and jury instructions are unconstitutional. The reason given is that May did not raise the claim at trial and did not show cause and prejudice for defaulting. But May has in fact shown cause and prejudice for the default based on ineffective assistance of his trial counsel.

The state courts on collateral review also disavowed making any ruling on the merits of May's constitutional claim. Because no state court adjudicated the merits of May's constitutional claim, the question must be considered de novo here. But even if measured under the deferential standard of 28 U.S.C. § 2254(d)(1), an adjudication against May would be contrary to, or involve an unreasonable application of, clearly established Federal law, as decided by the Supreme Court of the United States.

The State deprived May of his constitutional right to due process of law and proof of guilt beyond a reasonable doubt. By crafting its child molestation law as it did, Arizona spared itself from proving sexual intent and instead burdened May with disproving it. Absent sexual intent, however, all the conduct within the sweep of the statute is benign, and much of it is constitutionally protected. Nothing in the revised elements of the crime distinguishes wrongful from benign from constitutionally protected conduct. One must look to the defendant's burden of proof to see what this statute is really about, which is the same thing it has always been about: the defendant's sexual

intent. This shifting to the accused of the burden of disproving everything wrongful (here the only thing wrongful) about the prohibited conduct cannot stand unless there are no constitutional boundaries on a state's ability to define elements, transubstantiate denials into affirmative defenses, and be master of all burdens of proof. The State argues precisely that in defense of May's conviction, that element-defining and burden-shifting are no longer part of justiciable constitutional law. But there are boundaries, some well-settled boundaries, and this statute crosses them at a brisk sprint.

BACKGROUND AND PROCEDURAL HISTORY

The R&R recites the detailed history of this case. (Doc. 35 at 2-40.) To provide context for the discussion below, the following summary may be helpful.

On January 16, 2007, Stephen May was convicted in Arizona superior court on five counts of child molestation under sections 13-1410(A) and 13-1407(E) of the Arizona Revised Statutes. He was also acquitted on two counts. Section 13-1410 criminalizes "molestation of a child," which consists of "intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age." Ariz. Rev. Stat. § 13-1410(A) (2009). "Sexual contact" is defined as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." Ariz. Rev. Stat. § 13-1401(3) (2015). The prohibition does not require that the intentional touching have a sexual intent, though section 13-1407(E) provides that as an "affirmative" defense, a defendant may assert "that the defendant was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E) (2008). Arizona law also places the burden on the defendant to prove the affirmative defense—that is, to disprove that he had a sexual intent—by a preponderance of the evidence. Ariz. Rev. Stat. § 13-205(A) (2006).

May, a former school teacher and swim instructor, lived in a Mesa, Arizona apartment complex where he often taught children how to swim and played with them at the community pool. The charges against him arose from accounts by four children who

said he touched them inappropriately. May's trial attorney, Joel Thompson, made no motion to dismiss the charges before trial. He did request a jury instruction that as a matter of statutory construction under section 13-1410(A) the state bears the burden of proving beyond a reasonable doubt that May touched the children with sexual intent. Thompson did not assert that the law would be unconstitutional if it placed the burden of disproving that on May. The State argued that because sexual intent is not a stated element under section 13-1410(A), the defendant has the burden of proving his own lack of sexual intent by a preponderance of the evidence. Accepting the State's position, the trial judge instructed the jury that the State must prove beyond a reasonable doubt only the described touching and the victim's age but that they must acquit if May proved by a preponderance of the evidence that the touching was not motivated by sexual interest.

After several days of trial, the jury deliberated for two days but could not reach a verdict. (Doc. 35 at 21-22.) They gave the judge several notes indicating they were deadlocked, and the judge accordingly declared a mistrial and dismissed them. But just minutes after the proceedings were adjourned, the bailiff delivered a note stating that the jurors, who were still in the jury room gathering their things, wished to resume deliberations. (Doc. 35 at 22.) Neither side objected, and the jury reconvened. After nearly a full day of additional deliberation, the jury convicted May on five counts and acquitted him on two. (Doc. 35 at 23.) (An eighth count was previously severed and eventually dismissed.) May's attorney moved for new trial, arguing that the final jury instructions misstated Arizona law by requiring May to prove a lack of sexual intent. (Doc. 35 at 23.) Once again, Thompson did not assert the law or the jury instructions were unconstitutional. The judge denied the motion and later sentenced May to 75 years in prison, 15 years for each count. (Doc. 35 at 24.)

After an unsuccessful direct appeal, May sought post-conviction relief in Arizona superior court. This collateral review proceeding was his first chance under Arizona procedure to raise a claim of ineffective assistance of counsel. *See State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002) (holding that ineffective assistance of counsel may

not be presented until post-conviction review). May argued that Thompson provided ineffective assistance at trial by not challenging the constitutionality of placing the burden on him to disprove sexual intent. The superior court denied relief because of procedural default without deciding the merits of the constitutional claim (Docs. 1-11; 1-13), and the state appellate court affirmed on the decision below (Doc. 1-17). The Arizona Supreme Court summarily denied review. (Doc. 1-20.)

LEGAL STANDARDS ON FEDERAL HABEAS REVIEW

A federal habeas court cannot review a state court's denial of relief based on adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). Thus, a defendant defaults on any claim not presented to state courts in accordance with the state's procedural rules, generally barring federal habeas review. *Id.* at 731-32. Exceptions apply where the defendant shows cause and prejudice for the default or a miscarriage of justice would result from upholding the default. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). One way a petitioner can establish cause is by showing the default resulted from ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

May did not challenge the constitutionality of Arizona's child molestation statute at trial, raising it for the first time in collateral proceedings. Since Arizona law required him to raise it at trial, May cannot raise the claim here absent a showing of cause and prejudice for his default.[1] *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding post-conviction review of any claim that could have been raised at trial or on direct appeal). However, May contends his trial attorney was ineffective in not challenging the constitutionality of

[1] The Supreme Court has defined the other possibility, a "fundamental miscarriage of justice," to mean, effectively, actual innocence. *See McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (limiting "fundamental miscarriage of justice" cases to "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime"). May has not met the exceedingly high bar for showing actual innocence.

Arizona's child molestation law.[2]

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal habeas will not lie on claims decided on the merits by a state court unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court unreasonably applies federal law by "unreasonably extend[ing] a legal principle from [Supreme Court] precedent to a new context where it should not apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The legal principles applied "must be found in the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002) (citation and internal quotation marks omitted). To meet this standard an application of federal law cannot be merely erroneous; it "must have been objectively unreasonable." *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003) (internal quotation marks omitted).

While federal courts may consider both the decision and the reasoning of the state courts, the Supreme Court has specified:

> Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported[] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Harrington v. Richter, 562 U.S. 86, 102 (2011).

This Court must therefore assess at the threshold whether the Arizona state courts committed either of the errors enumerated in section 2254 in rejecting May's contention of ineffectiveness of counsel to excuse his procedural default on his constitutional claim.

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[2] May also argues his appellate counsel was ineffective for failing to raise the issue on direct appeal. (Doc. 2 at 80.) But because the constitutionality of Arizona's child molestation law was never raised at trial, May's appellate attorney was barred from raising it on appeal.

Ineffective assistance of counsel is measured by the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel must have performed deficiently, and this performance must have prejudiced the defendant. *Id.*

ANALYSIS

I. History of Arizona's Child Molestation Law

Discussion of May's ineffectiveness and merits claims first requires an overview of the history and current state of Arizona's child molestation statutes.

Separate from laws against sexual misconduct generally, Arizona's first prohibition specifically addressing child molestation appeared in the 1913 penal code:

> Any person who shall wilfully and lewdly commit any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison not less than one year.

Rev. Stat. of Ariz. (Penal Code) § 282 (1913).[3] That law had dropped out of the code by 1928, and not until 1965 did the state legislature pass a new law prohibiting sexual

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[3] The Arizona courts identify the state's first child molestation prohibition as a 1939 statute making it a crime to "molest" a child. *See State v. Holle (Holle I)*, 238 Ariz. 218, 223, 358 P.3d 639, 644 (Ariz. Ct. App. 2015) (citing 1939 Ariz. Sess. Laws, ch. 13, § 1), *vacated by State v. Holle (Holle II)*, 240 Ariz. 300, 379 P.3d 197 (2016). The prohibition they cite, while entitled "MOLESTING SCHOOL CHILD," provides:

> Any person who annoys or molests a school child, or without legitimate reason therefor loiters on the grounds of any public school at which children are in attendance, or within three hundred feet thereof, shall be deemed a vagrant, and upon conviction fined not more than five hundred dollars, imprisoned in the county jail not more than six months, or both.

1939 Ariz. Sess. Laws, ch. 13, § 1. In addition to coming twenty-six years after the 1913 statute, given the lenient punishment and lack of sexual context, the word "molests" in the 1939 statute likely did not refer to sexual contact but merely to the word's more traditional definition (operative both then and now): to "annoy" or "disturb." *See, e.g.*, *Molest*, Webster's New International Dictionary of the English Language 1580 (2d ed. 1936) (defining "molest" as "[t]o interfere with or meddle with unwarrantably so as to injure or disturb").

conduct with children in particular.[4] That year the legislature enacted section 13-653 of the Arizona Revised Statutes, providing:

> A person who molests a child under the age of fifteen years by fondling, playing with, or touching the private parts of such child or who causes a child under the age of fifteen years to fondle, play with, or touch the private parts of such person shall be guilty of a felony . . . .

1965 Ariz. Sess. Laws, ch. 20, § 3. (The statute was renumbered to section 13-1410 in 1977. *See* 1977 Ariz. Sess. Laws, ch. 142, § 66.) While this prohibition did not expressly recite a sexual intent requirement, the Arizona Supreme Court took it to be implied, reasoning:

> [F]rom both the word "molest" itself and the general intent of the Legislature as may be grasped from a reading of the statute as a whole, a scienter requirement is apparent. As we have said before, where a penal

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[4] Arizona's penal code may have still prohibited child molestation in the interim. In 1917, the legislature enacted another law making it a crime to

> wilfully commit any lewd or lascivious act upon or with the body or any part or member thereof, of any male or female person, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of either of such persons, in any unnatural manner . . . .

1917 Ariz. Sess. Laws, ch. 2, § 1. This law was "in addition to, and not in place of, any other provision of law." *Id.*, § 2.

The two key differences between this law and the 1913 molestation law were the former's application to "any male or female person" and the requirement that the lewd or lascivious act be conducted "in any unnatural manner," indications that the 1917 enactment likely targeted acts between same-sex partners. *See Unnatural Offense*, Black's Law Dictionary (2d ed. 1910) (defining "unnatural offense" as "[t]he infamous crime against nature; i.e., sodomy or buggery"). Perhaps assuming this law also covered child molestation, the 1928 Code reviser deleted the child-specific law, carrying forward only the more general 1917 enactment. Rev. Code of Ariz. § 4651 (1928). In 1965, the legislature amended the law, by then codified as section 13-652 of the Arizona Revised Statutes, providing for additional punishment where the acts in question were committed "upon or with a child under the age of fifteen years." 1965 Ariz. Sess. Laws, ch. 20, § 2. After renumbering the statute to section 13-1412 in 1977, 1977 Ariz. Sess. Laws, ch. 142, § 68, the legislature amended it in 1985 to limit application only to sexual acts between adults. 1985 Ariz. Sess. Laws, ch. 364, § 23. The statute was fully repealed in 2001. *See* 2001 Ariz. Sess. Laws, ch. 382, § 1.

> statute fails to expressly state a necessary element of intent or scienter, it may be implied. . . . [T]herefore, it is certainly possible for a doctor or parent to touch the private parts of a child without "molesting" him by doing so, in which case the statute has not been violated.

State v. Berry, 101 Ariz. 310, 313, 419 P.2d 337, 340 (1966) (citation omitted). This remained the law for several decades.

Over the next twenty years, the legislature tweaked section 13-1410 in various ways, but "[Arizona] courts continued to treat sexual interest as an 'essential element' of the offense." *State v. Holle (Holle I)*, 238 Ariz. 218, 223-24, 358 P.3d 639, 644-45 (Ariz. Ct. App. 2015), *vacated by State v. Holle (Holle II)*, 240 Ariz. 300, 379 P.3d 197 (2016). *See, e.g.*, *State v. Brooks*, 120 Ariz. 458, 460, 586 P.2d 1270, 1272 (1978); *State v. Madsen*, 137 Ariz. 16, 18, 667 P.2d 1342, 1344 (Ariz. Ct. App. 1983); *State v. Anderson*, 128 Ariz. 91, 92, 623 P.2d 1247, 1248 (Ariz. Ct. App. 1980). In 1983, the legislature enacted section 13-1407(E) of the Arizona Revised Statutes, making lack of sexual interest an affirmative defense to child molestation. *See* 1983 Ariz. Sess. Laws, ch. 202 § 10. But at that time, Arizona law on proving affirmative defenses generally was that upon the defendant raising an affirmative defense, the burden shifted to the state to refute it beyond a reasonable doubt. *See, e.g.*, *State v. Duarte*, 165 Ariz. 230, 231, 798 P.2d 368, 369 (1990) ("[O]nce evidence of self-defense is presented, the burden is on the state to prove beyond a reasonable doubt that the conduct was unjustified."). Thus in practice, prosecutors had to prove sexual intent beyond a reasonable doubt. *See Holle I*, 238 Ariz. at 224, 358 P.3d at 645 (collecting authorities and noting, "For practical purposes . . . the enactment of § 13-407(E) did not significantly change the way courts treated sexual interest.").

Not until 1993 did the legislature amend sections 13-1410 and 13-1407(E) to their current forms. *See Holle I*, 238 Ariz. at 225, 358 P.3d at 646. Before then, the text of section 13-1410 began with the words "[a] person who knowingly molests a child . . ." before reciting the precise actions that were prohibited. *See* 1965 Ariz. Sess. Laws, ch.

20, § 3. The 1993 update revised the language to read:

> A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age.

1993 Ariz. Sess. Laws, ch. 255 § 29. The Arizona court of appeals held that the new language, which omitted the verb "molests," eliminated sexual intent as an element of the crime. *State v. Sanderson*, 182 Ariz. 534, 542, 898 P.2d 483, 491 (Ariz. Ct. App. 1995). But the court of appeals upheld the statute on the understanding that it shifted only the burden of production to the defendant—not the burden of proof or persuasion. While it was the defendant's burden to assert lack of sexual intent as an affirmative defense, the state then bore the burden of proving sexual intent beyond a reasonable doubt. *See id.*; *Holle I*, 238 Ariz. at 225, 358 P.3d at 646. Thus, even under the *Sanderson* court's quibble on changing a verb ("molests") to a noun ("molestation"), whether a fact was treated as an element or the absence thereof as an affirmative defense had no practical consequence. Either way the state had the burden of proof beyond a reasonable doubt.

In 1997, the Arizona legislature intervened again, not by changing anything in the child molestation statute, but by changing the burden of proof for all affirmative defenses across the board. (Subsequent legislation excluded justification defenses, but that does not affect this case. *See Holle I*, 238 Ariz. at 226 n.7, 358 P.3d at 647 n.7; 2006 Ariz. Sess. Laws, ch. 199, § 1-2.) The new enactment of general application required that "a defendant shall prove any affirmative defense raised by a preponderance of the evidence . . . ." 1997 Ariz. Sess. Laws, ch. 136, § 4; Ariz. Rev. Stat. § 13-205(A) (2006). The 1997 amendments were the governing statutes when May stood trial in January 2007. (Doc. 22 at 163-64.)

The *Sanderson* precedent was grounded on Arizona's prior approach in which the State must disprove affirmative defenses. Not until several weeks after May's conviction did an appellate court address child molestation in light of the 1997 legislation. The court of appeals held that sexual intent continued not to be an element of child molestation

under Arizona law, but that section 13-205(A) now placed the burden on the defendant to prove by a preponderance of the evidence that he lacked sexual motivation. *State v. Simpson*, 217 Ariz. 326, 329, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007).

In 2015, a different panel of the court of appeals disagreed with *Simpson*, holding that lack of sexual intent is not an "affirmative defense" to child molestation under state law but just a "defense." *Holle I*, 238 Ariz. at 226, 358 P.3d at 647. *See* Ariz. Rev. Stat. § 13-103 (2006). The *Holle I* court held that for this reason the state still must prove sexual intent beyond a reasonable doubt. *Holle I*, 238 Ariz. at 226, 358 P.3d at 647. But the Arizona Supreme Court vacated that ruling in 2016, holding that lack of sexual intent is in fact an affirmative defense, which a defendant must prove by a preponderance of the evidence. *Holle II*, 240 Ariz. at 305, 379 P.3d at 202.

There is no indication the drafters of the 1997 amendment surveyed all affirmative defenses in Arizona law and reflected on the constitutionality of shifting the burden of proof on each one. Under the Arizona Supreme Court's decision in *Holle II*, the formality of labeling something an affirmative defense, which did not matter before, could now determine whether fundamental constitutional rights are accorded or denied for some defenses to some crimes.

Though no case had so held when May stood trial, as of today, ten years later, prosecutors bear the burden of proving beyond a reasonable doubt that the defendant "intentionally or knowingly" engaged in sexual contact with a child under fifteen, defined as any direct or indirect touching, fondling or manipulating of any part of the genitals or anus by any part of the body or by any object or causing a person to engage in such contact. *See* Ariz. Rev. Stat. §§ 13-1401(3), 13-1410(A). The defendant then bears the burden of proving by a preponderance of the evidence that such touching was without a sexual interest. The question arises here, as it no doubt will in other cases concerning essential denials relabeled as defenses to be proved, whether it is constitutional to put the burden of disproof on the defendant instead of the burden of proof on the state.

Of course, "proving lack of sexual intent" is exactly the same thing as "disproving

sexual intent." That same thing is proving a negative. However phrased, it is not proving anything affirmative. Putting the contradictory word "affirmative" in front of proof of a negative does not make it proof of an affirmative, though it may serve to confuse the reader. It is still what it is. This order uses both phrases interchangeably.

II. Arizona Deprived May of Due Process of Law and of the Right to Be Found Guilty Only by Proof Beyond a Reasonable Doubt

From the passage of section 13-205 until the conclusion of May's state court proceedings, no Arizona court—including those that reviewed May's conviction—addressed whether it is constitutional to require a child molestation defendant to disprove his sexual interest. In *Holle I* in 2015, the Arizona court of appeals avoided the question by distinguishing a "defense" from an "affirmative defense," and thereby held under state law that the prosecution must still prove sexual intent beyond a reasonable doubt. *Holle I*, 238 Ariz. at 226, 358 P.3d at 647. In its 3-2 decision vacating *Holle I*, the Arizona Supreme Court held that state law makes lack of sexual intent an affirmative defense to be proved by the defendant. *Holle II*, 240 Ariz. at 311, 379 P.3d at 208. The *Holle II* court also held, for the first time anywhere in the country, that putting such a burden on a child molestation defendant does not violate federal due process of law. *Id.* That federal law ruling, handed down by the state supreme court nine years after May's conviction and three years after his state court proceedings ended, is not entitled to deference from this Court. None of the state courts in May's case decided the federal constitutional question, so this habeas court must decide it as *res nova* if it reaches the question.

Because May failed to preserve the constitutional question at trial, this Court can reach the merits only if there was cause and prejudice for his default. May contends the default was the result of ineffective assistance of his trial counsel. (Doc. 2 at 86.) One prong of ineffective assistance of counsel is prejudice, i.e., that it is reasonably likely May would have obtained a different outcome absent the ineffectiveness, with "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687. Prejudice, therefore depends largely on the

strength of the defaulted federal constitutional objection.

It therefore makes sense to discuss the law's constitutionality at the outset. Merits discussion will do double service, once on the prejudice prong to escape the default and again to decide the constitutional claim itself.

A. Due Process Limits States in Placing Burdens of Proof on Defendants

The Fourteenth Amendment to the United States Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In criminal proceedings, this requires the state to "pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). States have wide latitude to determine what conduct to make a crime and what defenses to allow. *See, e.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive."). A legislature's choice in this regard, including how it allocates evidentiary burdens, warrants deference "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (internal quotation marks omitted).

That said, the Supreme Court has repeatedly cautioned legislatures against skirting *Winship* by simply extracting essential elements from offenses and putting the burden on defendants to disprove them. The Court first addressed this in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), in which it overturned a murder conviction where the jury was instructed it could infer "malice aforethought," an element of murder under Maine law, from a mere finding that the defendant committed an intentional killing. *Id.* at 703. While the defendant could downgrade the offense to manslaughter by raising heat of passion as an affirmative defense, he carried the burden of proving heat of passion by a preponderance of the evidence. *Id.* at 686. The Court concluded that this "affirmatively shifted the burden of proof to the defendant" to disprove malice, an essential element of

murder, even though the Maine supreme court had upheld the burden shifting scheme as an integral part of the state's law. *Id.* at 701.

Two years later a similar issue arose in *Patterson*, where the Supreme Court upheld a second-degree murder conviction under a New York statute that criminalized the intentional killing of another person without proof of malice. 432 U.S. at 198. The statute permitted a defendant to reduce the charge by proving by a preponderance of the evidence that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.* Malice need not be proved and lack of malice was not a permitted defense or rebuttal. The defendant nonetheless contended the charge-reduction scheme impermissibly shifted the burden of proof by effectively requiring him to disprove malice. *Id.* at 201. The *Patterson* Court disagreed, distinguishing *Mullaney* on the grounds that since the New York statute did not expressly recite malice as an element of murder, the heat of passion defense did not negate an essential element. *Id.* at 208-09. Significantly, neither party in *Patterson* disputed that "the State may constitutionally criminalize and punish" the intentional killing of another person without more. *Id.* at 209. But the Court emphasized that while its decision "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes[,] . . . there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210 (citation and internal quotation marks omitted).

Defying the plain language of *Patterson*, at oral argument the State defended May's conviction on the basis that legislatures have complete and unfettered authority to decide both the elements of and "affirmative" defenses to any crime. According to the State, the constitutional limit is entirely a matter of form: lawmakers can force the accused to prove or disprove any fact as long as the legislature is careful to call the arrangement an "affirmative defense." Or, as in this case, a legislature can take what was for decades an element of the crime (sexual intent) and relabel the denial of it as an affirmative defense, thereby freeing the state from having to prove it and making the

accused disprove it instead. At oral argument the State was candidly absolutist 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*: a legislature "cannot declare an individual guilty or presumptively guilty of a crime"; nor may it "validly command that the filing of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." *Patterson*, 432 U.S. at 210. The State declined any more specific constitutional justification for allowing a state to make an accused disprove sexual intent for child molestation.[5]

The State's unified field theory for evading *Winship* with thaumaturgic words is directly contrary to *Patterson*'s holding that "there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210 (citation and internal quotation marks omitted). The Supreme Court has reiterated this far too frequently to consider the question less than settled. *See McMillan*, 477 U.S. at 86; *Apprendi v. New Jersey*, 530 U.S. 466, 486 (2000) ("We did not . . . [in *McMillan*] budge from the position that . . . constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense."); *Jones v. United States*, 526 U.S. 227, 243 (1999) ("The seriousness of the due process issue is evident from *Mullaney*'s insistence that a State cannot manipulate its way out of *Winship*, and from *Patterson*'s recognition of a limit on state authority to reallocate traditional burdens of proof . . . ."); *Schad v. Arizona*, 501 U.S. 624, 639 (1991) (citing *Patterson* for the proposition that "there are obviously constitutional limits beyond which the States may not go" in

[5] At oral argument, the Court tested these limits by hypothesizing a "Felonious Hospital Nursing" offense in which a hospital nurse is guilty of a crime if a patient dies while under the nurse's watch. As an affirmative defense, the nurse could prove that no act or omission by the nurse caused the death. Counsel for the State argued that even this would be constitutional, as it would come within the State's no-limits rule. The State's endorsement of the hypothetical is a *reductio ad absurdum* of its thesis for upholding May's conviction.

defining offenses). The State's stance is antithetical to the very requirement of proof beyond a reasonable doubt. It is directly contrary to Supreme Court case law on the very level of generality at which the State poses it.

B. The Arizona Law Fails Under the Typical Supreme Court Criteria for Rejecting Unconstitutional Burden-Shifting

Arizona's child molestation law also falls short on the Supreme Court's more focused criteria and considerations limiting states' discretion to shift burdens of proof in criminal cases.

At a high level and as has been noted, deference to the legislature's discretion ends when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201-02. In confirming how traditions and conscience weigh in specific challenges, courts "have often found it useful to refer both to history and to the current practice of other States in determining whether a State has exceeded its discretion in defining offenses." *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (plurality opinion). A state may not "shift[] the burden of proof as to what is an inherent element of the offense," on which long history and widespread use shed light. *Id.* Of particular importance to this case, "a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions" signals possible constitutional infirmity. *Id.* At the very least, the remaining elements of the stripped-down crime must define something wrongful. *See Morrison v. California*, 291 U.S. 82, 90 (1934) ("For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . ."). Additionally, "the shifting of the burden [must] be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Id.* at 89.

For the following reasons, Arizona's burden shifting in child molestation fails readily on all these measures.

1. Sexual Intent Has Always Been Essential to the Crime of Child Molestation

Examination of both history and practice compels or at least forcefully suggests the conclusion that sexual intent is essential to child molestation. While sexual crimes against children have long been punished in America, specific laws against sexual contact with children are of more recent vintage. Both the British common law and early American jurisdictions typically treated sexual offenses against children under broader categories, such as assault with intent to commit rape, or even rape itself. *See* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 Seton Hall Legis. J. 1, 11-15 (1997). Where such offenses did not involve sexual penetration, a handful of states created separate statutes criminalizing the offense of "taking indecent liberties" with children, though these laws often did not enumerate specific elements. *Id.* at 17. Arizona's own 1913 molestation law, discussed above, likewise required that the prohibited acts be carried out "with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or of such child." Ariz. Rev. Stat. (Penal Code) § 282 (1913). Other states used the same language before and after Arizona did. *See, e.g.*, *People v. Curtis*, 1 Cal. App. 1, 1-2, 81 P. 674 (Cal. Ct. App. 1905); *Milne v. People*, 224 Ill. 125, 126, 79 N.E. 631, 631-32 (1906); *State v. Kernan*, 154 Iowa 672, 673, 135 N.W. 362, 363 (1912); *State v. Kocher*, 112 Mont. 511, 119 P.2d 35, 37 (1941).

Statutes of this sort became the norm across jurisdictions and persisted over time. The Model Penal Code, first published by the American Law Institute in 1962, compiled a single advisory corpus of preferred formulations of criminal statutes. *See* Markus D. Dubber, *Criminal Law: Model Penal Code* 7-11 (2002). The Model Penal Code included sexual crimes against children within a broader section on sexual assault, which provided for criminalizing certain kinds of "sexual conduct," defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire." ALI, Model Penal Code § 213.4 (1962). That language endures to the present. *See* ALI, Model Penal Code § 213.4 (2015). Today the statutes or case law of

48 out of 50 states, the District of Columbia, three U.S. territories, and the federal government require some sexual purpose for the crime of child molestation.[6]

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[6] Currently, the vast majority of jurisdictions define the "sexual contact" requisite for child molestation as intentional touching of specified body parts for sexual arousal or gratification. *See* Ala. Code § 13A-6-60(3) (1988) (Alabama); Ark. Code Ann. § 5-14-101(10) (2009) (Arkansas); Cal. Penal Code § 288(a) (West 2010) (California); Conn. Gen. Stats. § 53a-65(3) (2013) (Connecticut); Colo. Rev. Stat. § 18-3-401(4) (2013) (Colorado); Del. Code Ann. tit. 11, § 761(f) (2015) (Delaware); Ga. Ann. Code § 16-6-4(a) (2009) (Georgia); 9 Guam Code Ann. § 25.10(8) (1979) (Guam); Idaho Code § 18-1508 (1992) (Idaho); 720 Ill. Comp. Stat. 5/11-0.1 (2011) (Illinois); Ind. Code § 35-42-4-4(4) (2016) (Indiana); Iowa Code § 709.12(1) (2013) (Iowa); Kan. Stat. Ann. § 21-5506(a) (2011) (Kansas); Ky. Rev. Stat. Ann. § 510.010(7) (West 2012) (Kentucky); La. Stat. § 14:81 (2010) (Louisiana); Miss. Code Ann. § 97-5-23(1) (2015) (Mississippi); Neb. Rev. St. § 28-318(5) (2010) (Nebraska); Nev. Rev. Stat. 201.230 (2015) (Nevada); N.H. Rev. Stat. Ann. § 632-A:1(IV) (2009) (New Hampshire); N.Y. Penal Law § 130.00(3) (2010) (New York); N.C. Gen. Stat. § 14-202.1(a) (1994) (North Carolina); Ohio Rev. Code Ann. § 2907.1(B) (2007) (Ohio); Okla. Stat. tit. 21, § 1123(A) (2015) (Oklahoma); Or. Rev. Stat. § 163.305(6) (2010) (Oregon); 18 Pa. Cons. Stat. § 3126(a) (2006) (Pennsylvania); P.R. Laws Ann. tit. 33, § 4772 (Puerto Rico); S.C. Code Ann. § 16-3-655(C) (2012) (South Carolina); S.D. Codified Laws § 22-22-7.1 (2004) (South Dakota); Tenn. Code Ann. § 39-13-501(6) (2013) (Tennessee); Tex. Penal Code Ann. § 21.11(c) (2009) (Texas); Vt. Stat. Ann. tit. 13, § 2821(2) (1999) (Vermont); V.I. Code Ann. tit. 14, § 1699 (2002) (Virgin Islands); Va. Ann. Code § 18.2-67.10(6) (2004) (Virginia); Wash. Rev. Code § 9A.44.010(2) (2007) (Washington); W. Va. Code § 61-8B-1(6) (2007) (West Virginia).

Some jurisdictions also add the purposes of abuse, degradation, or humiliation. *See* D.C. Code § 22-3001(9) (2009) (District of Columbia); 18 U.S.C. § 2246(3) (Federal); Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(D) (2003) (Maine); Md. Code Ann., Crim. Law § 3-301(e) (2016) (Maryland); Mich. Comp. Laws 750.520a(q) (2015) (Michigan); Minn. Stat. § 609.341(11)(c) (2013) (Minnesota); Mo. Ann. Stat. § 566.010 (West 2016) (Missouri); Mont. Code Ann. § 45-2-101(67) (2016) (Montana); N.J. Stat. Ann. § 2C:14-1(d) (West 2012) (New Jersey); N.D. Cent. Code § 12.1-20-02(5) (2009) (North Dakota); 11 R.I. Gen. Laws § 11-37-1(7) (1999) (Rhode Island); Utah Code Ann. § 76-5-401.1(2) (West 2016) (Utah); Wisc. Stat. 948.01(5) (2015) (Wisconsin); Wy. Stat. Ann. § 6-2-301(a)(vi) (2010) (Wyoming).

Alaska does not enumerate a sexual or abusive intent requirement but does provide an enumerated exception—not a defense—for touching carried out under "normal caretaker responsibilities for a child, interactions with a child, or affection for a child." Alaska Stat. § 11.81.900(59)(B) (2013).

Child molestation statutes in Florida, Massachusetts, and New Mexico do not specify intent requirements or enumerate exceptions for, e.g., hygienic touching. *See* Fla. Stat. § 800.04(5)(a) (2014) (prohibiting certain intentional touching of anyone under 16 years of age "in a lewd or lascivious manner"); Mass. Gen. Laws ch. 265, § 13B (2008) (criminalizing "indecent assault and battery on a child under the age of 14"); N.M. Stat.

This virtually unanimous practice with consistent historical precedent is strong evidence of the traditions and conscience of our people that count as fundamental to the rights of persons charged with crimes. *See Patterson*, 432 U.S. at 201-02. They weigh heavily in favor of sexual intent as "an inherent element of the offense" of child molestation, an element in substance that the State must prove and cannot constitutionally put on an accused person to disprove.

2. Arizona's "Freakish Definition of the Elements" without Any "Sinister Significance"

Arizona certainly has "a freakish definition of the elements" grounded on nothing of "sinister significance." The language of the elements describes benign and constitutionally protected behavior that could only become wrongful with sexual intent—the very fact the Arizona law forces the defendant to disprove. This is convicting people without proof of wrongdoing because they have not disproved the only thing that could

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Ann. § 30-9-13(A) (2003) (criminalizing "the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one's intimate parts"). However, courts in all three states have gleaned requirements of something more than mere touching from the language of their respective statutes. *See Andrews v. State*, 130 So.3d 788, 789-90 (Fla. App. 2014) ("[T]he Legislature has not defined the terms 'lewd' and 'lascivious.' But generally speaking, these words . . . usually have the same meaning, that is, an unlawful indulgence in lust, eager for sexual indulgence" (alterations and internal quotation marks omitted)); *Commonwealth v. Lavigne*, 42 Mass. App. Ct. 313, 314-15, 676 N.E. 2d 1170, 1172 (1997) (defining "indecent" touching as "fundamentally offensive to contemporary moral values…and which the common sense of society would regard as immodest, immoral, and improper" (internal quotation marks omitted)); *State v. Pierce*, 110 N.M. 76, 83, 792 P.2d 408, 415 (1990) (holding that lawful parenting behaviors are foreclosed from prosecution under § 30-9-13 because only "unlawful" touching is prohibited).

Hawaii may be the only jurisdiction other than Arizona that does not require sexual intent for a child molestation offense. The state's penal code outlaws "knowingly subject[ing] to sexual contact another person who is less than fourteen years old or caus[ing] such a person to have sexual contact with the [offender]." Haw. Rev. Stat. § 707-732(1)(b) (2009). The Hawaii legislature in 1986 rewrote its definition of "sexual contact" specifically to cut out sexual gratification as a requirement. *See* Haw. Rev. Stat. § 707-700 (2016); *State v. Kalani*, 108 Hawai'i 279, 285, 118 P.3d 1222, 1228 (2005) (rejecting a constitutional vagueness challenge). No court has addressed whether some sexual intent requirement is implied, which party would have to prove or disprove it, or whether it would be unconstitutional for a defendant to have to disprove it.

color their conduct as culpable.

Indeed, the "affirmative defense" here is not an explanation, avoidance, or justification. Nor is it a diminishment of culpability, offense level, or punishment. The defense is proof of a negative. It is refutation of the entire wrongfulness that may be lurking in any of the extensive prohibited conduct. When a law as written criminalizes entirely benign intentional conduct and has no mental state requirement to separate the bad from the good, making disproof of a state of mind a complete "defense" retains state of mind as central to the crime.

There is a grievous threat to due process of law from making defendants disprove their own state of mind for conduct that is not wrongful in any sensible way without a bad mental state. The dissenting Justices in *Patterson* feared that under the Court's rule, which they thought overly broad and difficult to apply:

> For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. *The State, in other words, could be relieved altogether of responsibility for proving anything regarding the defendant's state of mind, provided only that the fact of the statute meets the Court's drafting formulas.*

Patterson, 432 U.S. at 224 n.8 (Powell, J., dissenting) (emphasis added). But even the dissenters thought their hypothetical statute so "egregious" that they had "no doubt that the Court would find some way to strike [it] down . . . ." *Id.* at 225 n.9. The *casus terribilis* the dissenters posed—no mental state requirement for widely criminalizing benign conduct with the defendant charged to disprove bad mental state—has arrived. It is in Arizona and people are in prison for it, May for the rest of his natural life.

These considerations, too, show the Arizona law has gone over the constitutional bounds of legislative discretion in defining crimes and putting burdens of proof on the accused.

3. Arizona Repudiated Its Own History When It Shifted the Burden of Disproving Sexual Intent to Defendants

The evolution of Arizona's child molestation law has an unmistakable trajectory. It expressly required sexual intent when first enacted in 1913. When enacted again in 1965, it was judicially construed to require prosecutorial proof of sexual intent beyond a reasonable doubt. Then the legislature only required prosecutors to do so once the defendant denied sexual intent. Now a defendant must disprove sexual intent by a preponderance of the evidence. *See* Ariz. Rev. Stat. § 13-205(A) (2006); *Holle II*, 240 Ariz. at 308, 377 P.3d at 205. In form, Arizona has written sexual intent out of its child molestation law—but in substance it is still at the center of the crime. All that has changed is who has to prove or disprove it.

The fact that a previously required element has been formally transferred to the defense does not automatically defeat the law. A legislature could initially require elements that go beyond any constitutional or common sense minimum of wrongfulness and later opt to remove them. *See Patterson*, 432 U.S. at 209. But in child molestation, sexual intent is not lagniappe. It is essential to separate wrongful conduct from everyday child touching in parenting, hygiene, medical care, athletics, and other non-culpable acts within the stated elements of the Arizona crime.

C. Application of Due Process Analysis to the Arizona Burden-Shifting Scheme

Measured against the Supreme Court's standards and criteria, the burden-shifting scheme in Arizona's child molestation law violates due process plain and simple. The defendant bears the burden of disproving the very thing that makes child molestation child molestation. There are "obviously constitutional limits beyond which the States may not go" in redefining offenses, *Patterson*, 432 U.S. at 210, and this is obviously one of the limits.

In its recent decision on this same question, the Arizona Supreme Court excused this burden-shifting on the ground that other criminal statutes occasionally sweep innocent conduct within their general language. *Holle II*, 240 Ariz. at 309, 379 P.3d at

206.[7] From the fact that sometimes happens without constitutional infirmity, the state supreme court implies that any law may intentionally and expansively sweep innocent conduct within its prohibition by omitting traditional and common sense elements of the offense—leaving it to the selected defendants to prove their innocence. The Arizona Supreme Court's obvious fallacy is that uncertainty about line-drawing does not prove there are no lines. Moreover, language cannot capture perfectly and only the events in the world of interest. But it can try in good faith to do so and come reasonably close. The Arizona statute does neither.

Shifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish. *See Patterson*, 432 U.S. at 209. Here, however, section 13-1410 criminalizes diapering and bathing infants and much other innocent conduct. *See Holle II*, 240 Ariz. at 308-09, 379 P.3d at 205-06. More than just innocent, some such conduct is constitutionally protected. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). As May's attorney pointed out at oral argument, the statute even criminalizes circumcision of babies, a ritual practiced in

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[7] Citing to Arizona's assault statute, which criminalizes "[i]ntentionally, knowingly or recklessly causing any physical injury to another person," Ariz. Rev. Stat. § 13-1203 (1978), the court noted that "[a] medical provider arguably commits an assault whenever he or she causes *any physical injury* to his or her patient, but that doctor can assert the affirmative defense of consent." *Holle II*, 240 Ariz. at 309, 379 P.3d at 206 (emphasis in original).

That example stands quite apart from child molestation. Arizona's formulation of assault faithfully tracks the traditional elements. *See, e.g.*, 1 William Hawkins, A Treatise of the Pleas of the Crown 133 (3d ed. 1739) (defining "assault" under English common law as "an Attempt, or Offer, with Force and Violence, to do a corporal Hurt to another"). Consistency with longstanding historical precedent, while not dispositive, carries great weight in establishing comportment with due process. *See Schad*, 501 U.S. at 650 (Scalia, J., concurring) ("It is precisely the historical practices that *define* what is 'due.'").

several religious faiths. *See generally* Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 Va. J. Soc. Pol'y & L. 497 (2002).

Dismissing this problem, the *Holle II* court assured that "prosecutors are unlikely to charge parents, physicians, and the like when the evidence demonstrates the presence of an affirmative defense under § 13-1407." *Holle II*, 240 Ariz. at 308-09, 379 P.3d at 205-06. But cases of just this sort have been brought even in jurisdictions that require sexual intent for conviction. *See* Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 Cal. L. Rev. 609, 625 (2013) (citing from multiple jurisdictions cases of "disputes in which a father is [criminally] accused in connection with giving a child a bath; wiping his daughter after going to the bathroom; dealing with incontinence issues; giving kisses in the context of play, after a bath, or diaper change; and even tucking his daughters into bed"). The rehearing papers in *Holle II* itself recounted a recent prosecution in Pima County, Arizona, where a father was put to his proof through trial for child molestation while bathing his daughter. He was acquitted. (Doc. 59-1 at 1-5.)

Our criminal justice system does rely heavily on the sound discretion of prosecutors. But discretionary enforcement assumes laws that by their terms and in good faith distinguish the prohibited wrongful conduct from innocent conduct. Just trusting the government to do the right thing is poor dressing for constitutional wounds. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *cf. McDonnell v. United States*, — U.S. —, 136 S. Ct. 2355, 2372-73 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'"). A regime in which everyone starts out guilty and law enforcement decides who has to prove himself innocent is not the rule of law. It is a police state, no matter how much we trust the police.

To be clear, this Court concludes only that the burden-shifting scheme of Arizona's child molestation law violates the Fourteenth Amendment's guarantees of due

process and of proof of guilt beyond a reasonable doubt. May has not made an overbreadth challenge or any other constitutional challenge. The question here is whether due process permits Arizona to remove the essential wrongfulness in child molestation and place the burden of disproving it upon people engaged in a wide range of acts, the vast majority of which no one could believe the State meant to punish. Because the resulting nominal offense has no element that distinguishes culpable from innocent or constitutionally protected conduct, the answer is no. Arizona's law exceeds the constitutional limits identified in *Patterson*.

The Supreme Court has not assayed a single formula to separate all the permissible burden-shifting from all the impermissible, and neither does this Court. But a number of tests mark out some of the permissible and some of the impermissible. They have been discussed above and the Arizona law comes up short on all of them. A most salient test is whether the only quality that separates a small amount of wrongful conduct from a great sweep of prohibited benign conduct is the very factor the accused is charged with disproving. An alternative formulation is this: If the "affirmative" defense is to disprove a positive—and that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime.

To think otherwise here, one would have to believe that Arizona really thinks children's hygienic care, bathing, medical care, athletics, religious circumcision, and all other occasions for touching private parts are wrongful in themselves without more. But they are not inherently wrongful, and the legislature surely did not mean to prohibit all such acts apart from the sexual intent of the actor. If the State says the legislature did so mean, this Court is not fooled. No one will be fooled. The Arizona Supreme Court was not fooled because they excused the law on the initially intuitive but illegitimate basis that the police will know who can prove the defense and not prosecute them. *See Holle II*, 240 Ariz. at 308-09, 379 P.3d at 205-06. That has nothing to do with whether people who are prosecuted can be made to prove their innocence.

The state supreme court's intuition does aid understanding of what this statute really is. The intuition that the State will only charge people who cannot disprove sexual intent may leave some comfortable that the right people are being convicted. But it is the very role of proof beyond a reasonable doubt to sort out who should be convicted from who should not. It is a limitation on the State's means of convicting, and it does not yield because the State picks the right people to prosecute. Reliance on that intuition reveals again what the State is doing here: freeing itself from proving an essential element of guilt because the prosecution has a pretty good idea who is guilty and the accused probably won't disprove it. To give that thought any purchase is to repudiate at its core the constitutional mandate that the state prove guilt beyond a reasonable doubt.

It is entirely obvious that sexual intent remains at the core of Arizona's child molestation law, and no amount of oxymoronic labels about affirmative disproof disguises that. Counsel for the State deserves credit for candor in positing his defense on a complete absence of any constitutional limit on a state's ability to shift burdens of proof on elements of crimes to defendants, as long as it uses the magic words.

III. Cause and Prejudice: Ineffective Assistance of Counsel

That said, May defaulted on the constitutional claim by not raising it at trial. He contends he has shown cause and prejudice because his trial attorney was ineffective for failing to challenge the constitutionality of Arizona's statute and the jury instructions given pursuant to it. May raised his claim of ineffective assistance of counsel at the proper time in his post-conviction proceeding and exhausted it in the state courts.

Both the state courts and the R&R reject May's ineffectiveness claim solely on the grounds that he cannot show prejudice under *Strickland*. The Court thus addresses that prong first.

A. Prejudice

To prove prejudice, May must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. He need not show this with certainty, but merely with "a

probability sufficient to undermine confidence in the outcome." *Id.*

This Court rejects the R&R's conclusion that May cannot show prejudice. Where state courts have reviewed a claim on the merits, a federal habeas court is limited to determining whether the state court's decision is "contrary to, or involved an unreasonable application of" settled Supreme Court law, or that is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

1. The State Courts Unreasonably Applied Federal Law

On habeas review, a federal court must "determine what arguments or theories supported, or could have supported, the state-court decision . . . ." *Harrington*, 562 U.S. at 88. The best indication of this is the reasoning of the state courts. And where such reasoning is summarily affirmed (or review denied) by a higher state court, "silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Kernan v. Hinojosa*, — U.S. —, 136 S. Ct. 1603, 1605-06 (2016) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991)) (internal quotation marks omitted).

The superior court on post-conviction review disavowed making any ruling on the merits of May's constitutional claim. *See* Doc. 1-11 at 3 ("Defendant's claim that the Arizona child molestation statute is unconstitutional is precluded."). But the court also ruled that May's trial counsel was not ineffective because the appeal he forfeited would not have succeeded. (Doc. 1-13 at 5-6.) The court of appeals adopted the superior court's reasoning (Doc. 1-17 at 12) and the Arizona Supreme Court denied review. (Doc. 1-20 at 2.) This Court therefore reviews the reasoning and conclusion set forth by the superior court on post-conviction review.

After a full evidentiary hearing, the superior court judge ruled on May's ineffectiveness claim as follows:

> Defendant claims ineffective assistance of trial and appellate counsel in failing to challenge the constitutionality of the child molestation statute. His expert did not opine on whether such a challenge would have been

> successful. (R.T. of Sept. 7, 2011, at 122-125).
>
> Defendant must show a reasonable likelihood that a challenge to the constitutionality of the child molestation statute would have been successful in order to demonstrate prejudice. *State v. Berryman,* 178 Ariz. 617, 622, 875 P.2d 850, 855.
>
> The Arizona Court of Appeals held that sexual interest is not an element of the crime of child molestation and that absence of sexual interest is an affirmative defense regarding motive. *State v. Simpson,* 217 Ariz. 326, ¶¶ 18-19, 173 P.3d 1027, 1030 (App. 2007). Defendant's appellate attorney was aware of this opinion. (R.T. of Sept. 7, 2011, at 69-70.)
>
> Arizona's child molestation statute is not significantly different that [sic] the murder statutes approved in *Patterson v. New York,* 432 U.S. 197 (1997). Under *Patterson,* the Arizona child molestation statute does not violate the constitution of the United States.
>
> Defendant has failed to show a reasonable likelihood that either his trial or appellate attorney would have been successful in challenging the constitutionality of the child molestation of the State of Arizona and has failed to establish prejudice.

(Doc. 1-13 at 5-6).

The superior court found May suffered no prejudice without deciding whether May's trial counsel performed deficiently. "It is past question that the rule set forth in *Strickland* qualifies as clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391 (internal quotation marks omitted). "That the *Strickland* test of necessity requires a case-by-case examination of the evidence . . . obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the Supreme] Court." *Id.* (citation and internal quotation marks omitted).

The superior court's reasons for finding no prejudice to May are not just erroneous but also unreasonable. First, the court noted that May's expert did not opine on whether a constitutional challenge would have been successful. But that is a question of law for a judge regardless of expert testimony, which is inadmissible in evidence. It is simply not

relevant whether May's expert testified about this. To the extent this led the superior court to find no prejudice, that conclusion was unreasonable.

Second, the superior court noted that the state court of appeals in *Simpson* held sexual intent is not an element of child molestation in Arizona and the absence of sexual interest is an affirmative defense. But *Simpson* was not decided until after May's trial. It held only that the child molestation law places the burden on the defendant to disprove sexual interest, not that it is constitutional to do so. The *Simpson* case has no bearing on whether May's trial counsel was ineffective for failing to challenge the law's burden-shifting scheme on constitutional grounds.

Third, the superior court said the Arizona statute "is not significantly different than" the statute in Patterson so there was no prejudice from not challenging it. But that is both incorrect and unreasonable. While missing a traditional element of murder, the statute in *Patterson* required the government to prove beyond a reasonable doubt something the state could make a stand-alone crime: intentional killing. *Patterson*, 432 U.S. at 209. The *Patterson* Court yielded two holdings: that that burden-shifting scheme did not deprive the defendant of due process, *id.* at 205-06, and more broadly, that within "constitutional limits," prosecutors need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused," *id.* at 210. But just as the Constitution does not require prosecutors to disprove every affirmative defense, *Patterson* is equally clear that the Constitution does not free prosecutors from ever having to prove anything labeled as an affirmative defense.

One struggles to reconstruct the omitted reasoning behind the bare assertion that the statute in *Patterson* and the one at issue here are "not significantly different." The likeliest candidate is that they share a common form: each omits one element traditionally part of the relevant offense and relabels it an affirmative defense a defendant must prove. These similarities of form do exist. But it is both incorrect and unreasonable to ignore substance altogether. *Patterson* itself said that while the state need not disprove every affirmative defense, "there are obviously constitutional limits beyond which the States

may not go in this regard." 432 U.S. at 210. To conclude that a statutory scheme relabeling anything as an affirmative defense is constitutional *per se* does violence to that holding.

The precise constitutional question here is whether Arizona may burden a defendant with disproving an essential aspect of the wrongfulness of child molestation. The statute does that by criminalizing wide swaths of conduct with no element of the crime to differentiate between culpable, innocent, and constitutionally protected conduct. By prohibiting "touching, fondling or manipulating" of a child's private areas, Arizona's child molestation law criminalizes sexual fondling of children, sitting a child down in a chair, diapering and bathing an infant, medical treatment, and religious circumcision alike. *See* Ariz. Rev. Stat. § 13-1410(A) (2009). While sexual fondling is criminally culpable behavior, the rest of the enumerated conduct is either innocent or even constitutionally protected. A law broadly criminalizing everyday innocent behavior that uses an affirmative defense as the marker for the only subset that is wrongful goes beyond *Patterson*'s holding and reasoning. Including constitutionally protected behavior within that broad prohibition goes farther yet.

In sum, the superior court summarily and "unreasonably extend[ed]" *Patterson*'s holding "to a new context where it should not apply." *See Williams*, 529 U.S. at 407. This is also an objectively unreasonable application of *Strickland*.

2. It Is Likely May Would Have Obtained a Different Outcome

The superior court's application of *Strickland* was unreasonable for another reason: the conclusion that May suffered no prejudice is refuted on this record. The *Strickland* measure for prejudice is a "reasonable probability" of a different outcome but for the default. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The R&R concludes that even if relieved of the burden of proving himself innocent, May still would have been convicted unanimously given the volume of evidence against him. (Doc. 35 at 56-57.) That is a remarkable conclusion in light of the

actual history of this trial. None of the state courts so found. This Court rejects that conclusion.

As it was, the jury was deadlocked after two full days of deliberation. On January 12, the jury submitted a note to the judge stating: "We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." (Doc. 22-2 at 71.) The judge called the jury back and gave a supplemental instruction on how they might restructure their discussion. (Doc. 22-5 at 179.) Later, a second note from the jury indicated continuing deadlock and sought clarification of the "reasonable doubt" standard, stating that some jurors believed there was reasonable doubt on the evidence presented while others did not. (Doc. 22-2 at 72.) The trial judge declared a mistrial and discharged the jury but shortly thereafter allowed them to resume when they asked to do so. (Doc. 35 at 21-22.) Only after a weekend recess and an additional full day of deliberation did the jury finally reach a verdict: conviction on five counts and acquittal on two counts. (Doc. 22-5 at 182, 188.)

Had the trial judge instructed the jury that the state must prove sexual intent beyond a reasonable doubt, it is reasonably probable that May would not have been convicted. There is certainly "a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694. Given how close it was under the prejudicial instruction actually given and the two deadlocks on reasonable doubt, the *Strickland* test for prejudice is readily shown here. In particular, there is a reasonable probability the jury would have remained deadlocked, even if only a single juror harbored reasonable doubt. *See Buck v. Davis*, — U.S. —, 137 S. Ct. 759, 776 (2017) (formulating district court's prejudice inquiry as whether habeas petitioner had demonstrated a reasonable probability that in sentencing phase, "at least one juror would have harbored a reasonable doubt" as to defendant's future dangerousness); *Cone v. Bell*, 556 U.S. 449, 452 (2009) (remanding petitioner's habeas claim for district court to determine whether there was a reasonable probability withheld *Brady* evidence "would have altered at least one juror's assessment of the appropriate penalty for [petitioner's] crimes"); *Wiggins v. Smith*, 539

U.S. 510, 537 (2003) (finding that, where jury did not hear mitigating evidence before sentencing defendant to death, "there is a reasonable probability that at least one juror would have struck a different balance" had mitigating evidence been presented).

The State argues the jury still would have convicted May because they found he touched the victims "intentionally or knowingly." The State contends such findings can only be explained as the jury inferring sexual intent beyond a reasonable doubt. (Doc. 22 at 189-90.) This is a bold contention. It means that intentional and knowing necessarily subsumes sexual intent, which then can never be disproven. Any instruction on sexual intent becomes a redundancy and might as well be omitted. It is enough to reject this that it is in defiance of the statute as written.

In any event, intentional and knowing is not a substitute for sexual intent. One can touch a child intentionally or knowingly without also having a sexual intent. Caregivers diapering children do this all the time, as do all other benign actors within the literal sweep of the stated elements of the Arizona crime. Even if such a connection were inferable, no reviewing court may ordain that the jury did draw that inference. To do so would violate May's constitutional rights both to proof beyond a reasonable doubt and to jury trial.

Moreover, finding prejudice is not limited to predicting what a specific judge or jury would have done. The entire course of proceedings must be considered to determine whether a different result was reasonably likely but for counsel's missteps. *See Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (holding that a defendant makes out a claim of ineffectiveness when deficient performance "deprives a defendant of an appeal that he otherwise would have taken"); *Burdge v. Belleque*, 290 F. App'x 73, 79 (9th Cir. 2008) (attorney's failure to preserve key issue for appeal sufficed for showing of prejudice under *Strickland*); *Gov't of Virgin Islands v. Vanterpool*, 767 F.3d 157, 168 (3d Cir. 2014) (holding that trial counsel's "failure to preserve a viable First Amendment challenge" to predicate statute constituted prejudice under *Strickland*); *French v. Warden, Wilcox State Prison*, 790 F.3d 1259, 1269 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 815

(2016) (reviewing prejudice based on "whether [the defendant] had a reasonable likelihood of securing a new trial if the attorney had properly preserved" the relevant issue for subsequent review); *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1315 (11th Cir. 2003) ("[T]he prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently: even when it is *trial* counsel who represents a client ineffectively in the *trial court*, the relevant focus in assessing prejudice may be the client's appeal."). It is a question of law, not of psychology, how an appeal should and would have turned out if preserved and taken.

There is a reasonable probability that May would have obtained a different outcome had the constitutional challenge to Arizona's child molestation law been preserved. Certainly there is "a probability sufficient to undermine confidence in the outcome." To conclude otherwise is an objectively unreasonable application of *Strickland*'s prejudice inquiry.

B. Deficient Performance

For an ineffectiveness claim under *Strickland*, May must also show that his attorney's performance was deficient. The state courts did not address this, finding instead that May suffered no prejudice either way. This Court therefore reviews deficiency of performance de novo. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing de novo element of petitioner's *Strickland* claim not reached by state courts).

Under *Strickland*, an attorney's performance is deficient if it "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Supreme Court has declined to articulate more specific guidelines, stating, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). A habeas court must make "every effort . . . to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The defendant must "overcome the strong presumption that counsel's performance was within the wide range of reasonable professional assistance and might be considered

sound trial strategy." *Carrera v. Ayers*, 670 F.3d 938, 943 (9th Cir. 2011) (internal quotation marks omitted). But that presumption is based on the need to choose among alternative and sometimes incompatible trial strategies—or at least not to forfeit one's credibility before the jury with weak strategies that detract from stronger ones.

At the hearing on his state post-conviction relief petition in 2011, May called as an expert Michael Piccarreta, a seasoned criminal defense attorney with extensive professional credentials, including previous expert testimony on ineffective assistance of counsel. (Doc. 23-9 at 137-38.) Piccarreta testified that the National Legal Aid and Defenders Association considers it standard criminal defense practice to "review [the statute charged] for constitutional issues." (Doc. 23-9 at 143.) He said the burden-shifting scheme of Arizona's child molestation law "jumps out at you that it's a problem" and that a standard course of action would have been to file a motion to dismiss the charges so that, at the very least, "you have preserved the issue for higher courts." (Doc. 23-9 at 145.) Piccarreta said that "particularly with the circumstances of this case, that failure to raise the constitutionality of the statute and the switching the burden was ineffective assistance of counsel." (Doc. 23-9 at 123-25.) On cross-examination, when asked whether attorneys who failed to raise constitutional challenges in other child molestation cases were ineffective, Piccarreta stated that in his opinion

> if you have a case like this where there's lack of motivation is an issue [sic], then it should be raised. It's not a mountain of work to file a motion to dismiss. The judge rules on it, you win, mazeltov [sic]. You lose, you've preserved it . . . for future courts.

(Doc. 23-9 at 169.) This Court understands Piccarretta's opinion to be that it was ineffective for May's trial lawyer to fail to raise and preserve the federal constitutional challenge at all. One way to do that would have been to file a motion to dismiss. Another would have been to object on constitutional grounds to the jury instruction. It is not necessary to have done it one way or the other as long as it was done.

This Court fully agrees with Piccarretta's opinion based also on the Court's own

knowledge and experience. The Court also concludes Thompson performed deficiently even without relying on expert testimony. It should have been obvious that the burden-shifting scheme presented a serious constitutional question that could have been dispositive for May. At the time, there was no appellate case assessing the constitutionality of Arizona's 1997 statutory amendment. Even if there had been a case on point, the constitutional question was a matter of federal law amenable to vindication in later federal court review. Thompson performed deficiently by failing to recognize and act on this. *See Hinton v. Alabama*, — U.S. —, 134 S. Ct. 1081, 1089 (2014) ("An attorney'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 under *Strickland*."). Minimal competence required preserving the obvious federal issue. *See Vanterpool*, 767 F.3d at 834 (remanding on performance prong of *Strickland* where counsel's failure to raise constitutional challenge raised factual question of whether it was "attributable to an ignorance of the law").

Moreover, in May's post-conviction proceedings, Thompson admitted to recognizing the unusual makeup of the law despite framing the problem solely as one of interpreting the state statute. (Doc. 23-9 at 40.) Though the trial judge invited briefing on the burden of proof jury instructions, Thompson filed nothing. (*Id.* at 66.)

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). That usual presumption, however, cannot stand on this record. When questioned about why he did not challenge the constitutionality of the burden-shifting scheme, Thompson had no explanation. He did not articulate any reason, strategic or otherwise, for having foregone a constitutional challenge. It is clear beyond question that there was no strategic or other benefit to May in not preserving the constitutional challenge. It would have cost no material time or resources and could not have undercut any other strategy or course of action. There is no reason, tactical or other, for failing to preserve the federal constitutional claim.

Piccarreta's opinion reflected as much. But the undersigned need only rely on 30 years at the trial and appellate bars, occasional expert testimony on standard of care for trial and appellate lawyers, and thirteen years as a judge of this Court presiding over more than 3,000 criminal cases. It is plain that May's trial counsel fell well below an objective standard of reasonableness under prevailing professional norms. Trial counsel's performance was constitutionally deficient. The performance and prejudice prongs of *Strickland* have both been met, and any contrary conclusion would be unreasonable. The ineffective assistance establishes cause and prejudice for May's default on his constitutional challenge.

IV. Constitutional Challenge

Having established cause and prejudice, May can present here his constitutional challenge to Arizona's child molestation statute and to the jury instruction given pursuant to it.

If the state court had decided the constitutional question on the merits, this Court would be limited to assessing whether the state court's decision "was contrary to, or involved an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d). The superior court on post-conviction review took a one-sentence peek at the merits through the lens of finding no prejudice from defaulting on the constitutional challenge. Technically, that was a finding on likely prejudice, not a finding of constitutionality. But even if the superior court's findings were to count as a ruling on the constitutional merits, this Court has already concluded in Section III(A)(1) above that applying *Patterson* to uphold the Arizona law would have been an unreasonable application of *Patterson.*

More likely, this Court is charged with de novo review because the state court's assessment of the constitutional question was not on the merits. The superior court specifically declined to review the merits of May's constitutional claim since he had defaulted on it by failing to raise it at trial. (Doc. 1-11 at 3.) The court of appeals did the same. (Doc. 1-17 at 6.) The state courts did not "decide[] the petitioner's right to post

conviction relief on the basis of the substance of the constitutional claim advanced," but rather "den[ied] the claim on the basis of a procedural or other rule precluding state court review of the merits." *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). Since no state court addressed the merits, this Court must decide the constitutional question de novo. *See Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005).

Whether under de novo review or deferential review, the burden-shifting scheme of sections 13-1410 and 13-1407(E) of the Arizona Revised Statutes as applied in this case violates the Constitution's guarantee of due process of law—specifically, May's right to be convicted of a crime only if the state proves each element beyond a reasonable doubt and to have the jury so instructed. *See* Section II, *supra.*

V. Harmless Error

"[Habeas] relief is proper only if the federal court has 'grave doubt whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" *Davis v. Ayala*, — U.S. —, 135 S. Ct. 2187, 2197-98 (2015) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)) (internal quotation marks omitted). The likelihood of a different outcome has been discussed thoroughly above. *See* § III(A)(2), *supra.* It is reasonably probable that the jury instruction as given had "substantial and injurious effect or influence" over May's verdict. There is a significant likelihood May would not have been convicted had constitutional instructions been given.

It violated May's right to due process of law to be assigned the burden of proving his own lack of sexual intent.

IT IS THEREFORE ORDERED that the Report and Recommendation (Doc. 35) is ADOPTED IN PART and REJECTED IN PART as provided in this order.

IT IS FURTHER ORDERED that petitioner's Petition for Writ of Habeas Corpus (Doc. 1) is GRANTED.

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment in favor of Petitioner Stephen Edward May against Respondent Charles L. Ryan that Respondent release Petitioner from custody forthwith.

IT IS FURTHER ORDERED that Respondent Attorney General Thomas. Horne and successors of office, who do not have custody of Petitioner, are DISMISSED as improper parties respondent in a federal habeas corpus proceeding.

The Clerk shall terminate this case.

Dated: March 28, 2017.

Neil V. Wake
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen Edward May,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CIV 14-0409-PHX-NVW (MHB)

REPORT AND RECOMMENDATION

TO THE HONORABLE NEIL V. WAKE, UNITED STATES DISTRICT COURT:

Petitioner Stephen Edward May, who is represented by counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and Memorandum of Law in Support of Petition (Doc. 2). Following a jury trial, Petitioner was convicted in Maricopa County Superior Court, case #CR2006-030290-001, of five counts of molestation and was sentenced to a 75-year term of imprisonment. In his Petition and supporting 162-page Memorandum, Petitioner names Charles L. Ryan as Respondent and the Arizona Attorney General as an additional Respondent. Petitioner raises 14 grounds for relief – most of which have multiple components. In total, Petitioner has alleged over 35 constitutional violations. Respondents filed their 463-page Answer on September 22, 2014, and Petitioner filed his Reply three months later. (Docs. 22, 29.)

BACKGROUND[1]

On February 15, 2006, the Maricopa County Grand Jury returned in CR2006-030290 an indictment charging Petitioner with eight counts of child molestation, class 2 felonies and dangerous crimes against children, in violation of A.R.S. §§ 13-1410 and 13-604.01. (Exh. A: Photostatted Instruments [hereinafter "P.I."], Item 1.) The indictment identified the victims as five children under the age of 15: Taylor S. (Counts 1 and 2), Danielle A. (Counts 3 and 4), Sheldon H. (Counts 5 and 6), Luis A. (Count 7), and Nicholas M. (Count 8). (Id.) The State alleged that Petitioner committed: (1) all of his crimes against Taylor and Danielle (Counts 1 through 4) between June 1, 2005, and September 30, 2005; (2) both offenses against Sheldon (Counts 5 and 6) between July 1, 2005, and July 31, 2005; (3) the crime against Luis (Count 7) between January 11, 2005, and May 17, 2005; and (4) the offense against Nicholas (Count 8) on or about October 8, 2001. (Id.)

On February 23, 2006, Joel Thompson, the Chief Trial Attorney for Phillips & Associates, entered his appearance as Petitioner's counsel. Thompson filed numerous pretrial motions on Petitioner's behalf, including a motion to dismiss Count 7. (Exh. A: P.I., Items 31, 41, 50.) Thompson also moved to dismiss Count 8 on the ground that the police either lost or destroyed evidence after the State initially declined prosecution, namely all audio and videotapes memorializing the pretrial interview statements made by Petitioner and Nicholas, the recording of Petitioner's confrontation call, and the photographs taken of Nicholas' penis. (Exh. A: P.I., Items 32, 38, 49.) The trial court denied both motions. (Exh. B: M.E., Item 43.)

Thompson also argued that he was entitled to severance of counts, pursuant to Arizona Rule of Criminal Procedure 13.4, because the charged offenses were consolidated for trial solely by virtue of their similar nature, were committed at different places and times, and had no eyewitnesses in common. (Exh. A: P.I., Item 29, at 2-3; Exh. C: R.T. 11/13/06, at 3-5,

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[1] Unless otherwise noted, the following facts are derived from the exhibits submitted with Doc. 22 – Respondents' Answer.

10-12.) On November 13, 2006, the trial court partially granted this motion by severing Count 8 from Counts 1 through 7. (Exh. A: P.I., Item 32, at 1-2; Exh. B: M.E., Item 43, at 2.) However, Judge Stephens also ruled that the seven remaining charges were properly consolidated because evidence of the charged offenses against Taylor, Danielle, Sheldon, and Luis would be cross-admissible at separate trials, pursuant to Arizona Rule of Evidence 404(b), to prove motive opportunity, intent, preparation, plan, identity, and absence of mistake or accident, and pursuant to Arizona Rule of Evidence 404(c), to demonstrate that Petitioner had an aberrant sexual propensity to commit the charged offenses. (Exh. B: M.E., Item 43, at 2; Exh. C: R.T. 11/13/06, at 5-10.)

Petitioner's trial commenced with jury selection on January 2, 2007, and concluded with the jury returning its verdicts on January 16, 2007. (Exh. B: M.E., Items 47, 233.) The following constituted the evidence supporting the prosecution's allegations against Petitioner:

Born in New York in September 1971, Petitioner learned to swim as an 18-month-old toddler, swam competitively during his grade school years, became an American Red Cross certified life guard when he was 15 years old, and offered swimming lessons since 1990—all despite having a "neurological condition," the main symptoms of which included "clumsiness," poor vision, and "nervous ticks" that "mostly" caused him to make "uncontrollable head-type movements" and "shake [his] head left and right ... and up and down." (Exh. G: R.T. 1/8/07, at 42; Exh. I: R.T. 1/10/07, at 25-27, 33, 36-37, 64-65, 82-83, 87.) Although this condition purportedly rendered the left side of his body weaker and smaller than the right, Petitioner testified at trial that: (1) he had "fairly average" motor skills on the right side of his body; (2) this neurological condition defied "a medical diagnosis per se"; (3) Petitioner never suffered dizziness or sudden losses of consciousness; (4) he never disclosed his condition to prospective employers; (5) he had not seen a "specialist" for his condition since he was a college student in his late teens or early 20's; and (6) he became a

certified life guard when he was 15 years old, later taught CPR classes, and gave swimming lessons to children. (Exh. I: R.T. 1/10/07, at 26-27, 33, 85-86, 90-91.)

Petitioner attended college at the Regents State University of New York, graduated in 1994 with a Bachelor of Arts degree with a concentration in recreation and education, began his professional career by becoming a certified Montessori teacher for children aged between 3 and 6 years old, and moved to Arizona in late 2000. (Id. at 25-27, 56-57.)

Petitioner rented an apartment at Gentry Walk Apartments, located in Mesa at 1313 South Val Vista Drive. (Exh. E: R.T. 1/3/07, at 77; Exh. F: R.T. 1/4/07, at 86; Exh. G: R.T. 1/8/07, at 40-42; Exh. H: R.T. 1/9/07, at 5; Exh. I: R.T. 1/10/07, at 26, 32.) Petitioner ultimately came to befriend numerous pre-adolescent children—including three of the four charged victims (Danielle, Taylor, and Sheldon)—and their parents at this complex because he spent "just about every day" at the community pool, solicited tenants to attend his swimming lessons, brought balls and other water toys to pool parties, and played games like Marco Polo, hide-and-seek, and shark with the children. (Exh. E: R.T. 1/3/07, at 67-68, 73; Exh. F: R.T. 1/4/07, at 41-42, 44-46, 61, 64, 78, 93, 108; Exh. G: R.T. 1/8/07, at 41-44, 62; Exh. H: R.T. 1/9/07, at 13-18, 24; Exh. I: R.T. 1/10/07, at 36-42, 52-53, 65-68, 72-74.) Petitioner also threw these children into the water and let them ride his back. (Exh. E: R.T. 1/3/07, at 89-90; Exh. F: R.T. 1/4/07, at 51, 64, 69-70, 72-73, 78, 80; Exh. H: R.T. 1/9/07, at 17; Exh. I: R.T. 1/10/07, at 39-40, 52.)

According to the record, Petitioner spent at least some time with children in the water in the absence of their parents, including Denise S. and Dan A., who allowed their daughters (Taylor and Danielle, respectively) to play in the pool after learning that Petitioner had agreed to supervise them on their behalf. (Exh. E: R.T. 1/3/07, at 67, 110-12; Exh. F: R.T. 1/4/07, at 94-95, 100; Exh. G: R.T. 1/8/07, at 42-43, 57-58, 68, 70; Exh. I: R.T. 1/10/07, at 40-41.)

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a. Luis A. (Count 7)

Born in June 1998, Luis attended the first grade at Tavan Elementary School in Scottsdale, Arizona, while Petitioner worked there as an assistant instructional assistant in the computer classroom. (Exh. E: R.T. 1/3/07, at 17-18, 20-21, 47-49, 60-61; Exh. F: R.T. 1/4/07, at 9; Exh. I: R.T. 1/10/07, at 30-31.) Luis knew Petitioner as "Mr. May," recalled that Petitioner was tall and wore eyeglasses, and recognized that Petitioner was "a helper of the computers" who came to his classroom "once in a while." (Exh. E: R.T. 1/3/07, at 20-21, 24, 30, 35, 94; Exh. F: R.T. 1/4/07, at 6-7.)

One day in early May 2005, Luis had a question during computer class, raised his hand, and Petitioner—one of the adults serving the room's 20 students—came to his desk. (Exh. E: R.T. 1/3/07, at 21-24, 37-38; Exh. F: R.T. 1/4/07, at 7, 9.) The record indicates that while moving the computer's mouse with his right hand, Petitioner used his other hand to do what Luis termed "a nasty thing." (Exh. E: R.T. 1/3/07, at 24-26, 36, 51-52; Exh. F: R.T. 1/4/07, at 7.) Luis testified that Petitioner "reached under the computer" and momentarily rested his left hand over Luis' "private part," the part which Luis goes to the bathroom "to pee" or do a "number one." (Exh. E: R.T. 1/3/07, at 26-29, 33, 36, 41.)

Luis "moved out of the desk because [Petitioner] was touching [his] private parts and [asked] the teacher if [he] could go to the bathroom ... so [that he] could run." (Id. at 33, 40.) Luis did not immediately report to his teacher what Petitioner had done because Luis was "scared of telling him" and feared that "[he] was going to be embarrassed." (Id. at 40.)

Upon coming home from school that very day, Luis did tell his mother, Sandra, that Petitioner (whom he called "Mr. May") had "touched his private part" and even mimicked Petitioner's conduct by covering his "forbidden parts" with his left hand, wiggling his fingers, and withdrawing his hand a short time afterwards. (Id. at 34-35, 42, 49-52, 58, 60.) When Sandra inquired whether Petitioner's physical contact was accidental, Luis responded, "No, mom, he did it on purpose." (Id. at 57.)

Although Sandra did not call the police, she did report the incident to the Tavan Elementary School's principal the following day. (Id. at 53-54, 63-64.) After personally interviewing Luis, the principal reported this molestation incident to law enforcement. (Id. at 96-97, 99; Exh. F: R.T. 1/4/07, at 2-3, 24, 35-37.) Consequently, on May 17, 2005, Phoenix Police Detective Phil Shores visited the school in civilian attire to interview Luis. (Exh. F: R.T. 1/4/07, at 2-3, 5-6, 13.)

When Detective Shores asked Luis whether he knew the reason for their meeting, Luis responded, "Is it about Mr. May?" (Id. at 6.) This question prompted Shores to ask Luis why he had mentioned "Mr. May," and Luis answered that "he had done some nasty stuff to him" during computer class. (Id. at 7, 20.) Shores subsequently testified that Luis elaborated that Petitioner "came over and, in the process of helping him, placed his hand on his zipper area." (Id. at 7-8.) To demonstrate what Petitioner had done, Luis pointed to his crotch and then "laid his hand over the zipper area of his pants." (Id. at 8, 17.)

Detective Shores did not submit this case for prosecution because Luis, then a 6-year-old first-grader, could not recall any peripheral details (such as the names of the students who sat next to him at the time of the incident), and because none of Luis' classmates and teachers reported witnessing the molestation. (Id. at 9-10, 35-37.) Nonetheless, the school district placed Petitioner on administrative leave during Shores' investigation. (Exh. I: R.T. 1/10/07, at 51, 63.) Petitioner testified at trial that his employment at Tavan Elementary terminated at the conclusion of his administrative leave, "due to the investigation regarding Luis and [his] lack of interest in staying there and [his] lack of interest in participating in the investigation there." (Id. at 86-87.)

When asked about Luis during his post-arrest interview with Mesa Police Detective Manuel Verdugo on November 9, 2005, Petitioner responded that "he wished he could tell [Verdugo] more than he could tell [Verdugo], but left it at that." (Exh. G: R.T. 1/8/07, at 86, 93.) At trial, Petitioner testified that he vaguely remembered Luis as a student in computer

class at Tavan Elementary, but claimed that he had no recollection of any one-on-one time with Luis. (Exh. I: R.T. 1/10/07, at 47-49.)

b. Taylor S. and Danielle A. (Counts 1-4)

Taylor and Danielle, who were best friends and only one school-grade apart, were two of the many child residents at Gentry Walk who befriended Petitioner at the pool and knew him as "Steve." (Exh. E: R.T. 1/3/07, at 66-69, 71, 113-16; Exh. F: R.T. 1/4/07, at 41-43; Exh. G: R.T. 1/8/07, at 43, 45-46.) Taylor was born in December 1996, and Danielle was born in September 1997. (Exh. E: R.T. 1/3/07, at 66, 70-71, 83, 108; Exh. F: R.T. 1/4/07, at 91-92; Exh. G: R.T. 1/8/07, at 40.)

During the summer months of 2005, Petitioner molested both girls at least twice by touching their vaginas over their bathing suits while they sat on his lap inside Gentry Walk's community swimming pool. (Exh. E: R.T. 1/3/07, at 70-77, 83-84, 105-06, 118-25, 135-36; Exh. G: R.T. 1/8/07, at 83-85; Exh. H: R.T. 1/9/07, at 44-49; Exh. XX: DVD of Taylor's forensic interview [Trial Exh. 25]; Exh. YY: DVD of Danielle's forensic interview [Trial Exh. 26].) Petitioner molested both girls at Danielle's birthday pool party on the afternoon of September 10, 2005. (Exh. E: R.T. 1/3/07, at 70-74, 83-84, 116-21.) Danielle's father, Dan, invited Petitioner among 40 other guests to attend the party. (Id. at 116-118; Exh. F: R.T. 1/4/07, at 91-93, 114.)

Upon seeing Petitioner at the shallow end of the pool, Taylor swam over to Petitioner and sat on his lap. (Exh. E: R.T. 1/3/07, at 72-73.) While Taylor was sitting on his lap, Petitioner placed his right hand "on top" of her "private" (her vagina). (Id. at 73-74, 81, 84; R.T. 1/8/07, at 49; Exh. I: R.T. 1/10/07, at 9; Exh. XX: DVD of Taylor's forensic interview [Trial Exh. 25].) Taylor testified that: (1) she and Petitioner were neither tickling nor playing with each other at the time of the touching; (2) Petitioner said nothing to her while his hand was on her vagina; and (3) Petitioner neither apologized for touching her vagina, nor ever claimed that the contact was accidental in nature. (Exh. E: R.T. 1/3/07, at 77, 100, 105.) At the time of this first incident, Taylor did not realize that Petitioner's touching was "bad at

all," but instead thought that Petitioner "didn't mean it," and even attributed the contact to Petitioner "just being clumsy" and "playful"—even despite the fact Petitioner "would hold [Taylor] by [her] private" whenever he threw her into the water. (Id. at 74, 77, 105.)

Taylor subsequently changed her mind, for several reasons: (1) she had matured, "took the time to think about it," and better understood the sexual nature of Petitioner's physical contact; (2) no one else had ever touched her vagina like Petitioner did; (3) Petitioner touched her vagina again in the swimming pool when she again sat on his lap on a subsequent afternoon after school; and (4) Taylor later learned that Petitioner touched Danielle in the same fashion. (Id. at 75-77, 85, 87-88, 103-04, 124-25; Exh. XX: DVD of Taylor's forensic interview [Trial Exh. 25].)

During her birthday party, Danielle saw Petitioner in the Jacuzzi, decided to join him, and sat in a corner across from him. (Exh. E: R.T. 1/3/07, at 117-19.) Petitioner then moved to Danielle's corner, put her on his lap, and manually touched her "down where he shouldn't be touching [her]," specifically the "private parts" that she uses "to go to the bathroom" and "pee," over her bathing suit. (Id. at 119-22, 123-24.) When Danielle tried to swim away and indicated that she "didn't want to do that," Petitioner grabbed her and continued touching her. (Id. at 119-20, 130.) Danielle did not immediately disclose this incident to her father because she was afraid that he might become angry with her. (Id. at 124.)

The record indicates that this was not the first time that Petitioner had touched Danielle's vagina because he engaged in the same behavior on an earlier occasion during a barbeque pool party in the beginning of the summer of 2005. (Id. at 121-23.) Although Danielle no longer had a recollection of the prior incident at the time of trial, she told Mesa Police Detective Carman Johnson during a videotaped interview (Exh. YY: DVD of Danielle's forensic interview [Trial Exh. 26]) that Petitioner came over, "put her" on "his lap," and used his hand to touch her vagina over her bathing suit. (Id. at 122-24; Exh. F: R.T. 1/4/07, at 109, 114; Exh. G: R.T. 1/8/07, at 83; Exh. H: R.T. 1/9/07, at 44-49, 54-55.)

During both of these incidents, Petitioner continued to touch Danielle's vagina, despite her demands to "stop." (Exh. E: R.T. 1/3/07, at 130, 135-37; Exh. F: R.T. 1/4/07, at 109.) Danielle told Detective Johnson that Petitioner touched her "every time she went to the pool." (Exh. H: R.T. 1/9/07, at 54; Exh. YY: DVD of Danielle's forensic interview [Trial Exh. 26].)

Neither Dan nor Denise—single parents and friends who took turns babysitting each other's daughters—suspected that Petitioner had been molesting Danielle and Taylor until November 3, 2005, when a former Gentry Walk resident, Mary Jimenez-Cruz, mentioned Denise's name to Mesa Police Department Officer Barbara Marquez while reporting that she had witnessed Petitioner engaging in misconduct (unrelated to the charges in this case) at the community pool that past summer. (Exh. F: R.T. 1/4/07, at 86-87, 94-95, 101-03, 107; Exh. G: R.T. 1/8/07, at 43-44, 47, 53, 55, 64-66, 75, 95-96.) While questioning Denise later that day, Officer Marquez obtained Dan's telephone number. (Exh. F: R.T. 1/4/07, at 86-87; Exh. G: R.T. 1/8/07, at 47-48, 59.)

At 10:00 p.m. that night, Marquez related to Dan the information that Mary had provided; when Dan announced his plan to speak with Danielle, Marquez asked Dan to call the police if Danielle disclosed "something different." (Exh. F: R.T. 1/4/07, at 87, 94, 103-04, 115-16.) Dan then called Denise to report that he was coming to her apartment to pick up Danielle, whom Taylor and Denise were hosting for a sleepover that night. (Exh. F: R.T. 1/4/07, at 116-17; Exh. G: R.T. 1/8/07, at 59-60.) After returning home, Danielle finally told her father that Petitioner molested her during two summer pool parties—the first celebrating the end of the school year and the second celebrating her birthday in early September 2005: (1) Petitioner made Danielle sit on his lap while they were in the Jacuzzi together; (2) Danielle told Petitioner that she did not want to stay and swam away; (3) Petitioner captured Danielle and made her sit on his lap again, even though she told him to stop; and (4) Petitioner manually touched Danielle's "private parts" (vagina) over her bathing suit. (Exh. F: R.T. 1/4/07, at 97, 102, 108-10, 114, 116.)

The following morning, Dan reported Danielle's disclosure to Officer Marquez, who advised Dan to not confront Petitioner and to keep Danielle from discussing this topic with anyone else, including Taylor. (Id. at 98, 110.) Dan also telephoned Denise and told her to speak with Taylor, but did not inform her that Danielle had reported being molested by Petitioner. (Id. at 99; Exh. G: R.T. 1/8/07, at 49, 51.) When Denise spoke with Taylor, she was likewise surprised to learn belatedly that Petitioner had molested Taylor in the swimming pool. (Exh. G: R.T. 1/8/07, at 48-49, 51, 53-54, 75.)

On November 8, 2005, Dan and Denise drove their daughters to the Mesa Police Department's headquarters for forensic interviews by Detective Carmen Johnson (Danielle) and Detective Quihuiz (Taylor). (Exh. G: R.T. 1/8/07, at 61, 74-75, 81-84; Exh. H: R.T. 1/9/07, at 44-49; Exh. I: R.T. 1/10/07, at 6-7; Exh. XX: DVD of Taylor's forensic interview [Trial Exh. 25]; Exh. YY: DVD of Danielle's forensic interview [Trial Exh. 26].) Danielle and Taylor's parents prevented them from speaking with each other before these forensic interviews and avoided any discussion about Petitioner during the ride to the police station. (Exh. F: R.T. 1/4/07, at 110; Exh. G: 1/8/07, at 70-71, 74-75, 82.) Denise did tell Taylor, however, the reason why they were driving to the police station that day. (Exh. G: R.T. 1/8/07, at 70-71.)

On November 9, 2005, Detective Verdugo arrested Petitioner, who waived his rights and agreed to answer questions during a videotaped post-arrest interview. (Exh. G: R.T. 1/8/07, at 86-88, 112-13; Exh. ZZ: DVD of Petitioner's Interview [Trial Exh. 27].) Verdugo later testified that Petitioner "had trouble maintaining eye contact" with him during the post-arrest interview. (Exh. G: R.T. 1/8/07, at 118-19.) Verdugo found Petitioner's demeanor "atypical" in that Petitioner seemed "not concerned" throughout the entire interview, remained silent whenever Verdugo ceased asking questions, never became angry or emotional when Verdugo revealed the nature of the allegations and accused Petitioner of falsely denying them, and even asked Verdugo questions about which children were involved in the investigation. (Id. at 88-92, 114.) Petitioner claimed that he did not know why he was

being accused, stated that he had no reason to be remorseful, and denied any recollection of such episodes. (Id. at 94, 99, 103-05, 109-111.)

Although Danielle and Taylor were the only Gentry Walk residents who had reported being molested, Verdugo mentioned several other children who also frequented the complex's community pool—including Ryder, Sheldon, Mary, and Kevin—and asked Petitioner whether he had touched them inappropriately. (Exh. G: R.T. 1/8/07, at 89, 122; Exh. I: R.T. 1/10/07, at 39, 65-66; Exh. ZZ: DVD of Petitioner's Post-Arrest Interview.) At one point during the interview, Petitioner claimed that "he didn't even know a half a dozen children," a misstatement that Petitioner later admitted at trial, but which he could not explain. (Exh. I: R.T. 1/10/07, at 65-66.) Petitioner also told Verdugo during the interview that he did not know Sheldon. (Id. at 67; Exh. ZZ: DVD of Petitioner's Interview [Trial Exh. 27].)

While relating Petitioner's response to the question whether he had ever touched Taylor in the swimming pool, Detective Verdugo testified:

> Due to the allegations, I asked him if he had any reason to touch her while she was swimming pool or helping her. He said he accidentally had. He said when he did touch ... her ... that it was by the feet and shoulder and the knees when he was throwing her in the pool. At one point, I asked if he could have accidentally touched her when he was throwing her, and he stated that he had not.

(Exh. G: R.T. 1/8/07, at 89-90.) When asked about how he threw children in the pool, Petitioner answered that "he picked them up from the knees, feet, and shoulders." (Id. at 120.) In response to Verdugo's inquiry whether "he touched them in such a manner where ... it would be perceived [as] touching them inappropriately," Petitioner said that "he did not." (Id.)

When Detective Verdugo asked Petitioner whether he had ever touched Danielle, Petitioner simply responded, "[N]o, I didn't." (Id. at 90.) Petitioner told Verdugo that he did not touch Danielle and Taylor "in such a manner [while throwing them in the pool that] would be perceived [as] touching them inappropriately." (Id. at 120.) At trial, however,

Petitioner abandoned these pretrial statements by testifying that he might "have touched [them] in the general areas of their genitals," albeit not intentionally, knowingly, or with any sexual motivation. (Exh. I: R.T. 1/10/07, at 39-41, 56.)

The State called Linda Cano—who supervised and befriended Petitioner during his employment with the City of Tempe's Special Olympics program—to testify that when she had lunch with Petitioner in mid-April 2006, she broached the topic of Petitioner's sexual-misconduct charges, but Petitioner answered all inquiries with the reply, "I don't remember." (Exh. G: R.T. 1/8/07, at 6-10, 26.)

c. Sheldon H. (Counts 5-6)

Born in mid-March 1996, Sheldon and his family resided at Gentry Walk Apartments. (Exh. F: R.T. 1/4/07, at 40, 58-59; Exh. G: R.T. 1/8/07, at 33-34.) When Sheldon and his older brother, Parlo, went to the community pool in August 2004, they met Petitioner playing hide-and-seek with Danielle, Taylor, and other children in the Jacuzzi. (Exh. F: R.T. 1/4/07, at 40-42.) Unlike many other children in the complex, Sheldon and Parlo were rarely ever accompanied by their parents when they frequented the pool. (Id. at 60; Exh. I: R.T. 1/10/07, at 41-42.)

Almost always at Sheldon's request, Petitioner picked Sheldon up and threw him into the water several times. (Exh. F: R.T. 1/4/07, at 51, 69, 73.) Sheldon alleged that Petitioner had manual contact with his penis on two separate occasions—first in mid-August 2004, and second shortly after July 4, 2005. (Id. at 46-56, 60, 72.) While using the water pitcher kept near the witness stand as a prop to illustrate his testimony, Sheldon testified that: (1) Petitioner picked him up with the left hand on the middle of Sheldon's back and the right hand resting on his "front private spot," the body part that Sheldon used to "pee" and called his "dick"; and (2) during the "second" time during which he was airborne and about to be thrown into the water, Sheldon shifted Petitioner's right hand to his stomach area, but Petitioner then replaced his hand over Sheldon's genitals. (Id. at 46-50, 67-69, 72; Exh. G: R.T. 1/8/07, at 33.) Sheldon additionally claimed that Petitioner caused Sheldon to rub his

penis against Petitioner's buttocks on several non-charged occasions by placing Sheldon against his back and suddenly shifting positions to make Sheldon slide down his back. (Exh. F: R.T. 1/4/07, at 63-64, 67-68, 70-71, 80.)

Sheldon initially believed that Petitioner's manual contact with his penis was accidental and continued to ask Petitioner to throw him into the water, even though he had witnessed Petitioner employing different holding techniques while throwing other children into the water. (Id. at 63, 66, 78-83.) Sheldon changed his mind about the inadvertent nature of Petitioner's manual contact with his penis, allegedly because Denise (Taylor's mother) told him that the touching was not accidental. (Id. at 79, 82-83.)

Sheldon's mother, Tisha, did not learn that Petitioner had touched Sheldon inappropriately until she had a conversation with a neighbor sometime after the police arrested Petitioner on November 9, 2005. (Exh. G: R.T. 1/8/07, at 32, 38, 85-87.) Because Sheldon became upset and refused to talk when Tisha broached this topic, she had her husband and Sheldon's stepfather, Fernando, question Sheldon about Petitioner. (Id. at 32.) Sheldon told Fernando that: (1) he estimated that Petitioner had touched his "privates" four times while they were in the swimming pool; (2) Sheldon did not initially believe that Petitioner touched his penis intentionally, but changed his mind because whenever Sheldon pushed Petitioner's hand away from his genitals, Petitioner returned his hand to Sheldon's penis; and (3) he did not tell anyone sooner because he was frightened. (Id. at 32-33, 38.)

On November 16, 2006, Detective Verdugo interviewed Sheldon, who reported: (1) Petitioner placed his hand on Sheldon's genitals while throwing him in the pool; (2) although Sheldon removed Petitioner's hand from his penis, Petitioner returned his hand to its prior location; (3) Petitioner's contact with Sheldon's penis was with an open hand; (4) Sheldon initially thought this contact was accidental; and (5) Petitioner made Sheldon rub his penis against Petitioner's back by forcing Sheldon to slide downward while on Petitioner's shoulders. (Exh. G: R.T. 1/8/07, at 85-86, 90-91, 99-102.)

The following constituted the evidence and arguments presented by defense counsel on Petitioner's behalf:

Attorney Thompson presented Petitioner's defense by cross-examining every prosecution witness, except Officer Marquez (Exh. F: R.T. 1/4/07, at 85-87), and presenting the testimony of three witnesses—Desiree Wells, Detective Quihuiz, and Petitioner. (Exh. E: R.T. 1/3/07, at 36-44 [Luis A.]; id. at 57-62 [Sandra Martinez]; id. at 80-103 [Taylor S.]; id. at 126-33, 138 [Danielle A.]; Exh. F: R.T. 1/4/07, at 11-25 [Detective Shores]; id. at 57-71, 82-83 [Sheldon H.]; id. at 100-08, 117 [Dan A.]; Exh. G: R.T. 1/8/07, at 10-23, 28-30 [Linda Cano]; id. at 34-36 [Fernando Lopez]; id. at 55-67, 76-77 [Denise S.]; id. at 93-108 [Detective Verdugo]; Exh. H: R.T. 1/9/07, at 5-19, 28-31 [Desiree Wells]; id. at 50-56, 63 [Detective Johnson]; Exh. I: R.T. 1/10/07, at 5-13, 18-19 [Detective Quihuiz] 25-56, 74-76, 97 [Petitioner].)

Because Judge Stephens did not grant his motion to sever all counts, Thompson had to counter two different sets of victims: (1) Luis—the sole child to allege that Petitioner touched his penis in a classroom setting; and (2) Taylor, Danielle, and Sheldon—children who lived in the same apartment complex and claimed to have been molested in the Gentry Walk community swimming pool. The Phoenix Police Department investigated Luis' molestation report, while the Mesa Police Department was responsible for the charges involving the three Gentry Walk children.

Although Thompson subsequently testified at Petitioner's PCR proceeding that he told Petitioner's parents that he could not "bring in witnesses to testify that [Petitioner] had 15 other opportunities to molest children and didn't" (Exh. CC: R.T. 9/7/11, at 19), Thompson nonetheless presented trial testimony that informed the jurors that other people had observed Petitioner interacting with children, but had not observed Petitioner initiating sexual contact with any minor. On cross-examination, Thompson elicited Linda Cano's testimony that: (1) she had hired Petitioner to work in the Special Olympics program, wherein approximately 80% of the athletes were under 18 years of age; (2) Petitioner worked for Linda from October

2004 to December 2005; (3) Petitioner not only helped coach athletes in swimming, speed skating, golf, and ice skating, but also attended basketball games and practices; and (4) Linda never received any complaints about Petitioner from any of the athletes, their parents, or other staff members who attended or participated in these events. (Exh. F: R.T. 1/4/07, at 6, 10-13, 18-22.) During closing argument, Thompson reminded the jurors that Linda had received no complaints about Petitioner during his employment at her program. (Exh. I: R.T. 1/10/07, at 144.)

Thompson also called a Gentry Walk resident, Desiree Wells, to testify that: (1) she allowed Petitioner to play with and give swim lessons to her 6-year-old daughter, Teagan; (2) she had watched Petitioner interact with children in the community swimming pool on many occasions, but had never seen Petitioner "focusing" on or "isolating a specific child"; (3) on more than 20 occasions, Desiree saw Petitioner playing with Taylor, Danielle, and Sheldon, and never saw "any inappropriate conduct or inappropriate touching"; and (4) Desiree noted that at least 30 people, including at least 10 adults, attended the birthday pool party at which Petitioner was accused of molesting Taylor and Danielle. (Exh. H: R.T. 1/9/07, at 5, 17-18, 29-31.) During closing argument the very next day, Thompson revisited Desiree's testimony that she also has a daughter who never saw Petitioner engage in any inappropriate touching. (Exh. I: R.T. 1/10/07, at 140.)

Although Petitioner denied any recollection of ever touching any child's genitals, Thompson nevertheless sought to alternatively establish that any such contact was accidental, unintentional, and therefore misconstrued as sexually motivated by eliciting testimony that:

> (1) Petitioner neither told the charged victims not to tell anyone that he had touched their genitals, nor threatened them with adverse consequences should they disclose such contact; instead, Petitioner said nothing at all during and immediately after the incident. (Exh. E: R.T. 1/3/07, at 42 [Luis]; id. at 100-01 [Taylor]; id. at 131 [Danielle]; Exh. F: R.T. 1/4/07, at 18-19 [Luis]; id. at 67-69 [Sheldon]; Exh. G: R.T. 1/8/07, at 99-100 [Sheldon]; Exh. I: R.T. 1/10/07, at 146, 153 [closing argument].)
>
> (2) Petitioner never rubbed, penetrated, or pinched the victims' genitalia. Instead, Petitioner placed his open hand over the crotch area of their pants or bathing suit, where it remained stationary for a brief period of time. (Exh. E: R.T. 1/3/07, at 41, 60, 62 [Luis]; id. at 87 [Taylor]; id. at 130 [Danielle]; Exh. F: R.T. 1/4/07, at 17-18

[Luis]; id. at 102 [Danielle]; Exh. G: R.T. 1/8/07, at 102 [Sheldon]; Exh. H: R.T. 1/9/07, at 55 [Danielle]; Exh. I: R.T. 1/10/07, at 9, 12 [Taylor]; id. at 153 [closing argument].)

(3) Two of the three Gentry Walk victims initially believed that Petitioner had accidentally touched their genitals. (Exh. E: R.T. 1/3/07, at 80-81, 84-85, 87 [Taylor]; Exh. F: R.T. 1/4/07, at 66 [Sheldon]; Exh. G: R.T. 1/8/07, at 102 [Sheldon]; Exh. I: R.T. 1/10/07, at 8, 11 [Taylor]; id. at 152 [closing argument].)

(4) All four victims testified that Petitioner touched their genitals on occasions when other adults and children were present. (Exh. E: R.T. 1/3/07, at 37-38 [other students and teachers in Luis' classroom]; id. at 112 [Taylor] id. at 129-31, 133 [Danielle]; Exh. F: R.T. 1/4/07, at 65 [Sheldon]; Exh. H: R.T. 1/9/07, at 29-31 [Danielle's birthday pool party]; id. at 54 [Danielle]; Exh. I: R.T. 1/10/07, at 146 [closing argument].) Petitioner also testified that he never threw any children in the water unless there were other adults present, that Dan and Denise were frequently at the pool when he played with their daughters, and that there were other students and teachers in Luis' classroom. (Exh. I: R.T. 1/10/07, at 39-40, 43, 46-47, 52, 88.)

(5) Although he previously denied ever touching any child inappropriately, Petitioner testified that any possible manual contact with their genitals was accidental and therefore neither intentional nor sexually motivated. (Exh. G: R.T. 1/8/07, at 89-90, 103-05, 109-11, 120; Exh. I: R.T. 1/10/07, at 34-35, 49, 56.)

While cross-examining all four victims and/or during closing argument, Thompson elicited testimony or made closing remarks that emphasized the following flaws in the victims' accounts:

- Luis had given inconsistent statements about whether Petitioner had squeezed his penis or merely rested his open hand over his genitals. (Exh. E: R.T. 1/3/07, at 15, 33, 41, 44, 51-52, 58-60; Exh. I: R.T. 1/10/07, at 135.)

- Luis seemed uncertain about whether Petitioner had facial hair at the time of the incident. (Exh. E: R.T. 1/3/07, at 28-29, 99; Exh. I: R.T. 1/10/07, at 135.)

- Luis did not tell his mother the name of the man who molested him. (Exh. E: R.T. 1/3/07, at 65; Exh. I: R.T. 1/10/07, at 135.)

- The State did not call Luis' teacher (whose name Luis could not recall at trial) to corroborate Luis' testimony that he asked to go to the bathroom after the incident. (Exh. E: R.T. 1/3/07, at 37; Exh. I: R.T. 1/10/07, at 136.) Nor did Luis tell his teacher what happened when he returned. (Exh. E: R.T. 1/3/07, at 37, 40.)

- Luis could not make an in-court identification of Petitioner at trial. Thompson argued that Luis identified Petitioner from one of the several photographs shown to him during trial only because he had seen Petitioner, but none of the other depicted men, in the courtroom. (Id. at 31-32, 93-95; Exh. I: R.T. 1/10/07, at 137.)

- Luis did not recall speaking with Detective Shores at school. (Exh. E: R.T. 1/3/07, at 43-44.) Shores testified that he did not even submit Luis' case to the county attorney for charging because Luis could not recall peripheral details, and there was

no corroborating evidence. (Exh. F: R.T. 1/4/07, at 10, 15-16; Exh. I: R.T. 1/10/07, at 137.)

• Luis had not only spoken with the prosecutor, Deputy County Attorney John Beatty, by telephone before trial, but had also visited Beatty that day at the Maricopa County Attorney's office. (Exh. E: R.T. 1/3/07, at 43.)

• Danielle's recall of events changed during her forensic interview, which contained inconsistent statements. (Exh. I: R.T. 1/10/07, at 138; Exh. YY: DVD of Danielle's forensic interview [Trial Exh. 26].)

• Danielle could not recall during trial: (1) whether the September pool party during which Petitioner molested her was on a school Friday or a weekend day; (2) whether she had told Detective Johnson that Petitioner touched her every time she went to the pool; (3) whether she told Petitioner to stop; and (4) how many people attended her birthday pool party. (Exh. E: R.T. 1/3/07, at 127-30.)

• Taylor could not recall the charged incidents very clearly during trial and therefore was uncertain about: (1) which days of the week Petitioner molested her; (2) whether Petitioner rested or moved his hand while it was touching her vagina; and (3) whether she sat on Petitioner's lap; and (4) which bathing suit she wore during the charged events. (Exh. E: R.T. 1/3/07, at 82-87, 102-03; Exh. G: R.T. 1/8/07, at 67.)

• Taylor initially believed that Petitioner had accidentally touched her, but attributed her change of mind to growing older and maturing. (Exh. E: R.T. 1/3/07, at 80, 84-85, 87; Exh. I: R.T. 1/10/07, at 11, 138-39.)

• Sheldon initially told Detective Verdugo that Petitioner had touched his penis just once, but later reported additional incidents; Sheldon also gave different dates for when these incidents occurred. (Exh. F: R.T. 1/4/07, at 67, 99-100; Exh. G: R.T. 1/8/07, at 105.)

• Sheldon initially believed that Petitioner touched him accidentally, but changed his mind after talking to Denise, who allegedly told him that it was not an accident. (Exh. F: R.T. 1/4/07, at 82-83; Exh. I: R.T. 1/10/07, at 137, 142.)

In support of his opening statement's assertion that "children's memories are fragile" (Exh. E: R.T. 1/3/07, at 9), Thompson launched a three-pronged defense against the charges involving Taylor, Danielle, and Sheldon by presenting evidence and argument suggesting that their allegations were the false products of three factors:

(1) By participating in "playground gossip" about Petitioner allegedly molesting other children, Taylor, Danielle, and Sheldon convinced themselves that Petitioner had purposefully touched their genitals while in the swimming pool.

(2) The first adults to speak with these children were their parents who had "loaded agendas," lacked training in proper forensic interview techniques, and therefore reinforced the allegations against Petitioner with suggestive questions.

> (3) While forensically interviewing Taylor and Danielle, Detectives Quihuiz and Johnson deviated from the protocol that Detective Shores detailed by asking unduly suggestive questions that "plant[ed] information in a big way" in the recollections of both victims.

To counter the State's evidence that Petitioner seemed "unconcerned" and failed to offer any information whatsoever about the charged incidents during his post-arrest interview, Thompson elicited testimony to support the theory that Petitioner's repeated professions of ignorance were attributable to two factors:

> (1) Detective Verdugo withheld necessary details about the allegations and choosing instead to ask Petitioner very general questions, such as, "Why do you think you are here?" "What's going on at the pool?" and "Tell me about Taylor?" (Exh. G: R.T. 1/8/07, at 94, 99, 103-04 [cross-examination of Detective Verdugo]; Exh. I: R.T. 1/10/07, at 34-35, 97 [Petitioner's testimony explaining that he answered, "I don't know," because Verdugo did not provide sufficient information to answer his questions, not because Petitioner was trying to be evasive]); id. at 149-50 [closing remarks criticizing Verdugo's opened-ended questioning techniques].)
>
> (2) Petitioner had no reason to recall specifics about his frequent interaction with children in the swimming pool. (Exh. E: R.T. 1/3/07, at 16 [opening statement reporting that Petitioner could not provide Detective Verdugo with any detailed information regarding the charged victims because there was "nothing memorable" about playing with children in the pool "months" before the interview].)

Thompson also elicited Petitioner's testimony that he was "very nervous" during the interview because he had no prior arrests, and that Petitioner's trembling was attributable to an untreatable neurological condition that caused his head to move from side to side involuntarily. (Exh. I: R.T. 1/10/07, at 33-35.) Verdugo conceded that Petitioner mentioned this neurological condition at the end of questioning, but Verdugo terminated the interview without obtaining additional information. (Exh. G: R.T. 1/8/07, at 106-08.)

As to the jury instructions, Petitioner asked Judge Stephens to charge the jury that the State had the burden of proving, beyond a reasonable doubt, that Petitioner intentionally or knowingly, and with the motivation of a sexual interest, directly or indirectly touched the genitals of a child under 15 years of age. (Exh. H: R.T. 1/9/07, at 71-73.) In support of his position that "the State [was] obligated to prove a motivation of sexual interest as an element of the offense" (id. at 71-72), Petitioner relied exclusively upon Arizona Senate Bill 1145's

amendments to the statutory definition of "affirmative defense" set forth in A.R.S. § 13-103(B):

> My reference is to the amended Senate Bill 1145, effective date April 24, '06, which, in effect, abolishes common law and affirmative defenses. In pertinent part, the amended Arizona Revised Statutes 13-103B states [that an] affirmative defense does not include any justification defense or [a] defense that either denies an element of the offense charged or denies responsibility, including misidentification or lack of intent.
>
> My view is that that establishes that there is no necessity remaining as there was under the previous circumstance where lack of intent would be an affirmative defense for the defendant to prove by a preponderance of the evidence that allegation. I believe that with the amendment to the statute, the State is obliged to prove beyond a reasonable doubt that the defendant was motivated by sexual interest. I think that is part of the offense that's charged.

(Id. at 72-73.)

The prosecutor ultimately opposed this instruction on three grounds: (1) A.R.S. § 13-1410 (A) did not include sexual motivation as an element of child molestation; (2) A.R.S. § 13-1407(E) established "lack of sexual motivation" as an affirmative defense that A.R.S. § 13-205(A) required Petitioner to prove by a preponderance of the evidence; and (3) the recent amendments to Sections 13-103 and 13-205(A) affected only the justification defenses set forth in Chapter 4 of Arizona's criminal code. (Exh. A: P.I., Item 212.) Petitioner responded by reiterating his position that, under "the current state of [Section] 13-103, it is the state's burden to prove a lack of sexual motivation beyond a reasonable doubt." (Exh. I: R.T. 1/10/07, at 100.)

Judge Stephens sustained the State's objection to Petitioner's proposed instruction. (Id. at 100-01.) Because Petitioner intended to argue his lack of sexual motivation to the jury, Judge Stephens gave the following jury instructions, over his objection:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual

> motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

(Id. at 107-08.)

Judge Stephens also instructed the jurors that they could not convict Petitioner without finding, beyond a reasonable doubt, that he performed a voluntary act:

> Before you may convict the defendant of the charged crimes, you must find the State proved beyond a reasonable doubt that the defendant committed a voluntary act or omitted to perform a duty imposed upon the defendant by law that the defendant was capable of performing.
>
> A voluntary act means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant committed the act voluntarily or failed to perform the duty imposed on the defendant.

(Id. at 107.)

To nullify the risk that the jury might convict Petitioner on one charge merely because it found him guilty on another count, Judge Stephens instructed the jurors:

> Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt all, some, or none of the charged offenses. Your finding for each count must be stated in a separate verdict.

(Id. at 106-07.)

During the second day of deliberations, the jury submitted several questions acknowledging this separate-counts instruction, but inquiring whether evidence regarding one crime could serve as corroboration with respect to other charged offenses:

> Can we use [corroborating] evidence? Yes or no[?] (In reference to page 7 of the final instructions that each count is a separate and distinct offense?)
>
> Is the information labelled "separate counts" on page 7 of the final instructions one and the same with the term [corroboration]?
>
> All 7 counts are distinct and separate counts but they involve the same subject. Can we use [corroboration]?
>
> The evidence we have heard on certain counts appears to [corroborate] the information on the other counts. The instructions say, "Each count charges a

> separate and distinct offense. You must decide ... on any other count." (Page 7 of the final instructions.) Can the evidence provided to support one allegation lend support to a separate allegation?

(Exh. A: P.I., Items 213-17; Exh. J: R.T. 1/12/07, at 4-6.)

In response, Judge Stephens provided the following supplemental instruction:

> Evidence of other acts has been presented. You may consider this evidence only if you find the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider this evidence to establish the defendant's motive, opportunity, intent, plan, [or] absence of mistake or accident. You must not consider this evidence to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense.

(Id.)

On January 12, 2007, and after almost 2 full days of deliberations, the jurors sent the court a note indicating that they were deadlocked. (Exh. A: P.I., Item 218; Exh. B: M.E., Item 220; Exh. J: R.T. 1/12/07, at 8.) At 2:55 p.m., Judge Stephens gave the jurors the following instructions to help them address their impasse:

> Ladies and gentlemen, I ... have received your note indicating that you are at deadlock in your deliberations. I have some suggestions to help you in your deliberations but not to force you to reach a verdict. I am trying to be responsive to your apparent need for help. I do not wish or intend to force a verdict. Each juror has a duty to consult with one another to deliberate with a future reading, an agreement if it can be done without violence to individual judgment[.] ... [H]owever you may want to identify areas of agreement and disagreement and discuss the law and the evidence as they relate to those areas of disagreement.
>
> If you still disagree, you may wish to tell the attorneys and me which issues you need assistance with. If you decide to follow this suggestion, please write down those questions of fact or law and give the note to the bailiff.

(Exh. J: R.T. 1/12/07, at 8.) The court then asked the foreman to "go back with your fellow jurors and discuss the most recent instructions that I have given and you can send a note back to me through the bailiff and let us know how you would like to proceed." (Id. at 9.)

Less than 30 minutes later, the foreman sent another note that Judge Stephens construed as a report of continued deadlock. (Id.; Exh. A: P.I., Item 219; Exh. B: M.E., Item

220.) After reassembling the jurors in the courtroom, Judge Stephens made the following statements:

> Ladies and gentlemen, I have received your most recent note and based upon the information contained in that note and discussing it with the attorneys, I'm going to declare a mistrial. I know you are disappointed not to be able to reach a verdict, but sometimes that happens. Some cases are more difficult to resolve than others.
>
> On behalf of the members of the participants in this trial, I want to thank you for your service to the community. You have gone above and beyond what we typically ask jurors to do and [are] most grateful for your time and attention. The attorneys indicated that they may wish to speak with you. You are certainly under no obligation to do so.
>
> If you are willing to speak with the lawyers, I would ask that you wait back in the jury room, and they will be in shortly.
>
> Again, thank you very much for your time and attention. You are excused. Have a good weekend.

(Exh. J: R.T. 1/12/07, at 9-10.) The jurors then left the courtroom. (Id. at 10; Exh. B: M.E., Item 220.)

While Judge Stephens, counsel, and Petitioner were rescheduling the retrial date inside the vacated courtroom, the jurors advised "the bailiff ... that they do not wish to have a hung jury and wish to continue deliberating and wish to communicate that [desire] to counsel." (Exh. B: M.E., Item 220; Exh. J: R.T. 1/12/07, at 10-11.) The bailiff related this development to the trial court, but not before the proceedings had adjourned at 3:27 p.m. (Exh. B: M.E., Item 220.)

Judge Stephens then had an off-the-record discussion with counsel, made an on-the-record announcement at 3:29 p.m. that the jurors wished to resume their deliberations, and inquired whether either party objected. (Id.; Exh. J: R.T. 1/12/07, at 10-11.) Because neither Petitioner nor the State opposed the jurors' request, Judge Stephens vacated her mistrial declaration and allowed the jurors to resume deliberating at 3:47 p.m. (Exh. B: M.E., Item 220; Exh. J: R.T. 1/12/07, at 11.) The jurors adjourned for the weekend recess at 4:47 p.m. (Id.)

On January 16, 2007, the jury resumed its deliberations, recessed for lunch at 12:11 p.m., resumed deliberating at 1:37 p.m., and reconvened in the courtroom at 3:16 p.m. to announce its verdicts on all seven counts. (Exh. B: M.E., Item 233.) The jurors found Petitioner guilty as charged on the charges involving Taylor S. (Counts 1 and 2), Danielle A. (Counts 3 and 4), and Luis A. (Count 7), but acquitted him of the two counts involving Sheldon H. (Counts 5 and 6). (Exh. A: P.I., Items 224-30; Exh. B: M.E., Item 233; Exh. L: R.T. 1/16/07, at 3-6.) Judge Stephens polled the jurors individually to verify that each juror personally assented to these verdicts. (Exh. B: M.E., Item 233; Exh. L: R.T. 1/16/07, at 5-6.) After thanking the jurors for their service, Judge Stephens told them, "If you wish to speak with the attorneys, you can wait back in the jury room, and they will be in shortly. You are certainly under no obligation to do so, and you are free to leave." (Exh. L: R.T. 1/16/07, at 8.)

On January 18, 2007, Judge Stephens dismissed Count 8 without prejudice because Nicholas' parents reported their inability to procure counseling before the trial date and expressed grave concern that forcing Nicholas to testify as scheduled would cause significant emotional harm. (Exh. B: M.E., Item 240; Exh. M: R.T. 2/16/07, at 4-12.)

On January 26, 2007, Petitioner filed a motion for new trial, pursuant to Arizona Rule of Criminal Procedure 24.1, arguing: (1) the verdicts were contrary to the weight of the evidence; (2) Judge Stephens erroneously denied Petitioner's motion for direct verdicts of acquittal; (3) Count 7 involving Luis should have been severed from Counts 1 through 6; and (4) the final jury instructions violated Arizona law by mischaracterizing the defense of lack of sexual motivation as an affirmative defense. (Exh. A: P.I., Item 241.) Judge Stephens found these arguments groundless and accordingly denied this motion. (Exh. M: R.T. 2/16/07, at 6-7.)

On February 8, 2007, Thompson submitted for Judge Stephens' consideration a mitigation package, including letters from more than 40 friends and relatives and photocopies of seven medical records that Petitioner's pediatrician, Dr. Arnold Gold, authored between

April 15, 1974, and December 9, 1983. (Exh. A: P.I., Item 244; Exh. M: R.T. 2/16/07, at 4-6.) On February 16, 2007, Thompson filed a sentencing memorandum that recommended the imposition of mitigated 10-year prison terms per count, with Petitioner receiving concurrent prison terms for each set of "paired counts relating to Taylor and Danielle," so that Petitioner would receive the mandatory minimum aggregate sentence of 30 calendar years' imprisonment. (Exh. A: P.I., Item 246, at 4.)

Prior to imposing sentence, Judge Stephens acknowledged the statutorily available option of ordering concurrent prison sentences for the molestation counts involving the same victims (Taylor and Danielle), but nonetheless concluded that "justice" warranted the imposition of consecutive sentences on all five convictions "because of the nature of these offenses." (Exh. M: R.T. 2/16/07, at 29.) Consequently, Judge Stephens imposed five consecutive, flat, and slightly mitigated 15-year prison terms, with credit for 170 days of pretrial incarceration on Count 1. (Id. at 29-30; Exh. B: M.E., Item 253.)

On February 16, 2007, Petitioner filed a timely notice of appeal from the judgments and sentences. (Exh. A: P.I., Item 251.) Petitioner retained Tracey Westerhausen to represent him on appeal. (Exh. CC: R.T. 9/7/11, at 50.)

On October 11, 2007, Westerhausen filed an opening brief raising four issues:

1. "The jury instructions [regarding child molestation] unconstitutionally placed the burden of proof on the defendant." (Doc. 1-2: Opening Brief, 1 CA-CR 07-0144, at 13.) Petitioner argued that Arizona's child-molestation statute required the State to prove, beyond a reasonable doubt, the specific-intent element "that the touching was motivated by sexual interest," and that the trial court's instructions requiring Petitioner to prove by a preponderance of the evidence that he lacked sexual motivation improperly shifted the burden of proof of an element of the crime from the prosecution to the defense. (Id. at 12-16.)

2. "Having declared a mistrial and discharged the jurors, the trial court violated [Petitioner's] constitutional rights by permitting the jurors to reconvene and deliberate further." (Id. at 16.) Petitioner identified the state and federal constitutional rights at issue as "the right to an impartial jury, the right to due process, and the guarantee against double jeopardy," with the thrust of his argument being that the jurors might have been exposed to improper outside influences during the interval between the trial court's declaration of mistrial and the subsequent resumption of deliberations. (Id. at 16-20.)

(3) "The trial court abused its discretion in imposing only 'slightly mitigated' sentences, ignoring the fact that [Petitioner's] conduct was milder than the usual child molest case." (Id. at 20-22.)

(4) "The individual sentence for each count and their and cumulative effect of 75 years violated the protection against cruel and unusual punishment." (Id. at 23-32.)

On January 29, 2008, the State filed its answering brief, to which Petitioner filed a reply on March 6, 2008. (Exh. N: Answering Brief, 1 CA-CR 07-0144; Doc.1-3: Reply Brief, 1 CA-CR 07-0144.)

On July 24, 2008, the Arizona Court of Appeals rejected these arguments and affirmed Petitioner's convictions and sentences. (Doc. 1-4: Memorandum Decision, 1 CA-CR 07-0144.)

On September 29, 2008, Petitioner, through Westerhausen, filed with the Arizona Supreme Court a petition for review on the following two claims:

A. A.R.S. § 13-1407, entitled "Defenses," enumerates defenses to child molestation. Subpart E provides that, "it is a defense" to child molestation "that the defendant was not motivated by a sexual interest." The Court of Appeals held that A.R.S. § 13-1407.E created an affirmative defense, thus shifting the burden of proof to the defendant. Did the Court of Appeals erroneously shift the burden of proof to the defendant, to prove that he was not sexually motivated?

B. Under the state and federal constitutions, a defendant is guaranteed a trial by a fair and impartial jury, including a jury free from taint by outside sources. The jurors here were discharged, minutes passed, and the dismissed jurors were allowed to re-deliberate. Is Mr. May entitled to a new trial because the trial court failed to explore jury taint that may have deprived Mr. May of a fair trial?

(Doc. 1-5: Petition for Review, at 2-3.)

On November 4, 2008, the State filed its opposition to this petition for review. (Exh. O: Opposition to Petition for Review by Arizona Supreme Court, CR008-0281-PR.)

On February 10, 2009, the Arizona Supreme Court summarily denied review. (Doc. 1-6: Arizona Supreme Court Order, CR-08-0281-PR, at 2.)

On March 24, 2009, Petitioner moved the Arizona Supreme Court to reconsider this ruling. (Exh. P: Motion for Reconsideration of Denial of Review, CR-08-0281-PR.) For the

first time on direct review, Petitioner challenged the constitutionality of the child-molestation statute:

> The child molestation statute violates due process because it relieves the state from proving every element of the charged crime beyond a reasonable doubt. First, the statute does this by making too many every day and innocent acts fall within its definition of child molestation. Second, although the Legislature has broad authority to define the elements of a crime, it may not lower the state's burden of proof by calling an "element" something else. The Legislature has unconstitutionally done that here.

(Id. at 4, citing Apprendi v. New Jersey, 530 U.S. 466, 476 (2000)).

On March 29, 2009, the Arizona Supreme Court denied Petitioner's motion for reconsideration of its prior order denying review. (Exh. Q: Arizona Supreme Court Order, CR-08-0281-PR.)

On May 8, 2009, Petitioner petitioned the United States Supreme Court to grant a writ of certiorari on the issue of "[w]hether Arizona's child molestation statutes violate an accused's Fourteenth Amendment right to due process because they 'manipulate the prosecutor's burden of proof by ... placing the affirmative defense label on at least some elements of traditional crimes.'" (Doc. 1, at 4, quoting Apprendi, 530 U.S. at 475.)

In its court-ordered brief in opposition, the State argued that certiorari should be denied because: (1) Petitioner had never presented this constitutional challenge to A.R.S. §§ 13-1410(A) and 13-1407(E) to the Arizona judiciary—an omission that would effectively transform the Supreme Court from a court of final review to one of first review; (2) "the conflict that Petitioner claims to exist among lower courts is illusory and inapposite to A.R.S. § 13-1410(A)"; and (3) "Petitioner's reliance on *Apprendi* and its progeny is misplaced." (Exh. R: PCR's Exh. ["Tab"] 109: Brief in Opposition, Supreme Court No.08-1393, at 17, 30, 32; Exh. CC: R.T. 9/7/11, at 125, 142-43.)

On October 5, 2009, the Supreme Court denied certiorari. See May v. Arizona, 558 U.S. 819 (2009).

On November 13, 2009, Petitioner, through retained counsel, filed a timely PCR notice. (Doc. 1-7.)

On March 30, 2010, Petitioner filed his PCR petition with a contemporaneous request for an evidentiary hearing. (Docs. 1-8, 1-9.) Petitioner sought relief on the following grounds:

- PCR Ground I: Petitioner "was deprived of his right to trial by jury when the trial court, following an unrecorded, undocumented communication between the judge and the jury, allowed unsworn jurors to pass judgment on [Petitioner's] guilt." (Id. at 19.) This claim's component arguments included the following allegations: (a) "[t]he twelve people in the jury room lacked the power to return a verdict" after the trial court declared a mistrial and dismissed the jurors; (2) "[b]y allowing the dismissed, unsworn former jurors to continue deliberating, the court denied [Petitioner] his structural right to an impartial jury"; and (3) "[t]he judge, through her agent, the bailiff, had substantive unrecorded *ex parte* communications with the jury." (Id. at 22, 24, 25.)

- PCR Ground II: "The trial judge coerced guilty verdicts by allowing jurors to continue deliberations after a mistrial had been declared." (Id. at 27.)

- PCR Ground III: "[Petitioner's] right to be convicted only upon proof beyond a reasonable doubt was violated by the jurors' pledging their votes in a quid pro quo that had nothing to do with the evidence." (Id. at 30.)

- PCR Ground IV: "The failure of the trial judge to properly instruct the jury, once it expressed confusion numerous times over a critical element of its task, denied [Petitioner] his jury trial rights under the Arizona and United States Constitutions and violated Arizona's Constitutional command that judges shall declare the law." (Id. at 34.) This claim alleged that the trial court "did not fulfill its duty to explain, in understandable terms, the critical concept that the jury was required to consider each count separately, under the reasonable doubt standard, and not group it all together and decide by clear and convincing evidence decide he must have done them all." (Id.)

- PCR Ground V: "The jury foreperson introduced extrinsic material and information into the jury's deliberations, violating [Petitioner's] rights to an impartial jury and to confront witnesses against him," specifically: (1) a teddy bear that Foreman Richardson brought into the jury room to conduct "illicit experiments" and evaluate reports regarding how Petitioner touched his victims; and (2) Richardson's alleged statement that Petitioner would "probably only get a year or two" if convicted of the charges. (Id. at 40-42.)

- PCR Ground VI: "The numerous and serious interferences with the impartiality of the jury cumulatively violated [Petitioner's] right to a jury trial." (Id. at 42.)

- PCR Ground VII: "[Petitioner's] convictions violate due process principles of the Arizona and United States Constitutions because Arizona's child molestation statute does not require the State to prove every element of the crime beyond a reasonable doubt." (Id. at 44.)

- PCR Ground VIII: "No reasonable fact finder could have found [Petitioner] guilty of child molestation beyond a reasonable doubt because the child molestation statute

unconstitutionally relieves the State of its burden to prove the core element of sexual motivation." (Id. at 48.)

• PCR Ground IX: "The application of Arizona Rules of Evidence 404(b) and 404(c) in this case unconstitutionally lowered the State's burden of proof and allowed the convictions by a non-unanimous jury." (Id. at 49.) Petitioner argued herein that Judge Stephens: (1) failed to make the requisite clear-and-convincing-evidence findings before denying his severance motion; and (2) gave final jury instructions that (a) inadequately addressed the jury's confusion over whether evidence offered to prove one count could be used to corroborate the other charges and (b) allowed the jury to convict him of each count based upon the lower standard of clear and convincing evidence. (Id. at 49-51.)

• PCR Ground X: "There is sufficient evidence of possible improper conduct by the prosecutor, making it impossible to rule out prosecutorial misconduct." (Id. at 52.) The component claims of this ground alleged that: (1) after the trial court granted Petitioner's motion to remand his case to the grand jury for a new probable-cause determination, the State engaged in prosecutorial vindictiveness by presenting evidence of his crimes against three additional victims and thereby obtaining an indictment that doubled the original number of counts; (2) the prosecutor unethically charged Petitioner with molesting Luis, allegedly because Luis could not recall the charged event; (3) the prosecutor was allegedly coached Luis, who was unable to identify Petitioner in the courtroom during direct-examination, but positively identified Petitioner on redirect-examination when shown a photograph taken of Petitioner in 2005, closer in time to the charged incident; (4) the prosecutor manifested his "greater-than-normal level of interest in this case" by persuading Linda Cano, a prospective defense witness, to testify for the State instead; and (5) the prosecutor attended the defense investigator's post-trial interview of Foreman Richardson and was allegedly responsible for Detective Verdugo's refusal to submit to an interview with Petitioner's PCR investigator. (Id. at 52-55.)

• PCR Ground XI.A: "Trial counsel was constitutionally ineffective for failing to raise the issue of prosecutorial vindictiveness." (Id. at 56.)

• PCR Ground XI.B: "Counsel was ineffective for failing to require compliance with Arizona Rule of Evidence 404(b) and 404(c)." (Id. at 60.) This claim alleged that both trial and appellate counsel rendered deficient performance by failing to object to the sufficiency of the trial court's findings regarding the cross-admissibility of evidence of the crimes against each victim at separate trials. (Id. at 60-62.)

• PCR Ground XI.C: "Counsel failed to argue and preserve the issue that the child molestation statute unconstitutionally shifts the burden of proof to the defendant." (Id. at 62.)

• PCR Ground XI.D: "Trial Counsel was deficient in his investigation and in presenting information that was learned through investigation," allegedly because: (1) "he failed to retain an expert to assist him" to develop "critical areas of inquiry [regarding] pretrial interviews of the detectives and civilian investigators that were central to the investigation," "educate [himself] as to children's memory formation as well as internal and external factors that can affect children's reports;" (2) he did not present medical evidence to corroborate Petitioner's testimony regarding his "long battle with ataxia," "a medical condition that causes clumsiness and involuntary movements"; and (3) he failed to investigate and present lay witness testimony to

"corroborate [Petitioner's] testimony regarding his dedicated service to education and his behavior around children." (Id. at 65-76.)

• PCR Ground XI.E: "Trial counsel provided ineffective assistance by failing to consult with [Petitioner] before agreeing to allow deliberations to continue." (Id. at 76.)

• PCR Ground XI.F: "Counsel was deficient in failing to object to continued deliberations." (Id. at 77.) Maintaining that allowing the mistrial declaration to stand would have allowed him to remain free on bond and proceed to trial with the benefit of having heard the State's case, Petitioner argued that trial counsel lacked a tactical basis for allowing the jurors to resume their deliberations—especially without renewing their oaths and receiving further instructions. (Id. at 77-78.) Petitioner also challenged the performance of appellate counsel, whom he faulted for not advocating "a bright-line rule that jurors may not return a verdict after a mistrial is declared and jurors are absolved of their oaths" and for not arguing that structural error resulted from the denial of his right to an impartial jury and the trial court's lack of jurisdiction to render a judgment following the declaration of mistrial. (Id. at 79.)

• PCR Ground XI.G: "Counsel was ineffective in failing to develop and present expert and character evidence at sentencing." (Id. at 80.)

• PCR Ground XI.H: "The cumulative impact of counsel's deficiencies amount to prejudicial substandard representation." (Id. at 81.)

• PCR Ground XII: "The cumulative errors at trial and on appeal violated [Petitioner's] right to due process." (Id. at 81.)

On July 26, 2010, the State filed its response to Petitioner's PCR petition arguing that: (1) PCR Grounds II, II, IV, VI, VII, IX, X were precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), and failed on their merits in any event; and (2) PCR Grounds III, V, VIII, XI.A through XI.H, and XII lacked merit. (Exh. S: State's PCR Response, filed on 7/26/10, at 14-75.)

On August 20, 2010, Petitioner filed his reply, arguing that: (1) newly discovered evidence rendered non-precluded, pursuant to Arizona Rule of Criminal Procedure 32.1(e), the claims he had not raised at trial and/or on appeal; (2) all of his claims warranted post-conviction relief; and (3) the trial court should conduct an evidentiary hearing. (Doc. 1-10: Reply to State's PCR Response, at 3-35.)

On January 4, 2011, the Honorable Kristin Hoffman issued the following rulings:

• PCR Grounds I, II, IV, VI, VII, IX, X, and XII were precluded under Rule 32.2(a)(2) and/or Rule 32.2(a)(3), because: (1) Petitioner either previously presented the claim to the Arizona Court of Appeals on direct review or failed to raise the claim at trial

and/or on appeal; and (2) Rule 32.1(e) exception for newly discovered evidence was inapplicable because Petitioner failed to exercise due diligence.

• Petitioner's claim of actual innocence (PCR Ground VIII), pursuant to Arizona Rule of Criminal Procedure 32.1(h), was meritless.

• An evidentiary hearing would be conducted to address the following non-precluded claims: (1) PCR Ground III, wherein Petitioner alleged that the jurors had traded votes on the verdicts; (2) PCR Ground V, wherein Petitioner alleged that the jurors considered extrinsic evidence; and (3) all of Petitioner's ineffective assistance of counsel claims (PCR Grounds XI.A through XI.H).

(Doc. 1-11: Minute Entry, filed on January 4, 2011.)

On January 18, 2011, Petitioner moved for reconsideration of Judge Hoffman's preclusion ruling with respect to: (1) PCR Grounds I, II, IV, and XII, which concerned claims regarding the jury's post-mistrial deliberations, alleged jury coercion, allegedly improper instructions, and cumulative error, respectively; and (2) a prosecutorial-misconduct sub-claim, PCR Ground X.2, which questioned the propriety of the State's decision to charge Petitioner with molesting Luis, despite his inability to recall the incident. (Exh. T: Motion, filed on 1/18/11, at 1-5.) The State filed its opposition on February 3, 2011 (Exh. U), and Petitioner replied on February 9, 2011 (Exh. V). After oral argument, Judge Hoffman denied Petitioner's motion for reconsideration. (Exh. W: Minute Entry, filed on 2/16/11.)

On March 24, 2011, Petitioner's attorneys, Mr. Cabou and Ms. O'Meara, filed a notice announcing that undisclosed ethical obligations mandated their withdrawal as counsel. (Exh. X: Notice of Mandatory Withdrawal of Counsel.) Consequently, on April 13, 2011, JoAnn Falgout entered her appearance as local counsel, contingent upon admission of *pro hac vice* counsel for Petitioner. (Exh. Y: Notice of Appearance [Falgout].)

On August 11, 2011, Petitioner, through Ms. Falgout, supplemented the pending PCR petition by alleging that: (1) Juror Melton, whom Petitioner had recently deposed, had a vague recollection that the subject of punishment had been "broached" during deliberations; and (2) the jury lacked jurisdiction to render a verdict after the court declared a mistrial and discharged them from service. (Doc. 1-12: Supplemental PCR, at 1-5.)

On August 15, 2011, the State moved to vacate the evidentiary hearing on any non-precluded claim because "there is no issue of fact or law that entitle[d] [Petitioner] to any evidentiary hearing." (Exh. Z: Amended Motion to Vacate Evidentiary Hearing.) Judge Hoffman, however, denied this motion, despite observing, "To the extent that defendant's allegations of ineffective assistance of counsel rely on undisputed facts regarding what defense counsel did or did not do, the testimony of defense counsel is not needed at an Evidentiary Hearing." (Exh. AA: Minute Entry, filed on September 2, 2011.)

On September 6, 2011, Judge Hoffman commenced a 3-day evidentiary hearing to adjudicate Petitioner's unresolved extrinsic-evidence and ineffective-assistance-of-counsel claims. (Exh. BB: R.T. 9/6/11; Exh. CC: R.T. 9/7/11; Exh. DD: R.T. 9/8/11.) In lieu of calling any jurors to testify, Petitioner and the State agreed that the judge could consider instead the transcripts of Petitioner's post-verdict interviews or depositions of the jurors whom retained counsel or their investigators were able to locate and question between May 18, 2008, and June 23, 2011. (Exh. BB: R.T. 9/6/11, at 9-16.) Thus, transcripts of the following jurors' post-verdict statements were admitted in evidence by the parties' stipulation:

- Hearing Exh. 27: Juror Lisa Diane Mayhew (a.k.a. Lisa Mayhew), whom defense investigator Martin Gonzalez interviewed on May 18, 2008. (Exh. EE: Transcript of First Interview of Juror Mayhew-Proeber, dated 5/18/08.)

- Hearing Exh. 28: Juror Lisa Proeber (a.k.a. Proeber), whom defense investigator Lew Ruggiero interviewed on December 3, 2009. (Exh. FF: Transcript of Second Interview of Juror Mayhew-Proeber, dated 12/3/09.)

- Hearing Exh. 29: Juror Bill Richardson, the foreman whom defense investigator Lew Ruggiero interviewed on December 10, 2009, with the trial prosecutor, Deputy County Attorney John Beatty in attendance. (Exh. HH: Transcript of Interview of Foreman Richardson, dated 12/10/09.)

- Hearing Exh. 30: Juror John Rout, whom defense investigator Lew Ruggiero interviewed on December 5, 2009. (Exh. II: Transcript of Interview of Juror Rout, dated 12/5/09.)

- Hearing Exh. 31: Juror Jacob Harris, whom defense investigator Lew Ruggiero interviewed on February 23, 2011. (Exh. JJ: Transcript of Interview of Juror Harris, dated 2/23/11.)

• Hearing Exh. 32: Juror Daniel Melton, whom Petitioner's retained PCR counsel deposed on June 22, 2011. (Exh. KK: Reporter's Transcript of Juror Melton's Deposition, dated 6/23/11.)

• Hearing Exh. 46: Juror Michael Lieb, whom Petitioner's retained counsel deposed on June 22, 2011. (Exh. LL: Reporter's Transcript of Juror Lieb's Deposition, dated 6/22/11.)

• Hearing Exh. 47: Juror Dallas Andrews, whom Petitioner's investigator Lew Ruggiero interviewed on March 5, 2011. (Exh. MM: Transcript of Interview of Juror Andrews, dated 3/5/11.)

• Hearing Exh. 48: Juror Lynwood Carey, whom Petitioner's investigator Lew Ruggiero interviewed on December 4, 2009. (Exh. NN: Transcript of Interview of Juror Carey, dated 12/4/09.)

• Hearing Exh. 49: Juror Helen Jo Reeves, whom Petitioner's investigator Lew Ruggiero interviewed on December 2, 2009. (Exh. OO: Transcript of Interview of Juror Reeves, dated 12/2/09.)

• Hearing Exh. 50: Juror Joanna Rzucidlo, whom Petitioner's investigator Lew Ruggiero interviewed on December 18, 2009. (Exh. PP: Transcript of Interview of Juror Rzucidlo, dated 12/18/09.)

• Hearing Exh. 51: Juror Tina Lyn Spradlin, whom Petitioner's investigator Lew Ruggiero interviewed on January 5, 2010. (Exh. QQ: Transcript of Interview of Juror Spradlin, dated 1/5/10.)

The parties also stipulated to the admission of un-notarized declarations signed by Angela Cazel-Jahn and Kelley Ames Fitzsimmons, who were employed at the Children's Museum of Phoenix, met Petitioner when he volunteered to help set up exhibits at the museum, and reported that they had neither seen Petitioner have inappropriate interactions with children, nor received complaints about Petitioner from other museum staff members, children, or their parents. (Exh. RR: Declaration of Angela Cazel-Jahn [Hearing Exh. 38]; Exh. SS: Declaration of Kelley Ames Fitzsimmons [Hearing Exh. 39].)

During the evidentiary hearing, Petitioner called the following witnesses: (1) his trial attorney, Joel Thompson (Exh. CC: R.T. 9/7/11, at 5-48); (2) his appellate counsel, Tracey Westerhausen (id. at 49-71); (3) Dr. Harvey Goodman, whose testimony concerned Petitioner's ataxia-related medical records from the early 1970s to 1989 and an MRI performed in 2008 (id. at 71-115); (4) Michael Piccaretta, a defense attorney who opined that Thompson and Westerhausen rendered ineffective assistance, based upon his examination

of the trial record (id. at 115-53); (5) Dr. Philip Esplin, a psychologist with a long history of testifying on behalf of the defense, and who opined that this case was complex and therefore necessitated at least consultation with an expert on the reliability of the memories of child witnesses (Exh. DD: R.T. 9/8/11, at 3-62); and (6) Terry Borden, Petitioner's step-father, who detailed his communications and interactions with Thompson and Westerhausen during the course of their representation of Petitioner at trial and on appeal (id. at 64-93).

Instead of closing arguments, the parties were permitted to file post-hearing memoranda in support of their respective positions on October 28, 2011. (Exh. TT: Defendant's Post-Hearing Memorandum; Exh. UU: State's Post-Hearing Memorandum.)

On November 10, 2011, Judge Hoffman issued a 7-page minute entry order denying post-conviction relief on all of Petitioner's non-precluded claims, reasoning that: (1) Petitioner offered insufficient proof that the jurors considered punishment during deliberations; (2) Petitioner likewise failed to prove his allegation of "vote trading," which is nonetheless not juror misconduct because federal and Arizona law tolerates compromise verdicts; (3) although the jurors considered extrinsic evidence (a teddy bear), the court found beyond a reasonable doubt that the verdicts were not tainted thereby; and (4) Petitioner failed to prove deficient performance and prejudice on any ineffectiveness claim. (Doc. 1-13: Minute Entry, filed on 11/10/11.)

On March 2, 2012, Petitioner petitioned the Arizona Court of Appeals to review Judge Hoffman's denial of post-conviction relief on the following claims:

> • Petitioner "was deprived of his state and federal constitutional rights to due process, confrontation, an impartial jury, and a fair trial, where the jurors received and considered extrinsic evidence during their deliberations—a child's Teddy Bear—which was presumptively prejudicial and, since that presumption of prejudice was never rebutted, the Defendant is entitled to a new trial." (Doc. 1-14: Petition for Review by Arizona Court of Appeals, at 1.) Significantly, Petitioner focused exclusively upon his prior argument that the teddy bear at issue constituted improper extrinsic evidence and therefore did not seek review of his other juror-misconduct claims—the jurors "traded votes," engaged in *ex parte* communications with the bailiff, and improperly considered (and grossly underestimated) potential punishment during deliberations. (Id. at 4-9.)

• Petitioner "was denied his state and federal rights to trial by jury, due process and a fair trial where, after a mistrial had been granted, the jurors reassembled on their own and recommenced their deliberations without ever being re-sworn or placed under oath and, thus, were without jurisdiction to render a valid verdict." (Id. at 1.) Petitioner elaborated, "[W]hen the jurors were discharged of their duties, they were relieved of their Oath. And once that happened, the twelve individuals, no longer legally a jury, had no power to return a verdict." (Id. at 10.)

• Petitioner's "convictions violate the due process clauses of the state and federal constitutions because Arizona's child molestation statutes (A.R.S. § 13-1410 and § 13-1407(E)) are unconstitutional on their face, and as applied, where they require the Defendant to prove that any touching lacked sexual motivation, thereby relieving the State of its burden to prove each essential element beyond a reasonable doubt, and no reasonable jury would have found [Petitioner] guilty without the burden having been shifted to the defense." (Id. at 1, 12-13.)

• Petitioner "was deprived of his state and federal constitutional rights to the effective assistance of trial and appellate counsel where, among other things, counsel failed to undertake an investigation and did not confer with or call necessary expert witnesses." (Id. at 1.) Petitioner specifically alleged that Thompson was ineffective because: (1) he did not "minimally consult with an expert concerning the reliability of children's testimony," and "the jurors would have benefitted from expert testimony on the fallibility of child witnesses," (2) Thompson did not offer medical testimony regarding Petitioner's ataxia to explain his unusual ("creepy and unordinary") appearance and support his defense that any touching was unintentional; (3) after the court declared a mistrial and discharged the jurors, Thompson should have objected to the jury's request to continue deliberations on the ground that the jurors lacked "jurisdiction"; (4) Thompson should have likewise conducted some investigation and consulted with Petitioner before agreeing to allow the jury to resume deliberations; (5) Thompson did not offer lay witnesses to testify that Petitioner behaved appropriately with children; (6) Thompson did not object to videotape footage of Detective Verdugo mentioning "another police investigation of [Petitioner] in New York" during his post-arrest interview; and (7) both Thompson and Westerhausen were ineffective for not challenging the constitutionality of Arizona's child-molestation statutes—an omission that allegedly prejudiced Petitioner because the State argued in its brief in opposition to his petition for certiorari that Petitioner never raised this argument at trial or on direct review, and the Supreme Court denied the writ. (Id. at 14-20.)

• Petitioner "was deprived of his state and federal constitutional rights to due process and a fair trial based upon significant prosecutorial misconduct, including, but not limited to, calling and coaching a witness [Luis] who had no recollection of the alleged incident." (Id. at 1.) Besides allegedly coaching Luis, Petitioner argued that the State engaged in prosecutorial vindictiveness after the trial court remanded the case to the grand jury by obtaining a new indictment that added three new victims and four additional counts. (Id. at 23-24.)

• Petitioner "was deprived of his state and federal constitutional right to be convicted only upon proof beyond a reasonable doubt and an impartial jury when the jurors were compelled to vote guilty under undue influence of the Foreman, who believed that [Petitioner] was guilty and, thus, reassembled the jurors, on his own initiative, after they had been discharged, despite a mistrial being declared." (Id. at 1.)

• "The trial court's failure to properly instruct the jurors, on a critical legal principle concerning how they could use evidence of other acts charged in the multi-count indictment to assess guilt or innocence, denied [Petitioner] his state and federal constitutional rights to due process and a fair trial and violated the constitutional command that judges shall declare the law." (Id. at 2, 22.)

• Petitioner "was deprived of his state and federal constitutional rights to due process and an impartial jury where Arizona Rules of Evidence 404(b) and 404(c) were impermissibly employed to deny a severance of the counts, lessen the prosecution's burden, and allowed evidence of each of the other alleged sexual offense[s] to be admitted at trial as proof of the other counts." (Id. at 2, 21-23.)

• "The cumulative effect of multiple trial errors violated due process and rendered the resulting criminal trial fundamentally unfair." (Id. at 2, 25.)

On April 23, 2012, the State filed its response opposing Petitioner's petition for review, to which Petitioner filed his reply on May 3, 2012. (Exh. VV: Response to Petition for Review; Doc. 1-15: Reply in Support of Petition for Review, at 1-10.)

On September 7, 2012, the Arizona Court of Appeals granted review, but denied relief in a memorandum decision, stating:

(1) Petitioner's constitutional challenge to A.R.S. § 13-1410(A) is precluded, pursuant to Rule 32.2(a)(3), because Petitioner failed to raise this claim on direct review. (Doc. 1-17: Arizona Court of Appeals' Memorandum Decision, at 2-3, ¶ 2.)

(2) Rule 32.2(a)(3) also precluded Petitioner's "claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application of Rule 404(b) and (c)." (Id. at 3, ¶ 3.)

(3) Petitioner's claim that the trial court erred by allowing the jurors to continue deliberating after its mistrial declaration was precluded under Rule 32.2(a) "because it had been addressed and rejected on appeal." (Id. at 3-4, ¶ 4.)

(4) Petitioner's "subject matter jurisdiction" challenge to the jury's resumption of deliberations and subsequent verdicts would not be considered on appeal because Petitioner did not raise a jurisdictional argument in his PCR petition, but instead this claim for the first time in his petition for review. (Id. at 4, ¶ 5.) Alternatively, Petitioner's claim lacked merit because "this is not a subject matter jurisdiction issue," because this term "refers to a court's statutory or constitutional power to hear and determine a particular type of case." (Id.)

(5) If brought pursuant to Arizona Rule of Criminal Procedure 32.1(a), Petitioner's claim of juror misconduct involving the stuffed animal "clearly was precluded [under Rule 32.2(a)] because it could have been raised on appeal." (Id. at 5, ¶ 7.) If raised instead pursuant to Arizona Rule of Criminal Procedure 32.1(e), which allows otherwise precluded claims supported by newly-discovered evidence, this juror-misconduct claim remains precluded because Petitioner "did not show that he exercised the requisite due diligence in attempting to secure the new evidence." (Id., citing Ariz. R. Crim. P. 32.1(e)(2)).

(6) Petitioner waived two ineffectiveness claims by failing to present them adequately to the trial court in his PCR petition and at the evidentiary hearing—to wit: (1) Thompson should have raised a jurisdictional challenge to the jury continuing to deliberate after the mistrial's declaration; and (2) trial counsel should have objected to videotape footage referencing another investigation. (Id. at 7, ¶ 11 & n.3.)

(7) Petitioner had not carried his burden of proving that Thompson's failure to object to the jury's resumed deliberations constituted deficient performance or resulted in prejudice, particularly because the court of appeals had rejected the underlying claim on direct appeal. (Id. at 7-8, ¶ 12.)

(8) Petitioner's claim, that Thompson failed to consult with him adequately before agreeing to allow the jury to resume deliberations, was groundless because this decision was "tactical" in nature (and apparently not one that required Petitioner's consent), and Petitioner had not asserted that he would have objected to this course of action, had there been lengthier consultations. (Id. at 8, ¶ 13.)

(9) The court of appeals adopted the trial court's rulings on the balance of Petitioner's ineffective-assistance claims. (Id. at 8, ¶ 14.)

On November 8, 2012, Petitioner petitioned the Arizona Supreme Court to review the denial of post-conviction relief, based upon the following arguments:

(1) "The court of appeals misapplied the law and created a harrowing new rule relating to when a claim of extrinsic evidence may be raised." (Doc. 1-18: Petition for Review by Arizona Supreme Court, CR-12-0416-PR, at 5-7.)

(2) "The hearing judge misapprehended the presumption of prejudice, and this case presents questions left open in the wake of State v. Hall regarding the prosecution's burden to rebut the presumption of prejudice," a claim that challenged Judge Hoffman's ultimate determination that the teddy bear at issue did not prejudice Petitioner beyond a reasonable doubt. (Id. at 8-10.)

(3) "Allowing a jury, which was released from its oath and no longer had jurisdiction, to reach a verdict is fundamental error that should have been reviewable in a post-conviction proceeding." (Id. at 11-12.)

(4) Petitioner "was convicted under an unconstitutional statute." (Id. at 12-13.)

(5) "Trial and appellate counsel were ineffective" because they did not raise claims challenging the constitutionality of Arizona's child-molestation statutes, did not allege prosecutorial vindictiveness, did not call experts to testify at trial. (Id. at 14-16.)

(6) "Was Petitioner deprived of his state and federal constitutional right to be convicted only upon proof beyond a reasonable doubt and an impartial jury when the jurors were compelled to vote guilty under undue influence of the Foreman, who, on his own, reassembled the jurors after they had been discharged, and had them recommence deliberations, even though a mistrial had been declared?" (Id. at 16.)
(7) "Did the trial court's failure to properly instruct the jurors, on a critical legal principle concerning how they could use evidence of other acts charged in the multi-count indictment to assess guilt or innocence, deny Petitioner his state and

federal constitutional rights to due process and a fair trial, and violate the constitutional command that judges shall declare the law?" (Id.)

(8) "Whether Petitioner was deprived of his state and federal constitutional rights to due process and an impartial jury where Arizona Rules of Evidence 404(b) and 404(c) were impermissibly employed to deny a severance of the counts, lessen the prosecution's burden, and allowed evidence of each of other sexual offenses to be admitted at trial as proof of the charged offenses?" (Id.)

On February 21, 2013, the State filed its opposition to the petition for review, to which Petitioner filed a reply on (Exh. WW: Response to Petition for Review; Doc. 1-19: Reply in Support of Petition for Review, CR-12-0416-PR.) On April 24, 2013, the Arizona Supreme Court summarily denied review. (Doc. 1-20: Order, Arizona Supreme Court CR-12-0416-PR.)

On October 7, 2013, the United States Supreme Court denied Petitioner's petition for writ of certiorari. See May v. Arizona, 134 S.Ct. 295 (2013); Doc. 1-21: Supreme Court letter, Stephen Edward May v. Arizona, No. 13-102.

In the instant habeas petition and supporting memorandum, Petitioner alleges the following:

(1) "Stephen May is being held in violation of his federal constitutional rights, including his right to confront the witnesses against him, right to an impartial jury, right to a fair trial and due process, where the jury foreman introduced extrinsic material, in the form of his daughter's 'large fluffy white stuff bear,' into the jury deliberations and the jurors conducted unauthorized experiments with the extrinsic evidence (teddy bear) on the ultimate issue of Stephen May's intent. U.S. Const. amends. V, VI and XIV."

(2) "Stephen May was denied his federal constitutional rights to trial by jury, due process and a fair trial where, after a mistrial had been granted, the jurors reassembled on their own and recommenced their deliberations without ever being re-sworn or placed under oath and, thus, were without jurisdiction to render a valid verdict. U.S. Const. amends. V, VI and XIV."

(3) "Stephen May's convictions violate his federal constitutional right to due process and a fair trial because Arizona's child molestation statutes (A.R.S. § 13-1410 and § 13-1407[E]) are unconstitutional on their face, and as applied, where they require the defendant, who is actually innocent, to prove that any touching lacked sexual motivation, thereby relieving the State of its burden to prove each essential element beyond a reasonable doubt, and no reasonable jury would have found the defendant guilty without the burden having been shifted to the defense. U.S. Const. amends. V, VI and XIV."

(4) "Stephen May was deprived of his federal constitutional right to the effective assistance of trial counsel. U.S. Const. amends. VI and XIV." Ground 4 includes the following sub-claims:

• Ground 4A: Thompson rendered ineffective assistance because: (1) he did not consult with experts regarding suggestive interview techniques, potential flaws in child-witness testimony, and the psychological profile of child molesters ("Ground 4A.1"); (2) he should have called an expert to testify about suggestive interview techniques ("Ground 4A.2"); (3) he should have called Dr. Esplin to testify about how certain factors might render children's memories genuine, but wrong, such as the incident's non-complex nature, the reinterpretation of a past event upon learning new information, and "the vulnerability of a child's memory to suggestions" and "memory contamination" ("Ground 4A.3"); and (4) he should have called an expert because one juror did not know how child molesters think and whether they are attracted to minors of both genders ("Ground 4A.4").

• Ground 4B: Thompson should have called an expert to testify about Petitioner's "lifelong battle with a neurological condition called Ataxia," in order to demonstrate that any touching was unintentional ("Ground 4B.1") and to explain his abnormal physical appearance, which led two jurors to believe that he looked "fidgety," "odd," "very scared he got caught doing something," "creepy and unordinary" and "like a child molester" ("Ground 4B.2").

• Ground 4C: Thompson did not allege that the State engaged in prosecutorial vindictiveness by obtaining a second indictment that added four new counts involving three additional victims (Luis A., Sheldon H., and Nicholas M.)

• Ground 4D: Thompson did not object when Judge Stephens did not make the findings required by Arizona Rules of Evidence 404(b) and 404(c).

• Ground 4E: Thompson did not object to the admission of videotape footage of Petitioner's post-arrest interview that included oblique references to a New York investigation that (according to Petitioner) were "allowed to permeate the trial" and were "unsettling" to one juror.

• Ground 4F: Thompson "failed to identify" that Arizona's child-molestation statutes are unconstitutional for allegedly shifting the burden of an element to the defendant.

• Ground 4G: Thompson should have consulted with Petitioner to a greater extent before announcing his lack of opposition ("Ground 4G.1"), Thompson should have objected to the jurors continuing to deliberate after Judge Stephens declared a mistrial ("Ground 4G.2"), and Thompson failed to make an adequate record when the jurors announced their desire to resume deliberations ("Ground 4G.3").

• Ground 4H: Thompson did not call any lay witnesses to offer testimony regarding Petitioner's appropriate non-sexual behavior with children.

• Ground 4I: "Trial counsel's representation was conflicted by and corrupted by his contractual relationship with the overburdened Phillips' firm."

• Ground 4J: Thompson's omissions should be viewed cumulatively.

(5) "Stephen May was deprived of his federal constitutional right to the effective assistance of appellate counsel. U.S. Const. amends. VI and XIV." Ground 5 contains two sub-claims:

• Ground 5A: Westerhausen did not challenge the constitutionality of Arizona's child-molestation statutes.

• Ground 5B: Westerhausen did not argue on appeal that the jury lacked jurisdiction to resume deliberations and return a verdict after the declaration of a mistrial.

(6) "Stephen May was deprived of his federal constitutional rights to due process and a fair trial based upon prosecutorial misconduct. U.S. Const. amends. V, VI and XIV." The components of Ground 6 include the following:

• Ground 6A: The State engaged in prosecutorial vindictiveness by obtaining a second indictment charging Petitioner with four new counts of child molestation against three additional victims (Luis A., Sheldon H., and Nicholas M.) while Petitioner's motion to remand the original indictment to the grand jury for a new probable-cause determination was still pending decision.

• Ground 6B: The prosecutor allegedly coached Luis A. during a recess in his testimony so that he could identify him from a photo array on redirect examination.

(7) "Stephen May was denied his federal constitutional right to be convicted only upon proof beyond a reasonable doubt and an impartial jury when the jurors were compelled to vote guilty under undue influence of the foreman, who believed that Stephen May was guilty and, thus, reassembled the jurors, on his own initiative, after they had been discharged, and had them recommence deliberations, despite a mistrial having been declared. U.S. Const. amends. V, VI and XIV." This ground has two subcomponents:

• Ground 7A: Foreman Richardson's pressure forced the holdout jurors (Root and Mayhew-Proeber) to swap votes with the majority as part of a "quid pro quo" whereby guilty verdicts would be returned on five counts and acquittals on the other two charges.

• Ground 7B: Foreman Richardson allegedly told one holdout juror (Mayhew-Proeber) that Petitioner would likely be imprisoned for just 1-to-2 years.

(8) "The trial court's failure to properly instruct the jurors, on a critical legal principle concerning how they could use evidence of other acts charged in the multi-count indictment to assess guilt or innocence, denied Stephen May his federal constitutional rights to due process and a fair trial. U.S. Const. amends. V, VI and XIV."

(9) "Stephen May was deprived of his federal constitutional rights to due process and an impartial jury where Arizona Rules of Evidence 404(b) and 404(c) were impermissibly employed to deny a severance of the counts, lessen the prosecution's burden, and allowed evidence of each of the other alleged sexual offenses to be admitted at trial as proof of the other counts. U.S. Const. amends. V, VI and XIV." Ground 9 alleges two different errors relating to Petitioner's consolidated trial:

• Ground 9A: The trial court's non-compliance with Arizona law, including its alleged failure to make "the four specific findings required to admit other-act evidence under Rule 404(b)," rendered its denial of Petitioner's severance motion reversible error.

• Ground 9B: The trial court's other-act-evidence instruction allegedly confused the jurors and led them to return guilty verdicts, based upon the clear-and-convincing-evidence standard.

(10) "The cumulative effect of the errors at trial and on appeal deprived Stephen May of his federal constitutional rights to due process, a fair trial and the effective assistance of counsel. U.S. Const. amends. V, VI and XIV."

(11) "Stephen May's federal constitutional right to due process was violated when the trial court's instructions to the jury on Arizona's child molestation statute, and the defense that any touching was not sexually motivated, placed the burden of proof on the Defendant. U.S. Const. amends. V and XIV."

(12) "Stephen May's federal constitutional right to an impartial jury, right to due process and guarantee against double jeopardy were violated when the trial judge permitted the jury to reconvene and deliberate further after declaring a mistrial and discharging the jurors. U.S. Const. amends. V, VI and XIV [Ground 12A]." Petitioner tacks three additional claims to this ground: (1) the jurors' communication with the bailiff was an ex parte communication with the court [Ground 12B]; (2) Judge Stephens never explored sua sponte whether the jurors had been exposed to outside influences [Ground 12C]; and (3) Judge Stephens "tacitly influenced the verdict by sending a loud and clear message that [she] wanted the jury to reach a decision" by "failing to take [the] rudimentary actions" of asking the jurors why they wanted to resume deliberations, re-charging the jurors, re-administering their oath, and ensuing that the jurors understood the acceptability of not being able to return a verdict at all [Ground 12D].

(13) "The individual sentence for each count, and the cumulative effect of 75 years imprisonment, violated Stephen May's federal constitutional right to be free from cruel and unusual punishment. U.S. Const. amends. VIII and XIV."

(14) "Stephen May is actually innocent of the charges and, but for the trial errors and constitutional violations, no reasonable juror would have found him guilty beyond a reasonable doubt. U.S. Const. amends. V, VI and XIV."

DISCUSSION

In their Answer, Respondents contend that Petitioner's claims are procedurally defaulted and/or fail on the merits. As such, Respondents request that the Court deny and dismiss Petitioner's habeas petition with prejudice.

A. Exhaustion and Procedural Default

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513

U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

Proper exhaustion requires a petitioner to have "fairly presented" to the state courts the exact federal claim he raises on habeas by describing the operative facts and federal legal theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.").

A "general appeal to a constitutional guarantee," such as due process, is insufficient to achieve fair presentation. Shumway, 223 F.3d at 987 (quoting Gray v. Netherland, 518 U.S. 152, 163 (1996)); see Castillo v. McFadden, 399 F.3d 993, 1003 (9th Cir. 2005) ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory."). Similarly, a federal claim is not exhausted merely because its factual basis was presented to the state courts on state law grounds – a "mere similarity between a claim of state and federal error is insufficient to establish exhaustion." Shumway, 223 F.3d at 988 (quotations omitted); see Picard, 404 U.S. at 275-77.

Even when a claim's federal basis is "self-evident," or the claim would have been decided on the same considerations under state or federal law, a petitioner must still present

the federal claim to the state courts explicitly, "either by citing federal law or the decisions of federal courts." Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000) (quotations omitted), amended by 247 F.3d 904 (9th Cir. 2001); see Baldwin v. Reese, 541 U.S. 27, 32 (2004) (claim not fairly presented when state court "must read beyond a petition or a brief ... that does not alert it to the presence of a federal claim" to discover implicit federal claim).

Additionally, under the independent state grounds principle, a federal habeas court generally may not review a claim if the state court's denial of relief rests upon an independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). The United States Supreme Court has explained:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31. A petitioner who fails to follow a state's procedural requirements for presenting a valid claim deprives the state court of an opportunity to address the claim in much the same manner as a petitioner who fails to exhaust his state remedies. Thus, in order to prevent a petitioner from subverting the exhaustion requirement by failing to follow state procedures, a claim not presented to the state courts in a procedurally correct manner is deemed procedurally defaulted, and is generally barred from habeas relief. See id. at 731-32.

Claims may be procedurally barred from federal habeas review based upon a variety of factual circumstances. If a state court expressly applied a procedural bar when a petitioner attempted to raise the claim in state court, and that state procedural bar is both

"independent"[2] and "adequate"[3] – review of the merits of the claim by a federal habeas court is barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

Moreover, if a state court applies a procedural bar, but goes on to alternatively address the merits of the federal claim, the claim is still barred from federal review. See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. ... In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.") (citations omitted); Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003) ("A state court's application of a procedural rule is not undermined where, as here, the state court simultaneously rejects the merits of the claim.") (citing Harris, 489 U.S. at 264 n.10).

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002) ("[T]he procedural default rule barring consideration of a federal claim 'applies only when a state court has been presented with the federal claim,' but declined to reach the issue

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[2] A state procedural default rule is "independent" if it does not depend upon a federal constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

[3] A state procedural default rule is "adequate" if it is "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-53 (1982)).

for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally barred.'") (quoting Harris, 489 U.S. at 263 n.9).

In Arizona, claims not previously presented to the state courts via either direct appeal or collateral review are generally barred from federal review because an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive petition is permitted. See Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior Rule 32 post-conviction proceedings. See, e.g., Stewart, 536 U.S. at 860 (determinations made under Arizona's procedural default rule are "independent" of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S. 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); State v. Mata, 185 Ariz. 319, 334-36, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the "cause and prejudice" test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. "A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an external impediment such as government interference or reasonable

unavailability of a claim's factual basis." Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations and internal quotations omitted). Ignorance of the State's procedural rules or other forms of general inadvertence or lack of legal training and a petitioner's mental condition do not constitute legally cognizable "cause" for a petitioner's failure to fairly present his claim. Regarding the "miscarriage of justice," the Supreme Court has made clear that a fundamental miscarriage of justice exists when a Constitutional violation has resulted in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96.

B. Merits

Pursuant to the AEDPA[4], a federal court "shall not" grant habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the state court decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court ... ." Robinson, 360 F.3d at 1055.

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 404-05. "A state court's decision can involve an 'unreasonable application' of Federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2)

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[4] Antiterrorism and Effective Death Penalty Act of 1996.

extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

Throughout Petitioner's habeas petition, he raises multiple claims alleging ineffective assistance of trial and appellate counsel. The two-prong test for establishing ineffective assistance of counsel was established by the Supreme Court in Strickland. In order to prevail on an ineffective assistance claim, a convicted defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See id. at 687-88.

Regarding the performance prong, a reviewing court engages a strong presumption that counsel rendered adequate assistance, and exercised reasonable professional judgment in making decisions. See id. at 690. "[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." Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995) (quoting Strickland, 466 U.S. at 689). Moreover, review of counsel's performance under Strickland is "extremely limited": "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.), judgment rev'd on other grounds, 525 U.S. 141 (1998). Thus, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

If the prisoner is able to satisfy the performance prong, he must also establish prejudice. See id. at 691-92; see also Smith, 528 U.S. at 285 (burden is on defendant to show prejudice). To establish prejudice, a prisoner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." Strickland, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. A court need not determine whether counsel's performance was deficient before examining whether prejudice resulted from the alleged deficiencies. See Smith, 528 U.S. at 286 n.14. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. (quoting Strickland, 466 U.S. at 697).

In reviewing a state court's resolution of an ineffective assistance of counsel claim, the Court considers whether the state court applied Strickland unreasonably:

> For [a petitioner] to succeed [on an ineffective assistance of counsel claim], ... he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. Rather, he must show that the [state court] applied Strickland to the facts of his case in an objectively unreasonable manner.

Bell v. Cone, 535 U.S. 685, 698-99 (2002) (citations omitted); see also Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002) ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied Strickland incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied Strickland to the facts of his case in an objectively unreasonable manner.") (citations omitted).

C. Petitioner's Grounds for Relief

1. Ground 1

In Ground 1, Petitioner contends that he "is being held in violation of his [Fifth, Sixth, and Fourteenth Amendment] federal constitutional rights, including his right to confront the witnesses against him, right to an impartial jury, right to a fair trial and due process, [because] the jury foreman introduced extrinsic material, in the form of his daughter's 'large fluffy white stuffed bear,' into the jury deliberations and the jurors conducted unauthorized experiments with the extrinsic evidence (teddy bear) on the ultimate issue of [Petitioner's] intent." (Doc. 1, at 8; Doc. 2, at 24-52.)

According to the record, nine jurors who were interviewed or deposed pursuant to PCR counsels' investigation between May 18, 2008, and June 23, 2011, reported that the foreman had brought a stuffed animal to the jury room to serve as a visual aide and proxy for a child while discussing the trial evidence during deliberations. Ground 1, however, does not warrant habeas relief as the Arizona Court of Appeals found this claim precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a)(3)—a procedural bar that constitutes an independent and adequate state-law basis for denying relief on claims that a defendant could have presented at trial or on direct review, but failed to do so.

On October 11, 2007, Petitioner, through Attorney Westerhausen, filed an opening brief that presented four arguments to the Arizona Court of Appeals, none of which alleged juror misconduct. (Doc. 1-2: Opening Brief, at 1-34.) Petitioner's subsequent pleadings on direct review likewise omitted any allegations of juror misconduct. (Doc. 1, at 4; Doc. 1-3: Reply Brief, at 2-10; Doc. 1-4: Memorandum Decision, at 1-7; Doc. 1-5: Petition for Review by Arizona Supreme Court, at 1-6.)

The March 30, 2010 PCR petition raised the claim that Foreman Richardson had engaged in jury misconduct by bringing a stuffed animal into the jury room, stating:

> There is no dispute that Mr. Richardson brought a large white teddy bear into the jury room, without the knowledge or permission of the judge or the parties. The jury conducted experiments with the teddy bear to evaluate the evidence about how [Petitioner] touched the children. These illicit experiments with the teddy bear were particularly prejudicial to [Petitioner's] defense because the jurors viewed the video-taped interviews of two of the child-accusers, who were asked by the interviewers to demonstrate the alleged touchings by using a teddy bear.

(Doc. 1-9: PCR, at 41.)

Following an evidentiary hearing on the issue, Judge Hoffman denied relief on Ground 1 in a minute entry order that made the following factual findings and legal conclusions:

> The jury foreman brought a stuffed bear (or rabbit according to one juror [Mayhew-Proeber]) into the jury room during deliberations and used it briefly to demonstrate how defendant might have touched the victims and how he reached his conclusions in the case. (Hearing Exhibit 29 [Richardson] at 13:14;

14:11). Several other jurors handled the stuffed animal, and one juror also used it to give a visual of "what possibly could have happened." (Hearing Exhibit 31 [Harris] at 11:12-13). One of the jurors said the presence of the stuffed animal helped the jurors to see "how he was holding the kids on his lap and how he put his hands between their legs and different things like that." (Hearing Exhibit 49 [Reeves] at 17:22-24). Another said, "he was just showing how different ways that could have been, if he could have held it on his lap or how things could have happened this way." (Separate Appendix to Defendant's Memorandum in Support of Petition for Post-Conviction Relief, Tab 73 [Reeves], 17:6-17:8). Another said, "we brought it in to kind of discuss about it to kind of look at specifics where if a child points here does that really mean this and just kind of see exactly what that translates to in person instead of on the video." (*Id.*, Tab 76 [Rzucidlo], 10:6-9). It was used "Just to develop a visual of, you know, different way that that—the person's hand could be if they were going to toss a child in a pool, for instance, and try to elaborate on how the children said that they had been touched as he threw them in a pool or that sort of thing." (*Id.*, Tab 77 [Spradlin], 22:26-23:1).

Evidence presented during the trial established that a stuffed bear was used during forensic interviews of the alleged victims to demonstrate how they were touched by defendant. The stuffed animal in the jury room was used in the same manner as the stuffed bear was during the interviews of the alleged victims.

Because the jury considered extrinsic evidence (the stuffed bear), prejudice is presumed unless the State proved beyond a reasonable doubt that the extrinsic evidence did not taint the verdict. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P. 3d 90, 95 (2003); *State v. Poland*, 132 Ariz. 269, 283, 645 P. 2d 784, 798 (1982).

There is no evidence that the presence of the stuffed animal was either favorable or unfavorable to defendant. The stuffed animal was a neutral object used by some of the jurors for demonstrative purposes. Because there is no evidence that the presence of the stuffed animal influenced the verdicts, the Court finds beyond a reasonable doubt that extrinsic evidence did not taint the verdicts.

...

THE COURT FINDS no evidence that juror misconduct influenced the verdicts they reached in this case.

(Doc. 1-13: Minute Entry, filed on November 7, 2011, at 2-3.)

In his petition for review by the Arizona Court of Appeals, Petitioner argued that Judge Hoffman improperly denied post-conviction relief on Ground 1 because: "(1) the jury considered presumptively prejudicial extrinsic evidence; (2) the prosecution failed to rebut the presumption; and (3) the hearing judge misapprehended the presumption of prejudice."

(Doc. 1-14: Petition for Review, at 4-9.) The Arizona Court of Appeals, however, found Ground 1 to be precluded because Petitioner did not raise this claim on direct appeal, stating:

> ¶ 6 May next contends the trial court erred in rejecting his claim of juror misconduct. The jury foreman brought a stuffed animal into deliberations for demonstrative purposes. May argues, as he did below, that the stuffed animal was "extrinsic evidence" and should not have been permitted in the jury room. He contends the court erred by finding he was not prejudiced by its use.
>
> In neither his petition for post-conviction relief nor in his petition for review did May specify the subsection of the rule under which he was seeking relief for this purported misconduct. *See* Ariz. R. Crim. P. 32.5 ("The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him...."). To the extent the claim fell under Rule 32.1(a), it clearly was precluded because it could have been raised on appeal. Ariz. R. Crim. P. 32.2(a). But May seemed to assert this claim under Rule 32.1(e) based on newly discovered evidence. In his petition for post-conviction relief, he stated that "significant relevant facts were not available until after trial and appeal." "Evidence is not newly discovered unless ... at the time of trial ... neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Thus, even assuming May was attempting to raise a claim of newly discovered evidence, he did not show he exercised the requisite due diligence in attempting to secure the new evidence. *See* Ariz. R. Crim. P. 32.1(e)(2). Consequently, May has not sustained his burden of establishing the trial court abused its discretion by denying relief on this ground.

(Doc. 1-17: Memorandum Decision, 2 CA-CR 2012-0257-PR, at 5, ¶ 7.)

In his petition for review by the Arizona Supreme Court, Petitioner not only reiterated his prior challenges to Judge Hoffman's ruling, but also argued that the Arizona Court of Appeals had "adopted a harrowing new approach whereby a defendant is barred from raising a challenge to the jury's use of new evidence in a PCR proceeding." (Doc. 1-18: Petition for Review, at 5-12.) On April 24, 2013, however, the Arizona Supreme Court summarily denied review. (Doc. 1-20: Order, Arizona Supreme Court CR-12-0416-PR.)

The Court finds that Ground 1 does not warrant habeas relief because the Arizona Court of Appeals found this claim precluded, pursuant to Rule 32.2(a) because Petitioner could have raised Ground 1on direct appeal, but failed to do so. Arizona Rule of Criminal Procedure 32.2(a) is an independent and adequate state ground that bars federal habeas review of constitutional claims. See, e.g., Stewart, 536 U.S. at 860 (determinations made

under Arizona's procedural default rule are "independent" of federal law); Smith, 241 F.3d at 1195 n.2 ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S. 856 (2002); see also Ortiz, 149 F.3d at 931-32 (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure).

Petitioner's conclusory attempt to argue that Rule 32.2(a) does not constitute a regularly applied or well-established state procedural rule because – (1) "[t]here is no established authority in Arizona requiring defendants to raise an unknown claim of juror misconduct on direct appeal," (2) "the Arizona Court of Appeals' decision does not cite to a single decision in support of its aberrant assertion that juror misconduct must be asserted on direct appeal," (3) the Arizona Supreme Court "recently confirmed [that] a defendant who learns of juror misconduct more than 10 days after trial ... may still seek post-conviction relief pursuant to Rule 32," and (4) juror-misconduct claims, like allegations of ineffective assistance of counsel, should be reserved for PCR proceedings, (Doc. 2, at 46-48) – is unpersuasive. See Stewart, 536 U.S. at 860; Murray, 745 F.3d at 1016; Ortiz, 149 F.3d at 931-32. See also State v. Karpin, 2013 WL 6040376 *2, ¶ 7 (Ariz. App. Nov. 13, 2013) (applying Rule 32.2(a)(3) to preclude post-conviction relief on jury-misconduct claims that the defendant had not raised on direct appeal).

Although a procedural default may be overcome upon a showing of cause and prejudice or a fundamental miscarriage of justice, see Coleman, 501 U.S. at 750-51, Petitioner has not established that any exception to procedural default applies.

Further, Petitioner cannot establish cause for procedurally defaulting Ground 1 by blaming Thompson and/or Westerhausen for not presenting this claim since Petitioner never presented the state courts with the claim that his trial and appellate attorneys rendered ineffective assistance by failing to raise this juror-misconduct issue; and a federal habeas

petitioner trying to excuse his procedural default by showing ineffective assistance of counsel as cause must first have presented the ineffective assistance claim to the state court.

Consequently, Ground 1 is procedurally barred.

2. Grounds 2, 4G.2, and 5B

Grounds 2, 4G.2, and 5B are all premised upon the following series of events: (1) after Judge Stephens declared a mistrial and excused the jury, the bailiff conveyed the jurors' request to resume deliberations; (2) Judge Stephens instructed the bailiff to advise the jurors that they could resume deliberations; and (3) Judge Stephens never summoned the jurors into the courtroom for a second administration of their oaths. (Exh. J: R.T. 1/12/07, at 9-12.) Petitioner contends that three distinct federal constitutional violations stem from the fact that the jurors were not re-sworn before they resumed deliberations. Specifically, Petitioner claims:

> Ground 2: "Stephen May was denied his federal constitutional rights to trial by jury, due process and a fair trial where, after a mistrial had been granted, the jurors reassembled on their own and recommenced their deliberations without ever being re-sworn or placed under oath and, thus, were without jurisdiction to render a valid verdict. U.S. Const. amends. V, VI and XIV."[5] (Doc. 1, at 10.)
>
> Ground 4G.2: Trial counsel rendered ineffective assistance because he did not object to the jury resuming its deliberations, based upon the rationale that Judge Stephens' mistrial declaration and her verbal discharge absolved the jurors of their oath and their "jurisdiction to reach a verdict." (Doc. 1, at 17; Doc. 2, at 70.)
>
> Ground 5B: "Stephen May was deprived of his federal constitutional right to the effective assistance of appellate counsel [Tracey Westerhausen] U.S. Const. amends. VI and XIV," because Westerhausen did not argue on appeal that the jury lacked

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[5] Like many of Petitioner's claims, Grounds 2 and 12A, which were raised during Petitioner's PCR proceeding and direct appeal, respectively, appear to overlap. Ground 2, however, asserts that the jury lacked jurisdiction to return a valid verdict, allegedly because the jurors had not undertaken a second oath after Judge Stephens rescinded her mistrial declaration. In contrast, Ground 12A alleges that Petitioner's "federal constitutional right to an impartial jury, right to due process and guarantee against double jeopardy were violated when the trial judge permitted the jury to reconvene and deliberate further after declaring a mistrial and discharging the jurors," in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

jurisdiction to resume deliberations and return a verdict after the declaration of a mistrial. (Doc. 1, at 19.)

a. Ground 2

In its memorandum decision affirming Judge Hoffman's denial of post-conviction relief, the Arizona Court of Appeals stated, in pertinent part:

> ¶ 4 May contends for the first time on review that he is entitled to relief because "the jury did not have jurisdiction to reach a verdict." He bases this argument on the fact that the jurors continued deliberating after a mistrial initially was declared. [FN2] The propriety of the continued deliberations was raised in May's direct appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11.[6] And the trial court correctly found that his claim [alleging that] it had erred by permitting the jury to continue deliberating was precluded because it had been addressed and rejected on appeal. Consequently, to the extent May argues he is entitled to relief due to the jury's continued deliberations, his argument is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).
>
> > FN2. After extensive deliberations, the jury informed the trial court that it was deadlocked. The court dismissed the jury and declared a mistrial. A few minutes later, the jury asked to begin deliberations again, and both the prosecutor and May's attorney stated they did not object.
>
> ¶ 5 May nevertheless contends he can raise this issue in his petition for review because, given the initial declaration of a mistrial, the jury lacked subject matter jurisdiction to decide his case. But in his petition for post-conviction relief before the trial court, May did not base his argument on subject matter jurisdiction. We will not consider May's argument because we do not consider issues raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review). Moreover, this is not a subject matter jurisdiction issue. *See State v. Maldonado*, 223 Ariz. 309, ¶ 14, 223 P.3d 653, 655 (2010) ("'subject matter jurisdiction' refers to a court's statutory or constitutional power to hear and determine a particular type of case").

(Doc. 1-17: Memorandum Decision, at 3-4, ¶¶ 4-5.)

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[6] On direct review, Petitioner presented the argument now advanced as Ground 12A of his habeas petition: "Reconvening a jury, after having declared a mistrial and excusing the jury, violates a number of state and federal constitutional rights, specifically, the right to an impartial jury; the right to due process; and, the guarantee against double jeopardy." (Doc. 1-2: Opening Brief, 1 CA-CR 07-0144, at 17.)

Thus, the Arizona Court of Appeals upheld the denial of post-conviction relief on Ground 2 because any claim based on lack of subject matter jurisdiction was raised for the first time in his petition for review. Ariz.R.Crim.P. 32.9(c)(1)(ii) confines claims considered in a petition for review to the Arizona Court of Appeals to those claims presented in the trial court. Petitioner's failure to raise this claim in his original petition in the trial court means this claim was not "fairly presented" in state court and has not been properly exhausted. See Roettgen, 33 F.3d at 38 ("A petitioner has not satisfied the exhaustion requirement unless he has fairly presented his claim to the highest state court. [Citation omitted]. Submitting a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation. [Citation omitted]."). Because the time to present this claim in a state post-conviction proceeding has passed, the claim is procedurally defaulted. See Ariz.R.Crim.P. 32.2(a), 32.4(a).

Petitioner has not established that any exception to procedural default applies. To the extent Petitioner attempts to establish cause by asserting ineffective assistance of trial and appellate counsel (Grounds 4G.2 and 5B), said claims will be discussed below.

b. Grounds 4G.2 and 5B

Petitioner is also not entitled to habeas relief on Grounds 4G.2 and 5B, which challenge the performance of trial and appellate counsel, respectively, on the ground that they did not object to the jury's jurisdiction to return a verdict after Judge Stephens' mistrial declaration and verbal discharge of the jurors, because the Arizona Court of Appeals found these ineffectiveness claims to be barred. Specifically, the Arizona Court of Appeals found, in pertinent part:

> ¶ 11 May advances several claims of ineffective assistance of trial and appellate counsel. Two of his claims—that counsel was ineffective for failing to raise a jurisdiction challenge to the continued deliberations and failing to object to a video of post-arrest questioning—are being raised for the first time on review.[] Therefore, we do not address these claims. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

(Doc. 1-17: Memorandum Decision, 2 CA-CR 2012-0257-PR, at 7, ¶ 11.)

By raising Grounds 4G.2 and 5B for the first time on appellate review, these claims were not fully and fairly presented to state courts. See 28 U.S.C. § 2254(b). Failure to fairly present these grounds has resulted in procedural default because Petitioner is now barred from returning to state courts. See Ariz.R.Crim.P. 32.2(a), 32.4(a). And, Petitioner has not established that any exception to procedural default applies.

Moreover, as to the merits of his claims, the Court notes that throughout his habeas petition, Petitioner alleges multiple grounds of ineffective assistance of trial and/or appellate counsel, most of which consist of bald assertions and conclusory suggestions that counsel failed to employ tactics that Petitioner would have chosen with respect to witnesses, evidence, and strategy. "In determining whether the defendant received effective assistance of counsel, '[the court] will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight,' but rather, will defer to counsel's sound trial strategy." Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001) (quoting Strickland, 466 U.S. at 689). "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." Strickland, 466 U.S. at 681.

Here, Petitioner cannot prevail on the merits of these ineffectiveness challenges. Specifically, the Arizona Court of Appeals determined that the jury retained authority to return verdicts in Petitioner's case, (Doc. 1-4: Memorandum Decision, 1 CA-CR 07-0144, at 4, ¶ 10), which eviscerates any argument that Thompson and Westerhausen rendered deficient performance when they did not raise a jurisdictional challenge at trial and on appellate review. Moreover, had Thompson or Westerhausen raised the jurisdictional question at trial and on appellate review, Petitioner has failed to demonstrate the reasonable probability of a different outcome. Thus, the Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of federal law.

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3. Grounds 3, 4F, and 5A

Grounds 3, 4F, and 5A are premised upon the alleged unconstitutionality of Arizona's child-molestation statutes. Petitioner alleges as follows:

> Ground 3: "Stephen May's convictions violate his federal constitutional right to due process and a fair trial because Arizona's child molestation statutes (A.R.S. § 13-1410 and § 13-1407[E]) are unconstitutional on their face, and as applied, where they require the defendant, who is actually innocent, to prove that any touching lacked sexual motivation, thereby relieving the State of its burden to prove each essential element beyond a reasonable doubt, and no reasonable jury would have found the defendant guilty without the burden having been shifted to the defense. U.S. Const. amends. V, VI and XIV." (Doc. 1, at 12.)
>
> Ground 4F: Thompson rendered ineffective assistance of trial counsel because he "failed to identify" that Arizona's child-molestation statutes are unconstitutional for allegedly shifting the burden of an element to the defendant. (Doc. 1, at 17.)
>
> Ground 5A: Westerhausen rendered ineffective assistance of appellate counsel because she did not challenge the constitutionality of Arizona's child-molestation statutes on direct review. (Doc. 1, at 19.)

a. Ground 3

In its memorandum decision affirming Judge Hoffman's denial of post-conviction relief, the Arizona Court of Appeals found that Ground 3 was precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), because Petitioner had not challenged the constitutionality of Arizona's child-molestation statute at trial or on direct appeal. (Doc. 1-17: Arizona Court of Appeals' Memorandum Decision, 2 CA-CR 2012-0257-PR, at 2-3, ¶ 2.) Accordingly, Ground 3 is procedurally defaulted because preclusion under Rule 32.2(a) constitutes an adequate and independent procedural bar.

Petitioner has not established that any exception to procedural default applies. To the extent Petitioner attempts to establish cause by asserting ineffective assistance of trial and appellate counsel (Grounds 4F and 5A), said claims will be discussed below.

b. Grounds 4F and 5A

Petitioner's claims as alleged in Grounds 4F and 5A are denied on the merits, as the Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of federal law.

Initially, the Court finds that Petitioner has failed to establish a reasonable probability that the outcome of his case would have been different, had Thompson and Westerhausen actually challenged the constitutionality of Arizona's child-molestation statutes at trial and on direct appeal and prevailed. The facts demonstrate that Petitioner was motivated by sexual interest when he touched the genitals of Danielle, Luis, and Taylor. The repetition and deliberate nature of sexual contact with these children demonstrates Petitioner's sexual motivation and diminishes any contention that the touching was inadvertent or otherwise innocent. Specifically, Danielle reported that: (1) Petitioner "grabbed" her and seated her on his lap before he began touching her vagina over her bathing suit; (2) when Danielle tried to escape by swimming away, Petitioner caught her and returned her to his lap; (3) although Danielle told Petitioner to stop when he touched her vagina, he continued doing so; and (4) Petitioner touched her vagina every time she saw him at the pool. (Exh E: R.T. 1/3/07, at 119-21, 124-25, 128, 130, 137; Exh. F: R.T. 1/4/07, at 97, 109; Exh. H: R.T. 1/9/07, at 54.) Taylor similarly recalled that: (1) Petitioner touched her vagina over her bathing suit while she was sitting on his lap in the pool's Jacuzzi area; and (2) Taylor had been touched in this manner "20 times." (Exh. E: R.T. 1/3/07, at 73-77, 82-84, 87, 106; Exh. I: R.T. 1/10/07, at 9, 11-12, 22, 90-91.) Luis reported that Petitioner placed his open palm on the zipper area of his pants and rested it over his genitals while Petitioner was helping him with a computer in the classroom. (Exh. E: R.T. 1/3/07, at 7-8, 16-17; Exh. F: R.T. 1.4.07, at 7-8.) However, when Luis told his mother, Sandra, that Petitioner had touched his genitals, he demonstrated the act by wiggling his fingers over his crotch and maintained that Petitioner had done this "on purpose." (Exh. E: R.T. 1/3/07, at 52, 55, 57-58, 60.)

Significantly, the Court also notes that the jurors in this case were given the following voluntary-act instruction, which implicated Petitioner's accidental or unintentional-related evidence:

> Before you may convict the defendant of the charged crimes, you must find the State proved beyond a reasonable doubt that the defendant committed a

> voluntary act or omitted to perform a duty imposed upon the defendant by law that the defendant was capable of performing.
>
> A voluntary act means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant committed the act voluntarily or failed to perform the duty imposed on the defendant.

(Exh. A: P.I., Item 165, at 8; Exh. I: R.T. 1/10/07, at 107.) And, the following instruction on the elements of child molestation also informed the jury that the prosecution was required to prove beyond a reasonable doubt that Petitioner "knowingly" touched the children's genitals—a burden the State could not meet with proof that Petitioner had accidentally done so:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.

(Exh. A: P.I., Item 165, at 8; Exh. I: R.T. 1/10/07, at 107-08.)

The jury was instructed that "knowingly" meant that "a defendant acted with awareness of or the belief in the existence of conduct or circumstances constituting an offense," that "knowingly" could be proven with evidence showing that Petitioner acted "intentionally," and that "intentionally" meant that "a defendant's objective is to cause that result or to engage in that conduct." (Exh. A: P.I., Item 165, at 9-10; Exh. I: R.T. 1/10/07, at 108-09.)

Thus, the jury would have still convicted Petitioner on the child-molestation counts involving Danielle, Luis, and Taylor, even had Thompson successfully prevailed on a motion to declare Arizona's child-molestation statutes unconstitutional and thereafter obtained jury instructions requiring the State to prove Petitioner's sexual motivation beyond a reasonable doubt. This conclusion also demonstrates that Petitioner's convictions would have been affirmed, even had Westerhausen raised this constitutional argument before the Arizona Court of Appeals on direct review.

Next, Petitioner cannot demonstrate that Thompson and Westerhausen rendered deficient performance. Thompson and Westerhausen reasonably forewent challenging Arizona's child-molestation statutes on federal constitutional burden-shifting grounds and, instead, made the tactical decision to make statutory-based arguments that the State had the burden of disproving Petitioner's defense of lack of sexual motivation beyond a reasonable doubt. As noted above, Thompson argued that the State had to carry the burden of proving sexual interest beyond a reasonable doubt because several months before Petitioner's trial, the Legislature had amended Sections 13-103(B) and 13-205(A) to reassign the burden of proving certain defenses to the State, and the Arizona Court of Appeals held that this amendment retroactively applied to defendants who committed their offenses before this legislation, but had yet to be tried. (Exh. A: P.I., Item 241, at 3; Exh. G: R.T. 1/9/07, at 72-73; Exh. I: R.T. 1/10/07, at 100.) On appeal, Westerhausen likewise advanced a statutory-based argument to challenge Judge Stephens' final instructions, namely that Section 13-1407(E)'s defense of lack of sexual motivation did not fall within Section 13-103(B)'s definition of affirmative defense, and that Section 13-205(A)'s allocation of the burden of proof to the defendant therefore did not apply to this defense. These tactical decisions were objectively reasonable especially considering that the Arizona judiciary had already rejected burden-shifting federal constitutional challenged to Section 13-1407(E):

> The defendant argues that the statutes defining child molestation are unconstitutional because they impermissibly shift to him the burden of disproving an element of the offense. He also argues that the jury instructions in this case inadequately informed the jury of the state's burden of proof. We reject both contentions.
> ...
>
> The defendant asserts that these statutes effectively created a presumption regarding the existence of sexual motivation which he was required to disprove. He argues that this violated due process. *See Mullaney v. Wilbur*, 421 U.S. 684 [ ] (1975). ...
>
> In any event, we find the argument to be without merit. The statutes in question did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive. This is constitutionally permissible. *Patterson v. New York*, 432 U.S. 197, 205-07 [ ] (1977); *Gretzler*, 126 Ariz. at 89, 612 P.2d at 1052.

> We likewise reject the suggestion that the statutes, which contain no reference at all to a presumption, nevertheless create a presumption on the "element" of motivation by sexual interest. *See Patterson*, 432 U.S. at 205 [ ]. Contrary to the defendant's implication, proving the existence of such motivation was not necessary to establish guilt of child molestation under the statute at issue.

Sanderson, 898 P.2d at 490-91. See also State v. Getz, 944 P.2d 503, 505-08 (Ariz. 1997) (holding that statute defining sexual abuse under A.R.S. § 13-1404 must be applied "as written" because its text is "plain on its face," and refusing to "inject" any affirmative defense under § 13-1407 into the crime's elements); State v. Sandoval, 857 P.2d 395, 399 (Ariz. App. 1993) ("A.R.S. section 13-1407(E) makes it a defense to prosecutions brought pursuant to A.R.S. section 13-1410 or to A.R.S. section 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.").

Because Petitioner cannot establish deficient performance or prejudice, he is not entitled to relief on Grounds 4F and 5A. Moreover, Ground 3 remains procedurally defaulted.

4. Ground 4

In Ground 4, Petitioner raises 10 grounds for relief claiming that his attorney, Joel Thompson, was ineffective. Grounds 4A, 4B, 4E, 4G.1, 4G.3, 4H, 4I, and 4J will be addressed in this section. Grounds 4C, 4D, 4F, and 4G.2 are addressed in the sections of this Recommendation discussing Grounds 2, 3, 6A, and 9A.

a. Ground 4A

Ground 4A has four components: (1) the contention that Thompson rendered deficient performance because he did not consult with experts regarding suggestive interview techniques, potential flaws in child-witness testimony, and the psychological profile of child molesters ("Ground 4A.1"); (2) the claim that Thompson should have called an expert to testify about suggestive interview techniques ("Ground 4A.2"); (3) the argument that Thompson should have called Dr. Esplin to testify about how certain factors might render children's memories genuine, but wrong ("Ground 4A.3"); and (4) the contention that Thompson should have called an expert because one juror did not know how child molesters think and whether they are attracted to minors of both genders ("Ground 4A.4"). (Doc. 1, at

14-15; Doc. 2, at 60-68.) The Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

After conducting an evidentiary hearing, Judge Hoffman denied relief on Ground 4A, reasoning as follows:

> Defendant claims his trial counsel was ineffective in failing to investigate and present testimony from expert witnesses and character witnesses. Trial counsel testified that he thought he could point out any deficiencies in the forensic interviews of the victims through cross-examination of the officer who conducted the forensic interviews and through closing argument. (Hearing Exhibit 1, at ¶¶ 8-9, 12-13, R.T. of Sept. 7, 2011 at 39.)
>
> He cross-examined each of the child victims, tested their memories of the events, pointed out inconsistencies in their testimony and elicited testimony that supported the defense theory of the case. Dr. Esplin, defendant's expert in the area of child witnesses, testified that he rarely testified for the prosecution. (R.T. of Sept. 8, 2011 at 20-21.) He also testified that trial counsel brought issues regarding credibility of the victims to the attention of the jury. (*Id.* at 34-37.) The Court has considered his testimony at the evidentiary hearing and does not find that his testimony established a reasonable likelihood of a different result had he testified at trial....
>
> THE COURT FINDS that there is no evidence that the performance of either trial or appellate counsel fell below prevailing objective standards. Even if it had, the Court finds no evidence of any resulting prejudice to the defendant.
>
> IT IS HEREBY ORDERED denying defendant's Petition for Post-Conviction Relief as to all grounds raised at the evidentiary hearing.

(Doc. 1-13: Minute Entry, filed on November 7, 2011, at 5-7.)

- **Ground 4A.1**

Petitioner has failed to demonstrate that Thompson's failure to consult experts on forensic interviews, child witnesses, and the internal thought patterns of pedophiles while preparing for Petitioner's trial constituted deficient performance. Petitioner predicates Ground 4A.1 upon the opinions of Dr. Esplin and his legal expert, Michael Piccarreta, that Thompson should have at least consulted with an expert because the State would call four different children to testify at his consolidated trial. (Exh. CC: R.T. 9/7/11, at 126-27; Exh. DD: R.T. 9/8/11, at 10-11, 62.)

In this case, however, Judge Hoffman received sworn testimony and an affidavit from Thompson establishing that: (1) the Arizona Board of Legal Specialization certified him as

a specialist in criminal law; (2) Thompson practiced criminal law exclusively since 1976 and served as a *pro tem* judge for an 8-year period between 1987 and 1995; (3) he had "wide experience representing clients charged with sex offenses" and conservatively estimated that he had "35 to 50 trials" involving such charges; and (4) based upon the aforementioned prior experience, Thompson "consider[ed] himself well-versed and current on literature concerning children's testimony in child sexual abuse cases, with sufficient recognized expertise that [he] had presented a 1992 CLE seminar for the State Bar of Arizona entitled 'The Child Witness.'" (Exh. R: PCR Exhibits [Tab 119], Thompson's Affidavit, at ¶¶ 3, 12; Exh. CC: R.T. 9/7/11, at 6, 26-27.)

Moreover, the prosecution's pretrial disclosure statements failed to notice any experts, let alone one who would offer testimony regarding the characteristics of child molesters and their victims. (Exh. A: P.I., Items 7, 34, 35.) Additionally, because Luis, Danielle, Sheldon, and Taylor had alleged only that Petitioner had touched their genitals indirectly and over their clothing, neither he nor the prosecution could offer expert testimony regarding any physical, forensic, or medical evidence—such as latent prints, DNA comparisons, or post-assault medical examinations—to bolster or refute these victims' allegations.

Petitioner has also failed to establish prejudice. Indeed, to the extent that Petitioner complains that Thompson's decision not to consult an expert before trial adversely impacted his cross-examination of the victims and the State's other witnesses, Petitioner fails to identify what additional favorable testimony Thompson could have elicited from the State's witnesses, had he consulted with experts on forensic interviews, child witnesses, and the internal thought patterns of pedophiles. And, self-serving speculation is insufficient to prove ineffectiveness:

> We have held that "a defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information ... would have produced a different result.'" *United States v. Kamel*, 965 F.2d 484, 499 n.45 (7th Cir.1992) (quoting *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987), *cert. denied*, 498 U.S. 842 [] (1990)). Rodriguez has explained neither what Santos's responses

> to further cross-examination might have revealed nor how those responses might have affected the result. Accordingly, his ineffective assistance of counsel claim must fail.

U.S. v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995); see Day v. Quarterman, 566 F.3d 527, 539-40 (5th Cir. 2009) ("Day's argument again suffers from speculation. As with her claim regarding counsel's failure to secure the assistance of a medical expert, Day merely 'point[s] to trial counsel's neglect [in] his failure to properly challenge the State's experts via cross-examination' and speculates that '[h]ad counsel investigated the case to any reasonable degree, the inexactness of medicine and the differences of opinion among doctors entail that he would easily have found something more than the perfunctory and peripheral things he used to attempt to challenge the State's conclusions.' Day does not offer a concrete explanation of the testimony that alleged proper cross-examination would have elicited.").

- **Ground 4A.2**

Petitioner has failed to demonstrate that Thompson's failure call an expert to testify about suggestive interview techniques constituted deficient performance. In his affidavit, Thompson provided the following explanation for not calling a defense expert on this topic:

> I felt that any deficiencies in the techniques of the forensic interviews conducted in the May case (e.g., leading the children or implanting memories that did not happen) could be better pointed out by me in later argument based upon simply cross-examining the police officer who testified about forensic interviewing (Phoenix Police Department Detective Phil Shores) rather than an outside expert.

(Exh. R: PCR Exhibits [Tab 119], Thompson's Affidavit, at 3, ¶ 13.)

During the evidentiary hearing, the State elicited additional testimony from Thompson on this point:

> Q. How about an expert for analyzing police action, somebody to come educate you about whether the police did a good interview or talked to the right people or something like that?
>
> A. Well, certainly, you know, in confession cases, you know, coerced confessions and those types of things, experts as to police procedures are very useful, there are areas where they are, and I have used them.
>
> Q. Okay, How about in this case? Did you feel it was appropriate?

> A. I felt that we had the best of both worlds, because one of the witnesses was a police officer who testified on just those issues about the bad way to question a witness and whatnot, so I felt that we had the benefit of what an expert would provide without the taint of my expert being a hired gun coming in.

(Exh. CC: R.T. 9/7/11, at 38-39.)

During trial, Thompson elicited Detective Shores' testimony that: (1) forensic interviewers should ask young children very general, open-ended, and non-leading questions in order to avoid suggesting desired responses; (2) the interviewer should avoid mentioning the person or event in question until the child has done so; and (3) police officers should never encourage parents to ask their own children about sexual abuse because parents have a tendency to suggest answers to their questions. (Exh. F: R.T. 1/4/07, at 11-13, 20-22, 24-25.)

Detective Shores' testimony on these points enabled Thompson at the end of trial to argue that the Gentry Walk victims were not worthy of belief because: (1) the first adults to speak with these children were their parents who had "loaded agendas," lacked training in proper forensic interview techniques, and therefore reinforced the allegations against Petitioner with suggestive questions (Exh. E: R.T. 1/3/07, at 86-87, 103, 126-28; Exh. F: R.T. 1/4/07, at 63-64, 103-04; Exh. G: R.T. 1/8/07, at 36, 65, 97-99; Exh. H: R.T. 1/9/07, at 53; Exh. I: R.T. 1/10/07, at 131, 143-44, 151); and (2) Quihuiz and Johnson deviated from the protocol that Detective Shores detailed by asking Taylor and Danielle, respectively, unduly suggestive questions that "plant[ed] information in a big way" in their recollections (Exh. F: R.T. 1/4/07, at 11-13, 20-22; Exh. I: R.T. 1/10/07, at 12-13, 18, 144-45, 148-49). Even Dr. Esplin's affidavit recognized that Thompson "destroyed" the Mesa Police Department detectives who interviewed the Gentry Walk victims. (Exh. DD: R.T. 9/8/11, at 36, citing Exh. R: PCR Exhibits, Vol. 6, Tab 116: Dr. Esplin's Affidavit, at 10.)

Petitioner also cannot establish resulting prejudice. Petitioner failed to meet this burden because he has never identified with particularity what testimony an uncalled expert would have offered the jury, above and beyond what Thompson had already presented

through cross-examination of the State's witnesses and highlighted during closing argument. See Tinsley v. Million, 399 F.3d 796, 806 (6th Cir. 2005) ("Putting to the side the question whether [relying on cross-examination to impeach the prosecution's blood-spatter expert] was ineffective—it most probably was not—Tinsley has failed to establish prejudice arising from the modest difference between the jury hearing this theory of defense through cross-examination and hearing it through the mouth of another expert."); Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (recognizing that a defendant cannot prove prejudice where his newly proffered evidence was cumulative to that which had already been presented at trial).

- **Ground 4A.3**

Petitioner has failed to demonstrate that Thompson's rendered deficient performance when he failed to call Dr. Esplin to testify about the factors that might render children's memories genuine, but wrong. After the evidentiary hearing, Judge Hoffman found Ground 4A.3 was meritless, based on the following reasoning:

> [Thompson] cross-examined each of the child victims, tested their memories of the events, pointed out inconsistencies in their testimony and elicited testimony that supported the defense theory of the case. Dr. Esplin, defendant's expert in the area of child witnesses, testified that he rarely testified for the prosecution. (R.T. of Sept. 8, 2011 at 20-21.) He also testified that trial counsel brought issues regarding credibility of the victims to the attention of the jury. (Id. at 34-37.) The Court has considered his testimony at the evidentiary hearing and does not find that his testimony established a reasonable likelihood of a different result had he testified at trial.

(Doc. No.1-13: Minute Entry, filed on November 7, 2011, at 5.)

Petitioner contends that Thompson rendered ineffective assistance because he did not call Dr. Esplin to educate the jury about the possible scientific reasons why children might encounter difficulties accurately recalling events, including sexual abuse. Petitioner argues, for instance, that such testimony would have assisted the jury because: (1) all of the charged offenses involved "a momentary touch over clothing in a pool or classroom"—events that created "'simplistic' memories ... more subject to 'alteration or malleability' than a more 'complex' event, such as an extended fondling or penetration," and (2) Taylor initially

believed that Petitioner's "alleged touch was 'clumsy' or accidental," but changed her mind about his sexual motivation after Danielle reported being touched in a similar manner. (Doc. 2, at 63.)

However, the record reflects that Thompson had made the jury aware of the significant memory problems plaguing Danielle, Luis, Sheldon, and Taylor through cross-examination and/or closing remarks demonstrating the following:

- Luis had given inconsistent statements about whether Petitioner had squeezed his penis or merely rested his open hand over his genitals. (Exh. E: R.T. 1/3/07, at 15, 33, 41, 44, 51-52, 58-60; Exh. I: R.T. 1/10/07, at 135.)

- Luis seemed uncertain about whether Petitioner had facial hair at the time of the incident. (Exh. E: R.T. 1/3/07, at 28-29, 99; Exh. I: R.T. 1/10/07, at 135.)

- Luis did not tell his mother the name of the man who molested him. (Exh. E: R.T. 1/3/07, at 65; Exh. I: R.T. 1/10/07, at 135.)

- The State did not call Luis' teacher (whose name Luis could not recall at trial) to corroborate Luis' testimony that he asked to go to the bathroom after the incident. (Exh. E: R.T. 1/3/07, at 37; Exh. I: R.T. 1/10/07, at 136.) Nor did Luis tell his teacher what happened when he returned. (Exh. E: R.T. 1/3/07, at 37, 40.)

- Luis could not make an in-court identification of Petitioner at trial, a deficiency the State remedied by showing Luis a series of photographs of several men, including one depicting Petitioner as he appeared several months after the charged molestation. (Id. at 31-32, 93-95.) Thompson thereafter argued that Luis identified Petitioner from one of these men only because Petitioner was the only depicted person in the courtroom. (Exh. I: R.T. 1/10/07, at 137.)

- Luis did not recall speaking with Detective Shores at school. (Exh. E: R.T. 1/3/07, at 43-44.) Shores testified that he did not submit Luis' case to the county attorney for charging because Luis could not recall peripheral details, and there was no corroborating evidence. (Exh. F: R.T. 1/4/07, at 10, 15-16; Exh. I: R.T. 1/10/07, at 137.)

- Danielle's recall of events changed during her forensic interview, which contained inconsistent statements. (Exh. I: R.T. 1/10/07, at 138; Exh. YY: DVD of Danielle's forensic interview [Trial Exhibit 26].)

- Danielle could not recall during trial: (1) whether the September pool party during which Petitioner molested her was on a school Friday or a weekend day; (2) whether she had told Detective Johnson that Petitioner touched her every time she went to the pool; (3) whether she told Petitioner to stop; and (4) how many people attended her birthday pool party. (Exh. E: R.T. 1/3/07, at 127-30.)

- Taylor could not recall the charged incidents very clearly during trial and therefore was uncertain about: (1) which days of the week Petitioner molested her; (2) whether Petitioner rested or moved his hand while it was touching her vagina; and (3) whether

she sat on Petitioner's lap; and (4) which bathing suit she wore during the charged events. (Exh. E: R.T. 1/3/07, at 82-87, 102-03; Exh. G: R.T. 1/8/07, at 67.)

• Taylor initially believed that Petitioner had accidentally touched her, but attributed her change of mind to growing older and maturing. (Exh. E: R.T. 1/3/07, at 80, 84-85, 87; Exh. I: R.T. 1/10/07, at 11, 138-39.)

• Sheldon initially told Detective Verdugo that Petitioner had touched his penis just once, but later reported additional incidents; Sheldon also gave different dates for when these incidents occurred. (Exh. F: R.T. 1/4/07, at 67, 99-100; Exh. G: R.T. 1/8/07, at 105.)

Thompson's cross-examination of the State's witnesses and his closing arguments also alerted the jury to the possibility that external influences might have altered victims' memories:

• Sheldon initially believed that Petitioner touched him accidentally, but changed his mind because Petitioner had contact with his penis on subsequent occasions, and Denise allegedly told him that it was not an accident. (Exh. F: R.T. 1/4/07, at 66, 82-83; Exh. I: R.T. 1/10/07, at 137, 142.)

• Taylor first thought that Petitioner had accidentally touched her genitals, but reconsidered her original interpretation as she "matured." (Exh. E: R.T. 1/3/07, at 80-81, 84-85, 87; Exh. I: R.T. 1/10/07, at 8, 11 [Taylor] id. at 152 [closing argument].)

• The three Gentry Walk victims—Danielle, Sheldon, and Taylor—were exposed to "playground gossip" about Petitioner allegedly molesting other children and therefore convinced themselves that Petitioner had purposefully touched their genitals while in the swimming pool. (Exh. E: R.T. 1/3/07, at 88, 127; Exh. G: R.T. 1/8/07, at 59-63, 69, 96; Exh. H: R.T. 1/9/07, at 50, 53-55; Exh. I: R.T. 1/10/07, at 7-8, 132, 138, 143, 148, 150.)

• While forensically interviewing Taylor and Danielle, Detectives Quihuiz and Johnson deviated from the protocol that Detective Shores detailed by asking unduly suggestive questions that "plant[ed] information in a big way" in the recollections of both victims. (Exh. F: R.T. 1/4/07, at 11-13, 20-22; Exh. I: R.T. 1/10/07, at 12-13, 18, 144-45, 148-49.)

The foregoing evidence and closing remarks demonstrate that counsel had made the jury aware that the victims had suffered memory problems and might have misinterpreted the charged events because of subsequent exposure to external influences or experiences. Under these circumstances, Thompson's reliance upon non-experts to undermine the victims' credibility was an objectively reasonable tactical decision.

Furthermore, Petitioner has failed to establish that the verdicts would have been different, had Dr. Esplin testified and potentially given the jury a scientific explanation for the memory flaws that Thompson had exposed through cross-examination.

- **Ground 4A.4**

Petitioner has failed to demonstrate that Thompson's rendered deficient performance when he failed to call an expert because Juror Root had stated during his post-trial interview that he did not know how child molesters "think" and whether they are attracted to children of both sexes. In the affidavit he submitted during Petitioner's PCR proceeding, Thompson indicated that he had considered presenting expert testimony regarding the psychological makeup of a pedophile, but elected against this course of action:

> The only expert I even considered was an expert to evaluate Mr. May's risk factors for aberrant sexual behavior. That said, if a defense expert somehow found or felt that Mr. May did show an attraction to children, that fact could become a bad fact for the defense, while evidence that he was not attracted to children (a pedophile) would have been irrelevant, hence inadmissible.

(Exh. R: PCR Exhibits [Tab 119], Thompson's Affidavit, at 2, ¶ 7.)

Elaborating on this affidavit during the evidentiary hearing, Thompson testified that he had called Dr. Gene Abel, "the godfather of risk assessment," to testify at length in a different trial "about what you can learn and not learn from [risk assessments]," but Maricopa County Superior Court Judge Warren Granville later struck Abel's testimony in its entirety because Abel responded, "You can't tell," when asked, "Can you tell whether this person on this occasion did what they're charged with based on your testing?" (Exh. CC: R.T. 9/7/11, at 37-38.) Because Thompson had the same experience in other cases, he further testified that "judges that I've dealt with [routinely] hold that [this type of testimony] is not relevant." (Id. at 38.) Thompson also reiterated his fear that results showing that Petitioner was in fact attracted to children would harm the defense. (Id.)

Thus, Petitioner cannot establish that Thompson rendered deficient performance because: (1) the Sixth Amendment does not obligate an attorney to proffer evidence that is inadmissible; and (2) a lawyer does not render deficient performance by avoiding courses of

action that might be detrimental to his client's defense. See, e.g., Matylinsky v. Budge, 577 F.3d 1083, 1092 (9th Cir. 2009); Murtishaw, 255 F.3d at 939 (quoting Strickland, 466 U.S. at 689).

b. Ground 4B

In Ground 4B, Petitioner alleges that Thompson should have called an expert to testify about Petitioner's "lifelong battle with a neurological condition called Ataxia," for two different purposes: (1) to demonstrate that any touching was unintentional ("Ground 4B.1"); and (2) to explain his abnormal physical appearance, which led two jurors to describe Petitioner as "fidgety," "odd," "very scared he got caught doing something," "creepy and unordinary" and "like a child molester, which was the very offense for which he was on trial" ("Ground 4B.2"). (Doc. 1, at 14-15; Doc. 2, at 57-60.) The Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

- **Ground 4B.1**

Thompson's decision not to present ataxia-related expert testimony was neither deficient performance nor prejudicial. During the evidentiary hearing, Thompson testified that he had discussed Petitioner's medical condition with Petitioner and his mother, and that he had reviewed the medical records that had been prepared by Petitioner's childhood doctors. (Exh. CC: R.T. 11/7/11, at 17-18, 33-34, 46.) Thompson made the tactical decision not to offer expert testimony or medical records regarding this condition, based upon the following reasoning:

> First, because the doctor that [Petitioner] had been see[ing] and diagnosed and treated by was long since deceased. It had occurred when he was quite young. My recollection from reviewing the records that his mother shared with me, I believe, he had indicated that it was a condition that [Petitioner] might outgrow as he matured and developed. He had not—[Petitioner] had not been treated by a physician for that condition in his adulthood, there was no doctor locally who had treated him for that condition and under those circumstances, [I] did not feel it was a strong point.

(Exh. CC: R.T. 11/7/11, at 34.)

Moreover, the medical records and expert testimony that Petitioner offered at the evidentiary hearing, as well as Petitioner's own testimony at trial, collectively verified that Petitioner had not sought medical treatment for his ataxia since 1989, when he was 18 years old, and approximately 15 years before the he committed the first of the seven charged offenses. (Exh. I: R.T. 1/10/07, at 25 [Petitioner's testimony that he was born in September 1971], 33, 75-76 [Petitioner's testimony that Dr. Gold, a pediatrician, ceased treating him when he became an adult]; id. at 91 [Petitioner's testimony that he could not recall the last time he had seen a specialist for his neurological condition and estimating that his last consultation transpired in his late teen years or very early twenties]; Exh. CC: R.T. 11/7/11, at 81, 105, 109-10 [Dr. Goodman's testimony acknowledging the absence of any medical records for Petitioner between 1989 and 2008].)

Further supporting Thompson's assessment that the ataxia-related testimony and medical records he elected against presenting would not have been "a strong point" in Petitioner's defense, the following evidence offered at trial and the PCR evidentiary hearing demonstrates that Petitioner's ataxia affected only his head's movements and progressively improved throughout his childhood:

- Although Petitioner's medical records from childhood were replete with references to his involuntary head movements and complaints about neck pain, neither Dr. Gold nor any other physician reported that Petitioner complained about or manifested the inability to control his hand movements. (Exh. CC: R.T. 11/7/11, at 82-110.)

- In a report prepared in January 1974, Dr. Gold indicated that he was "most pleased with [Petitioner's] improvement and function." (Id. at 85.) This report contained no mention of Petitioner experiencing "movement" difficulties. (Id. at 86.)

- Dr. Gold expressed optimism about Petitioner's progress once again in the report he drafted in September 1974. (Id. at 90.)

- On October 25, 1974, Dr. Gold reported that his "motor examination" of Petitioner revealed "normal, bulk, tone, and strength of all muscle groups." (Id. at 90-91.) Regarding Gold's entry, "It is of note that his strength in both hands [was] normal, as well as his prehension," Dr. Goodman defined "prehension" as "fine motor control," particularly the "function between the thumb and index finger." (Id. at 91.) This record also reported that Petitioner's "cranial nerve examination was within normal limits." (Id.)

• In February 1975, Dr. Gold reported improvement since his evaluation during the prior October and was "most pleased" that Petitioner was "largely asymptomatic" and displayed "no evidence of paresis." (Id. at 92.) Referring to Petitioner as "this right handed child," Dr. Gold continued, "I could not delineate any evidence of ataxia with regular walking or on making sudden turns. Motor examination showed normal bulk, tone and strength of all muscle groups." (Id. at 93.) Petitioner also manifested "no evidence of a cerebellar deficit" "on finger/nose/finger function." (Id.)

• In March 1975, Dr. Gold reported, "At no time could I delineate any evidence of ataxia and he had no difficulty in making sudden turns. Again, motor examination showed normal bulk, tone and strength of all muscle groups." (Id.) Despite Petitioner's "limited cooperation," Gold found his performance on the finger/nose/finger function to be "grossly normal," that is, "what would be expected for an individual of that age." (Id. at 93-94.) Although this report memorialized Petitioner suffering from large circular movements of his head, Dr. Gold did not note that Petitioner also experienced involuntary hand or arm movements. (Id. at 94.)

• Although Petitioner had been prescribed Haldol for these head tics until May 1977, this drug was not administered to address any involuntary hand or arm movements. (Id. at 94-96.)

• In July 1978, Dr. Gold advised Petitioner's mother that he believed that Petitioner's condition might have improved. (Id. at 97.)

• In a letter to Dr. Gold written in September 1979, Dr. Stanley Fahn reported finding "no evidence of progressive neurological disease," described Petitioner's "head shaking as mild, hardly noticeable, [and as something that] should not be a major concern." Dr. Fahn did not report that Petitioner experienced involuntary movements in his hands and arms. (Id. at 97-98.) Dr. Fahn also reported, "I did not detect any ataxia." (Id. at 98.)

• In a letter to Petitioner's mother written in May 1980, Dr. Gold wrote, "Stephen, although slightly different in coordinative skill, has improved when compared to my prior evaluation." (Id. at 99-100.)

• In June 1981's report, Dr. Gold memorialized his finding that Petitioner's "detailed neurological examination was within normal limits." (Id. at 100.) Although Petitioner complained of neck pain and requested a neck brace, Dr. Gold did not record any involuntary arm or hand movements. (Id. at 100-01.)

• Dr. Gold's reports in June 1982 and November 1984 memorialized Petitioner's continued difficulties with his head's "most unusual movement disorder of obscure etiology," but omitted any allusion to involuntary hand and arm movements. (Id. at 101-02.)

• A report prepared by Dr. Gruver of the Mayo Clinic during the same time period found "no evidence of a progressive disorder" and indicated that Petitioner might be "able to control his head movements by simple maneuvers, such as touching the mandible or resting his head." (Id. at 102-03.) Dr. Gruver likewise made no mention of involuntary hand or arm movements. (Id.)

• The brain scan conducted in August 1988 was "essentially unchanged from the prior scan." (Id. at 103-04.)

• In September 1988, when Petitioner turned 17 years old, Dr. Gold reported that Petitioner's "isolated muscle testing did not show any evidence of weakness." (Id. at 104.)

• Not surprisingly in light of Dr. Gold's report in September 1988 that Petitioner's "isolated muscle testing" revealed no signs of weakness, Petitioner testified at trial that he first became a life guard when he was 15 years old (sometime in 1986), that he started teaching swim lessons for the American Red Cross in 1990 (when he was 18 and 19 years old), that he served as the aquatic director for a health club, that he continued teaching swimming lessons after he moved to Arizona, and that he provided swimming lessons at the Gentry Walk apartment complex's community swimming pool after 2001. (Exh. I: R.T. 1/10/07, at 26, 32, 36.)

• Petitioner demonstrated his ability to coordinate and control his hand movements by not only obtaining certification to perform CPR from American Red Cross, but also finding employment as a CPR instructor. (Id. at 26, 28.)

• Consistent with the medical reports detailed above, Petitioner testified that the most prominent symptoms of his neurological disorder affected his vision and caused involuntary head movements. (Id. at 33, 65.)

• Petitioner never listed involuntary hand movements as a symptom of his neurological condition—the name of which (ataxia) he could not recall during trial and therefore called a "condition that doesn't have a diagnosis per se." (Id. at 33-34.)

• Petitioner testified that he did not disclose his neurological disorder to his employers. (Id. at 85.)

• Petitioner testified at trial that his condition did not cause loss of memory or consciousness. (Id. at 86.)

• Petitioner testified that he had no issues driving a car. (Id. at 90.)

The aforementioned evidence supports the following conclusions: (1) Thompson did not render deficient performance when he elected against presenting ataxia-related evidence, above and beyond Petitioner's testimony, as the medical records and Petitioner's own testimony demonstrated that his condition had improved since childhood, no longer required treatment, and did not affect his ability to perform the hand movements underlying the charged offenses; and (2) there is no reasonable probability the jury would have acquitted Petitioner, had Thompson presented the evidence at issue.

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- **Ground 4B.2**

The Court also finds that Thompson's failure to present medical testimony and records to explain Petitioner's appearance to the jury was neither deficient performance nor prejudicial.

During trial, Thompson elicited testimony from Petitioner about his neurological condition:

> Q. We have had access to the interview that you had with Detective Verdugo in November of 2005. You mentioned there that you had a neurological condition. Could you share with us some details about that neurological condition?
>
> A. Sure. From birth, I—some of this I remember, some of this I have been told, but from birth I experienced a lot of hospital stays, a lot of doctor's visits. I had a pediatric neurologist from Columbia Presbyterian that I saw from as young as I can remember all the way to the late teens, probably in the early 20s until I could no longer see a pediatrician, I guess.
>
> I visited the specialist at the Mayo Clinic on his request when I was about eight. I have a neurological condition that doesn't have a diagnosis per se. It doesn't have a treatment per se, but that soft spot at the top of your head where that's supposed to close when you're a baby, it never closed on me and I have nervous ticks and I tend to be clumsy and also shorter on my left side and making me even more clumsy and I have glasses and eye conditions that go along with that as well.
>
> Q. Okay. So among the symptoms that you have, are there any kinds of body movements that you have that are non-consciously [sic] controlled?
>
> A. Mostly head ticks. I tend to shake my head left and right and I am trying to do it, but don't know exactly how I do it. And up and down, but uncontrollable head-type movements.
>
> Q. While watching the video of your interview with Detective Verdugo, there seemed to be especially in period of times when you were by yourself in the [interview] room, you seemed to be moving your head side to side. Is that symptomatic of the neurological condition that you have?
>
> A. Yes.
>
> Q. Is that something that you are aware of and conscious of when it happens?
>
> A. No.
>
> Q. Were you nervous when you were talking to Detective Verdugo?
>
> A. Yes, very much.

Q. Why?

A. I had never been arrested before. It was very scary.

Q. When you are nervous, does that exacerbate or increase any of your neurological condition symptoms.

A. I have been told that it does.

Q. Are you aware of it?

A. No. Never.

(Exh. I: R.T. 1/10/07, at 33-34.)

During their interviews several years after Petitioner's trial, Jurors Andrews and Harris both recalled that Thompson had offered evidence that Petitioner's abnormal physical mannerisms were the manifestations of a neurological condition. Despite being unable to recall any specifics because of the passage of 4 years since Petitioner's trial, Juror Andrews—who reportedly found Petitioner "creepy and unordinary" and thought that Petitioner's "physical appearance, body language, and personality" comported with the "perfect profile of someone to do such a crime"—told Petitioner's investigator, "I remember there was something wrong of—there was some kind of condition or something was said that I cannot remember about this." (Exh. JJ: Transcript of Interview of Juror Harris, dated 3/5/11, at 3.) When asked whether he considered Petitioner's ataxia while determining whether any sexual contact was accidental, Juror Andrews responded, "Yeah, I took it into consideration. I think, I know a lot of us on the jury did." (Id.) Juror Harris—who told Petitioner's PCR investigator more than 4 years after trial that he had noticed Petitioner's "fidgety" mannerisms, admitted that Petitioner struck him as "a little odd," thought that "something's not right with this individual" upon viewing Petitioner, and recalled the videotape footage depicting Petitioner "constantly moving as if he was very, very scared that he got caught doing something" after Verdugo left the interview room—likewise demonstrated his recollection that Thompson had offered ataxia-related evidence at trial with the following post-trial interview statement:

> Q. Do you remember anybody bringing up Stephen May's condition called ataxia, a neurological condition?
>
> A. Yes. I do remember that and I believe that is the cause of his ticking, I believe they called it, his constantly moving back and forth of his head. I do remember them bringing that up.

(Exh. JJ: Transcript of Interview of Juror Harris, dated 2/23/11, at 17.)

Significantly, neither Andrews nor Harris ever told Petitioner's investigator that they or any other juror disbelieved Petitioner's testimony that he had this neurological disorder. Of equal importance is the fact that Petitioner's investigator never asked these two jurors whether they would have abandoned their subjective impressions of Petitioner as "creepy and unordinary," "fidgety," "a little odd," and as an individual with "something[] not right," had Thompson called a physician or admitted medical records to provide them with physiological explanations for Petitioner's physical appearance and involuntary head movements. Consequently, this ineffectiveness claim does not warrant habeas relief because it rests entirely upon Petitioner's speculation that the verdicts would have been different, had Thompson presented evidence regarding Petitioner's neurological condition beyond Petitioner's own testimony. See Hodge v. Haeberlin, 579 F.3d 627, 640 (6th Cir. 2009) ("Hodge's speculation that his testimony would have left a favorable impression with the jury does not demonstrate the required prejudice under *Strickland*."); Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009) (collecting cases holding that "speculation is not sufficient to establish prejudice" in the ineffective-assistance context).

c. Ground 4E

In Ground 4E, Petitioner contends that Thompson rendered ineffective assistance of trial counsel because he did not object to the admission of videotape footage of Petitioner's post-arrest interview that included references to a New York investigation that Petitioner contends were "allowed to permeate the trial," and which one juror (Joanna Rzucidlo) found "unsettling." (Doc. 1, at 16-17; Doc. 2, at 68-69; Exh. PP: Transcript of Interview of Juror Rzucidlo, dated 12/18/09, at 6-7.)

The State played the videotape of Petitioner's post-arrest interview during its redirect examination of Detective Verdugo on the fourth day of trial without any defense objection. (Exh. G: R.T. 1/8/07, at 112-13.) The videotape footage to which Thompson did not object depicted Detective Verdugo confronting Petitioner about a report alleging that Petitioner had been "trying to stare at some little kids at a school or a park or something" in New York on an unspecified occasion in 1996. (Exh. ZZ: DVD of Petitioner's Interview [Trial Exhibit 27], at 10:49-10:50.) Petitioner denied that he had ever been arrested or questioned by police in New York at any time. (Id.) This exchange lasted less than 2 minutes and occurred during the second half of Petitioner's hour-long post-arrest interview. (Id.)

One juror thereafter submitted the question, "Is it a lie that there was an instance in New York?" (Exh. A: P.I., Item 145.) Because Thompson objected, the trial court did not ask this question. (Exh. G: R.T. 1/8/07, at 118-21.) However, the prosecutor subsequently asked Detective Verdugo whether he had "made up out of the blue" the "incident that might have happened in New York," because the jurors had inquired about whether Verdugo fabricated the names of the uncharged children he mentioned during the post-arrest interview and asked another question asking why he lied to Petitioner during the post-arrest interview. (Id. at 119-20, 122; Exh. A: P.I., Items 139, 140.) Verdugo responded that the New York incident "was something I referred to." (Exh. G: R.T. 1/8/07, at 122.)

Neither party revisited the New York incident during closing arguments or while questioning the remaining trial witnesses, including Petitioner. (Exh. H: R.T. 1/9/07, at 5-74; Exh. I: R.T. 1/10/07, at 5-159.)

Even assuming that Thompson rendered deficient performance by not objecting to the videotape's brief footage concerning this 1996 New York incident, Petitioner cannot demonstrate that this omission resulted in prejudice.

Juror Rzucidlo's post-trial interview statements do not support Ground 4E, but instead demonstrate that the jury did not consider the New York incident as evidence of Petitioner's guilt, because Rzucidlo told Petitioner's PCR investigator that: (1) no police officers ever

testified about the New York incident; (2) the judge did not answer the question she submitted about the New York incident; (3) the jurors construed the court's other-act instructions as "not letting [them] discuss [the New York incident] in the actual trial," which Rzucidlo found to be "a little wrong" because the incident was referenced during the post-arrest interview; (4) the jurors "had no idea" whether the New York incident was similar or dissimilar to the charged offenses. (Exh. PP: Transcript of Interview of Juror Rzucidlo, dated 12/18/09, at 6-7.)

Furthermore, the references to the New York incident were brief and isolated events during a trial that spanned several days. See Brecht, 507 U.S. 619, 639 (1993) (noting that prosecutor's improper remarks comprising less than two pages of a 900-page record, were infrequent, and thus "did not substantially influence the jury's verdict"); Hall v. Whitley, 935 F.2d 164, 165-66 (9th Cir. 1991) ("Put in proper context, the comments were isolated moments in a 3-day trial."). And, Thompson also elicited ample proof that New York law enforcement neither arrested nor charged Petitioner with any crime in 1996, the State called no witnesses to present testimony about this incident, and Petitioner testified that he had never been arrested before the instant case and was therefore "very much" nervous during his interview on November 9, 2005.

The Court finds that the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

d. Ground 4G

This ineffectiveness claim has three components, all of which concern trial counsel's conduct after Judge Stephens reported that the jurors wanted to resume deliberations following the mistrial declaration: (1) Thompson allegedly should have consulted with Petitioner to a greater extent before announcing his lack of opposition ("Ground 4G.1"); (2) Thompson allegedly should have objected to the jurors continuing to deliberate after Judge Stephens declared a mistrial, based upon the rationale that allowing the mistrial to stand was the best tactical decision ("Ground 4G.2"); and (3) Thompson failed to "make an appellate

record" when the "unsworn" jurors announced their desire to resume deliberations ("Ground 4G.3"). (Doc. 1, at 17; Doc. 2, at 70.) The Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

- **Ground 4G.1**

Thompson's alleged failure to consult with Petitioner before announcing a lack of opposition to the jurors decision to resume deliberations was not deficient performance. The Arizona Court of Appeals found as follows regarding Ground 4G.1:

> Similarly, the trial court correctly rejected his fourth claim—that trial counsel "did not adequately confer with [him]" before allowing the jury deliberations to continue. In rejecting this claim, the court found that counsel's decision was "a tactical and strategic decision" that cannot "form the basis for a claim of ineffective assistance." [Doc. 1-13: Minute Entry, filed on 11/10/11, at 6] But the claim also fails because May does not assert he would have made a different decision had he been consulted further. *See* [State v. Salazar, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992)] (defendant must prove prejudice; without it, court need not address counsel's performance); *see also Strickland*, 466 U.S. at 694.

(Doc.1-17: Memorandum Decision, at 8, ¶ 13.)

The Arizona Court of Appeals' first articulated rationale—the decision to allow the jurors to resume deliberating was a tactical matter exclusively within Thompson's purview—comported with clearly established federal law. Indeed, numerous courts—like the Arizona Court of Appeals in the instant case—have classified the decision to request or refuse a mistrial as a strategic matter falling within the exclusive province of defense counsel, despite a client's contrary wishes. "The Supreme Court has never suggested that decisions about mistrials are 'of such a moment' that they can be made only by the defendant himself, and every circuit to consider the question has concluded that decisions regarding mistrials belong to the attorney, not the client." U.S. v. Chapman, 593 F.3d 365, 368 (4th Cir. 2010) (collecting federal circuit cases). Courts reaching this conclusion have reasoned that "[t]he decision whether to move for a mistrial or instead to proceed to judgment with the expectation that the client will be acquitted is one of trial strategy." Galowski v. Murphy, 891

F.2d 629, 639 (7th Cir. 1989). Accordingly, these courts have held that an attorney possesses exclusive authority to decide whether to request a mistrial or not, and that the defendant's lack of consent or express opposition is of no consequence. See Chapman, 593 F.3d at 367-70.

Thus, it follows that Thompson's performance cannot be deemed deficient on the basis that he conferred only momentarily with Petitioner before announcing that the defendant had no objection to the jurors resuming their deliberations.

Alternatively, Ground 4G.1 does not warrant habeas relief because the Arizona Court of Appeals reasonably determined that Petitioner could not prove prejudice from the alleged omission because Petitioner did "not assert he would have made a different decision had he been consulted further." (Doc. 1-17: Arizona Court of Appeals' Memorandum Decision, at 8, ¶ 13.) The factual finding is supported by the record because the following passage from Petitioner's affidavit does not mention that he would have opposed the jury's request to resume deliberations, had Thompson conferred with him to a greater extent:

> 9. During trial, after the judge declared a mistrial, the jury was excused and the judge set a new trial date. The judge then told me I would remain on release until the new trial on the same terms and conditions of release previously imposed.
>
> 10. The judge then suddenly said that the jury wanted to keep deliberating. After the judge said that, Mr. Thompson and I conferred at the counsel table for a very short time, no more than twenty seconds, before he informed the court that he did not object to the jury continuing deliberations. Mr. Thompson did not discuss with me any of the legal issues underlying this decision, nor did he discuss with me the risks and possible consequences of this decision.
>
> 11. I declare under the penalty of perjury that the foregoing is true and correct.

(Exh. R: PCR Exhibits, Vol. 6, Tab 117: Petitioner's affidavit, dated February 22, 2010, at 2-3.)

Because Petitioner did not testify at the evidentiary hearing, he did not supplement this affidavit with any assertion that he would have opposed the jury's request to resume deliberations, had he and Thompson consulted for a lengthier period of time.

Further, Petitioner also fails to establish prejudice because he has not demonstrated that Judge Stephens would have refused to let the jury continue deliberating, even had Thompson decided to oppose the jury's request after a lengthy conference with Petitioner on the issue. See U.S. v. Taylor, 569 F.3d 742, 748 (7th Cir. 2009) (finding that the failure to oppose a mistrial request foreclosed finding prejudice because defendant offered no proof that such an objection would have altered the district court's ruling).

Consequently, Petitioner cannot prove either deficient performance or resulting prejudice.

- **Ground 4G.2**

The Court finds that Thompson's failure to object to the jurors continuing to deliberate after Judge Stephens declared a mistrial was neither deficient performance nor prejudicial.

In her minute entry order, Judge Hoffman acknowledged that Petitioner had raised Ground 4G.2 with the following statement in the "Allegations of Ineffective Assistance of Counsel" section: "Michael Piccarreta opined that trial counsel Joel Thompson was ineffective in ... (4) not objecting to continued deliberation after a mistrial was declared." (Doc. 1-13: Minute Entry, filed on November 10, 2011, at 3.) Judge Hoffman denied relief on Ground 4G.2 with the following statements at the end of her order:

> THE COURT FINDS that there is no evidence that the performance of either trial or appellate counsel fell below prevailing objective standards. Even if it had, the Court finds no evidence of any resulting prejudice to the defendant.
>
> IT IS HEREBY ORDERED denying defendant's Petition for Post-Conviction Relief as to all grounds raised at the evidentiary hearing.

(Id. at 6-7.)

Petitioner cannot demonstrate that Thompson's consent to the jury's post-mistrial request to resume deliberations constituted deficient performance. The Supreme Court squarely rejected the notion that a tactical decision that ultimately proved unavailing necessarily constitutes deficient performance:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after

> conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-34 [ ] (1982). 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.

Strickland, 466 U.S. at 689.

Nor can Petitioner establish deficient performance, based upon the fact his legal expert, Michael Piccarreta, testified that he would have opposed the jury's request to resume deliberations and elected instead to "live and fight another day." (Exh. CC: R.T. 9/7/11, at 129.) Petitioner cannot demonstrate that no reasonable attorney in Thompson's place would have agreed to the jury's request to continue deliberating, given the fact that strategic reasons supported Thompson's determination that this course of action might prove beneficial. In his post-trial affidavit, Thompson expressed concern that if the case was retried, Petitioner would have "to go through another complete trial with the prosecution in possession of a complete transcript of his testimony from the mistried case." (Exh. R: PCR Exhibits [Tab 119], at ¶ 38.)

Moreover, the notes that the jury sent to Judge Stephens before her mistrial declaration, as well as the responses to the jury's questions, provided Thompson with reasonable grounds to conclude that allowing this group of jurors to resume deliberations would benefit Petitioner. Specifically, at 2:58 p.m., the jurors sent their next note, which declared, "We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." (Exh. A: P.I., Item 218.) Despite receiving an impasse instruction and returning to the jury room for further discussion, the jurors informed Judge Stephens less than 30 minutes later that the two sides remained divided over whether reasonable doubt existed:

> Part of the jury believes they have heard sufficient evidence and the evidence is of sufficient quality to resolve reasonable doubt; part of the jury believes the quantity and quality of evidence is not sufficient to resolve reasonable doubt.

> We do not have significant dispute over the facts or the elements of law, or how to apply the law to the facts. We feel we need more guidance to "proof beyond a reasonable doubt."

(Exh. A: P.I., Item 219 [filed at 3:30 p.m.].)

Instead of providing the jurors with a supplemental instruction clarifying the meaning of reasonable doubt, Judge Stephens declared a mistrial. (Exh. J: R.T. 1/12/07, at 9-10.) Under these circumstances, Thompson could reasonably conclude that this jury would give Petitioner the benefit of the doubt and acquit him on all counts when they ultimately resumed deliberations.

Nor can Petitioner demonstrate prejudice. As noted above, Petitioner cannot carry his burden through self-serving speculation that Judge Stephens would have sustained any objection that Thompson might have lodged to the jury's request to resume deliberations.

Nor can Petitioner prove a reasonable probability that the outcome on the jury's request to continue deliberations would have been different, had Thompson followed the courses of action Piccarreta enumerated during the evidentiary hearing, which included moving Judge Stephens to: (1) poll the jurors individually about their desire to continue deliberating; (2) conduct an on-the-record inquiry to explore the events or reasons that prompted the jury to have the bailiff convey their desire to resume deliberations moments after the mistrial declaration; and (3) question the bailiff, Mike Fucci, under oath about what the jurors said to him when they asked him to relate to Judge Stephens their desire to continue deliberations. (Exhibit CC: R.T. 9/7/11, at 129-30.) Petitioner improperly speculates that Judge Stephens would have granted these motions.

Thus, Petitioner cannot demonstrate either deficient performance or resulting prejudice.

- **Ground 4G.3**

Lastly, the Court fails to find deficient performance or prejudice in counsel's failure to "make an appellate record" when the "unsworn" jurors announced their desire to resume

deliberations. Petitioner's one-sentence claim relies entirely on speculation. He fails to identify – much less demonstrate – any grounds for ineffective assistance.

e. Ground 4H

Petitioner next contends that Thompson rendered ineffective assistance because he "failed to introduce any evidence of [his] good character or reputation for behaving appropriately when working with children in other community activities, even though [Petitioner] and his family provided [Thompson] with names" of "non-expert witnesses who could be called to corroborate [Petitioner's] testimony about his appropriate non-sexual behavior." (Doc. 1, at 17; Doc. 2, at 73.) Petitioner attributes this alleged omission to Thompson's "erroneous[] belie[f] that character evidence was not admissible in a case such as this," despite the fact that "Arizona Rules of Evidence 404(c) and 405 provide for the admissibility of character or reputation testimony that a defendant does not possess the character trait that would cause him to commit the offense." (Id.)

The pertinent state-court decision denying Ground 4H found as follows:

> Defendant claims his trial counsel was ineffective in failing to investigate and present testimony from expert witnesses and character witnesses. ...
>
> Defendant claims that his trial counsel was ineffective in failing to present character witnesses at trial. He presented recorded statements from two people who worked with defendant in the past. (Hearing exhibits 38 and 39.) No character witnesses testified at the evidentiary hearing. Trial counsel testified that there was a limited network of possible character witnesses. He also gave reasons for not presenting evidence of defendant's good character and good conduct with children. (Hearing exhibit 1 at ¶¶ 25-26.) Defendant has not demonstrated that trial counsel was ineffective in failing to call character witnesses or a reasonable likelihood of a different result if he had called character witnesses.

(Doc. 1-13: Minute Entry, filed on November 10, 2011, at 5-6.) Judge Hoffman's denial of post-conviction relief on Ground 4H was neither contrary to, nor an unreasonable application of, clearly established federal law.

During the PCR evidentiary hearing, Thompson testified that he consulted with Petitioner and his parents about whether to call character witnesses during the defense case, but only "a pretty limited number of friends and work associates ...were discussed." (Exh.

CC: R.T. 9/7/11, at 18.) On cross-examination, Thompson explained that he did consider calling character witnesses, but he did not do so because these individuals were either unavailable or had been called by the prosecution in its case in chief:

> The witnesses were really not available. I can recall going over a list of potential witnesses with [Petitioner] and focused on one ... one witness in particular [Linda Cano], a woman he had worked with and I believe [that she] was ultimately called by the State to testify, so we got to cross-examine her. I don't recall there being other character-type witnesses.

(Id. at 32-33.) Significantly, the state record reflects that on December 19, 2006, Thompson filed a supplemental disclosure notice announcing his intention to call Linda as a defense witness at trial. (Exh. A: P.I. Item 44.)

Thompson further testified that he "recalled telling [Petitioner and his parents] that [they] can't bring in witnesses to testify that [Petitioner] had 15 other opportunities to molest children and didn't." (Exh. CC: R.T. 9/7/11, at 19.) Petitioner never questioned Thompson during the evidentiary hearing about whether Petitioner and/or his parents had ever informed him that Angela Cazel-Jahn and Kelley Fitzsimmons were willing to testify about Petitioner's non-sexual appropriate behavior toward children. (Id. at 5-23, 42-47.) As Judge Hoffman observed in her order denying relief on Ground 4H, Petitioner did not call either witness at the PCR evidentiary hearing, but instead offered their declarations in evidence. (Exh. BB: R.T. 9/6/11, at 2-16; Exh. CC: R.T. 9/7/11, at 2-153; Exh. DD: R.T. 9/8/11, at 2-93.)

Here, the record reflects that Thompson had an objectively reasonable basis for not calling Angela Cazel-Jahn and Kelley Fitzsimmons to testify that they had observed Petitioner's interactions with children and found his behavior appropriate because such evidence would have been cumulative to evidence that Thompson had already offered through two other trial witnesses, namely, Linda Cano and Desiree Wells. An attorney's decision to forego the presentation of cumulative evidence does not constitute deficient performance. See Matylinsky, 577 F.3d at 1096-97 (counsel's failure to call 41 witnesses who would have testified to defendant's good character was neither deficient performance

nor prejudicial because such testimony would have been cumulative to the evidence counsel had introduced to "humanize" the defendant); State v. Gerlaugh, 698 P.2d 694, 708 (Ariz. 1985) ("In particular, the decision whether to call cumulative character witnesses is precisely the kind of strategic choice that will not establish reversible error.").

On cross-examination of Linda Cano, whom Thompson had planned to call as a character witness during the defense case, Thompson elicited testimony that: (1) Linda had hired Petitioner to work in the Special Olympics program, wherein approximately 80% of the athletes were under 18 years of age; (2) Petitioner worked for Linda from October 2004 to December 2005; (3) Petitioner had not only helped coach athletes in swimming, speed skating, golf, and ice skating, but also attended basketball games and practices; and (4) Linda never received any complaints about Petitioner from any of the athletes, their parents, or other staff members who attended or participated in these events. (Exh. A: P.I. Item 44; Exh. F: R.T. 1/4/07, at 6, 10-13, 18-22.) Such testimony enabled Thompson to remind the jury during closing argument that Linda had received no complaints about Petitioner during his employment at her program. (Exh. I: R.T. 1/10/07, at 144.)

During the defense case, Thompson called a Gentry Walk resident, Desiree Wells, to testify that: (1) she allowed Petitioner to play with and give swim lessons to her 6-year-old daughter, Teagan; (2) she had watched Petitioner interact with children in the community swimming pool on many occasions, but had never seen Petitioner "focusing" on or "isolating a specific child"; (3) on more than 20 occasions, Desiree saw Petitioner playing with Taylor, Danielle, and Sheldon, and never saw "any inappropriate conduct or inappropriate touching"; and (4) Desiree noted that at least 30 people, including at least 10 adults, attended the birthday pool party at which Petitioner was accused of molesting Taylor and Danielle. (Exh. H: R.T. 1/9/07, at 5, 17-18, 29-31.) During closing argument, Thompson revisited Desiree's testimony that she never saw any Petitioner engage in any inappropriate touching with her daughter or any other child in the community pool. (Exh. I: R.T. 1/10/07, at 140.)

Thus, in spite of any alleged belief that Arizona's evidentiary rules precluded him from offering evidence that Petitioner had not molested children on non-charged occasions, Thompson succeeded in presenting such testimony Linda Cano and Desiree Wells. (Exh. F: R.T. 1/4/07, at 6, 10-13, 18-22; Exh. H: R.T. 1/9/07, at 5, 17-18, 29-31; Exh. I: R.T. 1/10/07, at 140, 144.)

The fact that Linda Cano and Desiree Wells gave testimony establishing that Petitioner had not molested other children on other occasions also demonstrates that Petitioner suffered no prejudice as a result of Thompson's allegedly deficient performance. See Hall v. Thomas, 611 F.3d 1259, 1293 (11th Cir. 2010) (rejecting claim that trial counsel rendered ineffective assistance by failing to call two character witnesses whose testimony would have been cumulative to testimony given by other defense witnesses, and where petitioner never demonstrated that these uncalled witnesses "would have made any difference in the outcome of the trial").

f. Ground 4I

This claim alleges that Thompson rendered ineffective assistance because his "representation was conflicted by and corrupted by his contractual relationship with the overburdened Phillips' firm." (Doc. 2, at 74-75.) Thompson testified that he entered into a contract with Phillips & Associates to handle the firm's felony criminal cases something in 1998, and that the firm assigned him Petitioner's case in 2005. (Exh. CC: R.T. 9/7/11, at 6-9.) Petitioner suggests that Thompson was overburdened during the time his case was pending trial because the Arizona Supreme Court had sanctioned the principal attorney of Phillips & Associates regarding the supervision of a law firm that "represented approximately 33,000 clients between 2004 and 2006" and "employed 250 people, including thirty-eight lawyers." In re Phillips, 244 P.3d 549, 550, ¶ 2 (Ariz. 2010). Petitioner further notes that the firm did not compensate Thompson for time spent during retrials on several mistried cases, and that the firm manager advised him that "there wasn't a budget for experts" during a discussion about Petitioner's case. (Doc. 2, at 74-76; Exh. CC: R.T. 9/7/11, at 15, 21-23.) Finally,

Petitioner cites Thompson's testimony, "I would do [the case] very differently today if it [were] my case today." (Doc. 2, at 75; Exh. CC: R.T. 9/7/11, at 22.)

Petitioner must demonstrate that either a specific omission or a particular action by Thompson constituted deficient performance that resulted in prejudice. Petitioner has not sustained this burden.

In any event, Thompson unequivocally testified that: (1) he had "anywhere from 25 to 35 cases that were active at [any] one time" during the years he had a contract with Phillips & Associates; (2) he "wasn't overwhelmed by the numbers" while representing Petitioner; and (3) the decisions he made in the instant case were not affected by any "time issue." (Exh. CC: R.T. 9/7/11, at 21.) Additionally, "[Thompson's] performance throughout the trial demonstrates sufficient preparation and knowledge of the case that 'falls within the wide range of reasonable professional assistance.'" Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990) (quoting Strickland, 466 U.S. at 689). The Court finds that the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

g. Ground 4J

In Ground 4J, Petitioner contends that "the cumulative effect of counsel's many errors" deprived Petitioner of effective assistance. (Doc. 1, at 18.) Petitioner's one-sentence conclusory statement fails to provide any argument or identify any authority regarding cumulative-error in the ineffective-assistance-of-counsel context.

Even if cumulative error constituted a violation of clearly established federal law, Petitioner's claim fails because: (1) none of the acts and omissions challenged in Grounds 4A through 4I constituted deficient performance by Thompson, and (2) even assuming that Thompson rendered deficient performance with respect two or more of these claims, the resulting prejudice was insufficient to establish a constitutional violation. See Ceja v. Stewart, 97 F.3d 1246, 1254 (9th Cir. 1997) (rejecting relief under cumulative-error doctrine

where defendant alleged numerous IAC claims that were found non-prejudicial). Thus, the Court finds no error.

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5. Grounds 6A and 4C

Ground 6A and 4C will be consolidated. In Ground 6A, Petitioner alleges that he "was deprived of his federal constitutional rights to due process and a fair trial based upon prosecutorial misconduct," specifically by obtaining a second indictment charging Petitioner with four new counts of child molestation against three additional victims (Luis A., Sheldon H., and Nicholas M.) while Petitioner's motion to remand the original indictment to the grand jury for a new probable-cause determination was still pending (Doc. 1, at 21; Doc. 2, at 106-09.) In Ground 4C, Petitioner seeks habeas relief on the basis that trial counsel rendered ineffective assistance by not objecting to the second indictment on prosecutorial-vindictiveness grounds. (Doc. 1, at 16; Doc. 2, at 70-71.)

a. Ground 6A

The Court finds that Ground 6A is procedurally barred because the state courts explicitly found his prosecutorial-vindictiveness claim precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), as the result of Petitioner's failure to raise this claim on direct appeal. In its initial ruling on Petitioner's PCR petition, the trial court ruled as follows:

> Defendant's allegation of prosecutorial misconduct is precluded. All of the materials defendant relies on in support of this claim were available at the time the notice of appeal was filed. Because the case was affirmed on direct appeal, there is a presumption that defendant's convictions were regularly obtained and are valid. Defendant bears the burden or rebutting that presumption. *Canion v. Cole*, 210 Ariz. 598, 601, 115 P.3d 1261, 1263 (2005). Defendant has made no showing that he is entitled to relief.

(Doc. 1-11: Minute Entry, filed on January 3, 2011, at 3.) The Arizona Court of Appeals affirmed this ruling in the last-reasoned state-court decision denying post-conviction relief on Ground 6A:

> May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again,

> because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, at 3, ¶ 3.) Thus, Ground 6A is procedurally defaulted because preclusion under Rule 32.2(a) constitutes as an adequate and independent procedural bar. See Stewart, 536 U.S. at 860; Smith, 241 F.3d at 1195 n.2; Ortiz, 149 F.3d at 931-32.

Petitioner has not established that any exception to procedural default applies. To the extent Petitioner attempts to establish cause by asserting ineffective assistance counsel (Ground 4C), said claim will be discussed below.

b. Ground 4C

The state court's rejection of Petitioner's ineffectiveness challenge to the second indictment on prosecutorial-vindictiveness grounds was neither contrary to, nor an unreasonable application, of clearly established federal law.

The following ruling constitutes the decision subject for review:

> Defendant presented no evidence that a failure to raise a claim of prosecutorial vindictiveness after more charges were added when the case was remanded to the Grand Jury was unreasonable conduct under the facts of this case. As defense expert Picarretta acknowledged, "It's a difficult motion to prevail on." ([Exh. CC: R.T. 9/7/22, at 146].) He also failed to establish that there was a reasonable likelihood that he would have prevailed on the claim had it been made. *United States v. Goodwin*, 457 U.S. 368, 372-73, 381 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *State v. Brun*, 190 Ariz. 505, 507, 950 P.2d 164, 166 (App. 1997).

(Doc. 1-13: Minute Entry, filed on November 7, 2011, at 4.)

Petitioner again fails to demonstrate deficient performance and/or prejudice, as he again relies on speculation and conclusory statements to support his claim. Moreover, as both Judge Hoffman and Petitioner's expert, Michael Piccarreta, observed, motions to challenge prosecutorial charging decisions are "difficult ... to prevail on." (Doc. 1-13: Minute Entry, filed on November 7, 2011, page 4, quoting Exh. CC: R.T. 9/7/22, at 146.)

"A criminal defendant faces a substantial burden in bringing a vindictive prosecution claim [because] [a] 'presumption of regularity' attends decisions to prosecute." U.S. v.

Johnson, 325 F.3d 205, 210 (4th Cir. 2003) (citing U.S. v. Armstrong, 517 U.S. 456, 464 (1996)). See U.S. v. Stewart, 590 F.3d 93, 122 (2nd Cir. 2009) ("The decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, and a prosecutor's pretrial charging decision is presumed legitimate."). To overcome this presumption of regularity and "establish prosecutorial vindictiveness, a defendant must show through objective evidence that '(1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus.'" Johnson, 325 F.3d at 210 (quoting U.S. v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001)). Stated differently, "[a] prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right." U.S. v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000).

As the Ninth Circuit observed, prevailing precedent affords defendants two avenues for overcoming the presumption of regularity accorded to prosecutorial charging decisions:

> A defendant may establish vindictive prosecution (1) "by producing direct evidence of the prosecutor's punitive motivation," *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007), or (2) by showing that the circumstances establish a "reasonable likelihood of vindictiveness," thus giving rise to a presumption that the Government must in turn rebut, *United States v. Goodwin*, 457 U.S. 368, 373 [ ] (1982).

U.S. v. Kent, 649 F.3d 906, 912-13 (9th Cir. 2011). "Absent direct evidence of an expressed hostility or threat to the defendant for having exercised a constitutional right ..., to establish a claim of vindictive prosecution the defendant must make an initial showing that charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness." U.S. v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982) (internal citations omitted).

Because Petitioner never proffered any direct evidence of the prosecutor's alleged animus during his PCR proceeding, he asserted an entitlement to the presumption of prosecutorial vindictiveness under the theory that the State created the "appearance of vindictiveness" by procuring an indictment charging him with four additional

child-molestation counts involving three new victims (Luis, Sheldon, and Nicholas) after the trial court had granted Petitioner's motion to remand his case for a new probable cause determination. Specifically, Petitioner's complaint was that the State had added new charges in the second indictment before trial, allegedly to punish him for invoking his pretrial procedural right to have the prosecutor convey to the grand jurors his request to testify before returning an indictment.

However, the fact that Petitioner's "appearance of vindictiveness" claim rested upon his exercise of a pretrial right rendered the likelihood of prevailing on such a challenge to his second indictment unlikely:

> While a prosecutor's decision to seek heightened charges after a successful *post*-trial appeal is enough to invoke a presumption of vindictiveness, "proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the *pretrial* context." *United States v. Miller*, 948 F.2d 631, 633 (10th Cir. 1991) (emphasis added); *accord United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000) ("[I]n the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from the defendant's exercise of a right.").

U.S. v. Barner, 441 F.3d 1310, 1316 (11th Cir. 2006). See Stewart, 590 F.3d at 122 ("[T]his court has consistently adhered to the principle that the presumption of prosecutorial vindictiveness does not exist in a pretrial setting."); U.S. v. Frega, 179 F.3d 793, 801 (9th Cir. 1999) (collecting cases).

The Supreme Court has explained several reasons why no presumption of prosecutorial vindictiveness should automatically arise from the governmental filing new charges after the defendant's invocation of a constitutional, statutory, or procedural right before trial:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an

> accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.
>
> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.
>
> Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. [Footnote omitted.] As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

Goodwin, 457 U.S. at 381-82. The justifications that the Supreme Court cited as reasons not to presume vindictiveness in the pretrial setting apply to the instant case.

First, Petitioner's motion to remand his case for a new probable cause determination, based upon the grand jury not receiving his request to testify at the hearing, was merely an invocation of just one of the many procedural rights that the State expects defendants to assert before trial. The Supreme Court and the Ninth Circuit have therefore found it "unrealistic to assume that the prosecutor's probable response to a defendant's successful pretrial challenge to an indictment is to seek to penalize and deter." Goodwin, 457 U.S. at 381 (listing "pretrial motions to ... challenge the sufficiency and form of an indictment" as insufficient to create a presumption of vindictiveness).

Second, the presentation of evidence to the grand jury is typically brief, consuming few prosecutorial resources—yet another fact militating against the presumption that the trial court's order granting Petitioner's motion for remand engendered a vindictive response from the State. See U.S. v. Moon, 513 F.3d 527, 535 (6th Cir. 2008) ("[T]he fact that the

government had to return for a superseding indictment does not constitute a sufficient stake in deterring Defendant's exercise of a protected right.").

Third, the State's response to Petitioner's severance motion demonstrates that the prosecution continued to investigate Petitioner's crimes and evaluate its evidence beyond November 21, 2005, the date the grand jury returned the original indictment charging Petitioner with only the four counts of child molestation involving Taylor and Danielle. (Exh. DDD: Docket for Maricopa County Superior Court CR 2005-136958, at 2.) The following excerpt from said response states the following:

> The first 6 counts involve a total of 3 victims [involving Danielle A., Taylor S., and Sheldon H.] who were molested by the defendant in the swimming pool of their apartment complex in Mesa. Each of those 3 victims was a resident of the apartment complex, as was the defendant, when the molestations occurred. Each of those offenses came to light during the same investigation; the offenses in counts 5 and 6 [involving Sheldon H.] were also subject to a more complete investigation after the original charges were filed. Count 5 occurred when the victim had just moved into the complex; Count 6 occurred [in] the summer of 2005, when the first 4 counts occurred.
>
> The allegations in counts 7 and 8 arise from earlier investigations from Mesa or East Phoenix. Count 7 [involving Luis A.] came to light just before the crimes in the first 6 counts, but was investigated by a different police agency [the Phoenix Police Department] and therefore was not originally combined in the charges against the defendant. The crime happened on the border between Phoenix and Scottsdale. Count 8 came to light in the year 2001, when the defendant molested a child [Nicholas M.] in his care at a Mesa daycare center. Because no other significant allegations had been brought against the defendant at that time, the case was not then pursued for prosecution. The cases that arose in 2005 in Mesa caused the State to reinvestigate the allegations in Count 8.

(Exh. A: P.I., Item 73, at 2.)

The apparent reason why the prosecutor decided to add these four new charges during the 5-week interval between Petitioner's remand motion and the second grand jury presentation is that his review of Petitioner's case clarified: (1) proof that Petitioner touched Luis, Sheldon, and Nicholas' in various settings—a daycare center, a classroom, and the swimming pool—greatly diminished the plausibility of the anticipated defense that Petitioner's contact with Taylor and Danielle's was accidental; and (2) the evidence the prosecutor had to present to prove the original four charges involving Taylor and Danielle

would enhance the prospect of convicting Petitioner on the molestation charges involving the three aforementioned boys.

During oral argument on Petitioner's severance motion, the prosecutor stated:

> All the counts are like that. It shows—by showing that one of these events in the trial of another event, you get [Petitioner's] intent, his putting himself into these situations where he will be able to have access to the children, so he prepares for it and makes a plan for it, Judge. He certainly, in one case involving one victim, the jury is not [sic] going to be able to say, well, this is probably a mistake. The defense would argue, well, what happened to her or what happened to him was just a mistake. What I am able to show through all of these other witnesses and other victims is that no, this is not a mistake. This is a man that puts himself into a situation where he can have access to children and do bad things to them. It's not absence [sic] of accident, and, definitely, if we need to show this is the man that did it, then we have the other victims coming in and saying he did it, he did it, he did it, and 404(b) allows for that kind of evidence, Judge, not to show that he has a character to do this, but rather to show that he had all the other intentional opportunities.

(Exh. C: R.T. 11/13/06, at 7-8.)

In light of the foregoing, because any objection or motion to dismiss regarding the second indictment on prosecutorial vindictiveness grounds would have failed, the Court finds that the state court's rejection of Ground 4C was neither contrary to, nor an unreasonable application of, Strickland.

6. Ground 6B

Ground 6B alleges that Petitioner "was deprived of his federal constitutional rights to due process and a fair trial based upon prosecutorial misconduct," allegedly when Deputy County Attorney John Beatty met with and coached Luis A. during a recess in his trial testimony—misconduct that Petitioner alleges that enabled Luis, who failed to make an in-court identification of Petitioner on direct examination, to select a 2005 photograph of Petitioner from a 7-person photo array that the prosecutor showed Luis during redirect examination. (Doc. 1, at 21; Doc. 2, at 111-14; Exh. E: R.T. 1/3/07, at 29-34, 90-95.)

Ground 6B is procedurally barred because the state courts explicitly found this argument precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), as the result of Petitioner's failure to raise this claim on direct appeal. In its initial ruling on Petitioner's

PCR petition, the trial court found this claim precluded because Petitioner could have raised it on direct appeal. (Doc. 1-11: Minute Entry, filed on January 3, 2011, at 3.) The Arizona Court of Appeals affirmed this ruling in the last reasoned state court decision rejecting Ground 6B:

> May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, 2 CA-CR 2012-0257-PR, at 3, ¶ 3.)

Thus, Ground 6B is procedurally defaulted because preclusion under Rule 32.2(a) constitutes an adequate and independent procedural bar. See Stewart, 536 U.S. at 860; Smith, 241 F.3d at 1195 n.2; Ortiz, 149 F.3d at 931-32.

Petitioner has not established that any exception to procedural default applies.

7. Ground 7

In Ground 7, Petitioner argues that: (1) Jurors Rout and Mayhew-Proeber, who favored acquittal on all counts, were pressured to convict Petitioner on the five counts involving Taylor S., Danielle A., and Luis A. and consequently agreed to a compromise whereby the other 10 jurors agreed to acquit Petitioner on the two counts involving Sheldon H. in exchange (Ground 7A); and (2) Foreman Richardson allegedly persuaded Juror Mayhew-Proeber to change her verdict by opining that Petitioner would likely be imprisoned for just 1-to-2 years (Ground 7B).

a. Ground 7A

The last reasoned state-court decision, which was rendered by the trial court when it denied post-conviction relief, was neither contrary to, nor an unreasonable application of, clearly established federal law. The trial court found as follows:

> Two jurors allege vote trading. Those two jurors stated in open court that they agreed with the verdicts when jurors were polled after the verdicts were read in open court. Interviews and depositions of other jurors do not support the

> allegation of vote trading. The court finds that the defendant has failed to prove his allegation of vote trading.
>
> Even if defendant had proved that jurors traded votes, jurors can compromise in reaching a verdict. *United States v. Powell*, 469 U.S. 57, 65 (1984); *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. McKenna*, 222 Ariz. 396, ¶ 36 n.14, 214 P.3d 1037, 1048 n.14 (App. 2009); *State v. Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App. 2009).

(Doc. 1-13: Minute Entry, filed on 11/07/11, at 2.)

As the court noted, not only is compromise in jury verdicts permitted, see, e.g., Powell, 469 U.S. at 65 ("It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."), but (1) Jurors Rout and Proeber "stated in open court that they agreed with the verdicts when jurors were polled after the verdicts were read in open court," and (2) "[i]nterviews and depositions of other jurors do not support the allegation of vote trading." (Doc. 1-13: Minute Entry, filed on 11/07/11, at 2.)

The record reflects:

- Foreman Richardson told Petitioner's PCR investigator that: (1) no undue pressure was placed on any juror; (2) the not-guilty verdicts were attributable to the lack of sufficient evidence, not to any compromise agreement by which guilty and not guilty verdicts were exchanged; and (3) he recalled that the jurors were united on the guilty verdicts. (Exh. HH: Transcript of Foreman Richardson, dated 12/10/09, at 25-26, 29.)

- Juror Harris told Petitioner's PCR investigator that: (1) his not-guilty verdicts were attributable to his determination that Sheldon H. was not credible; and (2) he had no recollection of "vote trading," which he considered "completely unethical. (Exh. JJ, at 4, 13.)

- Juror Melton testified that: (1) he had no recollection of the jurors trading verdicts; and (2) his verdicts were attributable to the fact that "some charges had stronger evidence than others. (Exh. KK, at 9-10.)

- Juror Carey told Petitioner's PCR investigator that: (1) the jurors reviewed the evidence "piece by piece" during deliberations; and (2) his not-guilty verdicts were attributable to finding Sheldon H. less credible than the other victims. (Exh. NN, at 7-9.)

- Juror Reeves told Petitioner's PCR investigator that the jurors were not pressured in reaching their verdicts, everyone agreed with the final verdicts, and none of the jurors was upset with the trial's final outcome. (Exh. OO, at 9, 14.)

• Juror Rzucidlo told Petitioner's PCR investigator that: (1) the deliberations were "very civil and cordial"; (2) the jurors were not pressured into returning verdicts; (3) the not-guilty verdicts was attributable to the evidence on those counts being found lacking; and (4) that vote trading had "not really" occurred. (Exh. PP, at 10, 14-17.)

• Juror Spradlin told Petitioner's PCR investigator that: (1) she did not believe Sheldon and therefore voted not-guilty on those counts; (2) she had no recollection of vote trading; and (3) no juror was pressured. (Exh. QQ, at 5, 9, 20, 23.)

• Juror Lieb had no recollection of vote trading during deliberations. (Exh. LL, at 9.)

• Juror Andrews told Petitioner's PCR investigator that he did not recall "any kind" of vote trading. (Exh. MM, at 11.)

• During her first post-trial interview, Juror Mayhew-Proeber did not attribute the verdicts to vote-trading or intramural "plea bargaining" among the jurors, but instead stated that the convictions were "[b]asically because [the prosecutors] had a little bit more evidence" on those counts. (Exh. EE, at 7-8.) Not until her second interview, which occurred 18 months later, did Mayhew-Proeber attribute the guilty verdicts to a "plea bargain" engineered by Foreman Richardson, against whom she harbored animosity because her fellow jurors elected him as the foreman after she volunteered herself for that office. (Exh. FF, at 1, 16-20.)

• Juror Rout offered varying explanations for the verdicts, ultimately adopted Petitioner's PCR investigator's "trading votes" terminology during the post-verdict interview, and expressed regret that he had not "stuck to his guns." (Exh. II, at 12, 16, 18-23, 26.)

• When polled by Judge Stephens during trial, Meyhew-Proeber and Rout answered in the affirmative when asked whether they agreed with the verdicts returned in open court. (Exh. L: R.T. 1/16/07, at 5-6.)

b. Ground 7B

The trial court found Mayhew-Proeber's allegation untrue and therefore denied post-conviction relief stating:

> One juror alleged that jurors considered the possible penalty in reaching their verdicts. That juror confirmed that the court had instructed the jurors to not consider the possible penalty. The record indicates that the trial court told the jurors that they were not to consider punishment. (R.T. of Jan. 10, 2007, at 105-106.) The other jurors do not support the allegation that the jurors considered the possible punishment in reaching their verdicts. The Court finds that defendant has failed to prove his allegation that jurors considered punishment in reaching their verdicts.

(Doc. 1-13: Minute Entry, dated 11/7/11, at 3.)

The record demonstrates that Foreman Richardson denied Proeber's allegation that he made statements regarding Petitioner's potential sentence by telling Petitioner's PCR

investigator that: (1) he denied any knowledge of the sentencing range for Petitioner's charged offenses; and (2) the jurors did not discuss possible penalties ("It's not our role. It's not what we're being asked to do."). (Exh. I: R.T. 1/10/07, at 105-06; Exh. HH, at 27-28.) Jurors Carey, Rzucidlo, Spradlin, and Lieb corroborated Foreman Richardson's assertion that possible punishment was not considered during their deliberations. (Exh. LL, at 10 (Lieb: "Never discussed it."); Exh. NN, at 10-11 (Carey did not know range of penalties and stated that such knowledge would not have affected his verdict vote); Exh. PP, at 16-17 (Rzucidlo: "I can't recall anybody saying well, I think for these charges you get this amount of time or anything like that."); Exh. QQ, at 20 (Spradlin: "I don't remember a discussion like that.").) Juror Melton corroborated Foreman Richardson's interview statements about the jury's lack of authority to consider sentencing by testifying during his deposition that he recalled the subject of punishment being "broached," but only because another juror had "piped up and said, 'That's not within the scope. That's not something we're here—we're here to determine what the facts are of the case and to deliberate on those facts.'" (Exh. KK: at 11-12.) Juror Rout likewise had no idea what sentences Petitioner faced and recalled no discussion about the prospective penalty during deliberations. (Exh. II, at 20-21.)

Further, as noted by the trial court, Judge Stephens instructed the jurors, "You must decide whether the defendant is guilty or not guilty by determining what the facts of the case are and applying these jury instructions. You must not consider the possible punishment when deciding on guilt. Punishment is left to the judge." (Exh. I: R.T. 1/10/07, at 105-06.) Thus, the record reveals that the jurors were aware of and intended to abide by the court's instruction, notwithstanding Juror Mayhew-Proeber's interview statement to the contrary. (Exh. HH, at 27-28 [Richardson]; Exh. KK, at 11-12 [Melton].) These instructions foreclose habeas relief, even assuming that the jurors broached the topic of Petitioner's possible sentence:

> We share the *Silva* and *Bayramoglu* courts' concerns regarding speculation about sentencing by jurors, because such speculation may distort their evaluation of the evidence regarding guilt. However, such speculation was also

> the subject of the routine admonition by the judge in the instructions, "do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict." Having been so admonished, the other jurors were well armed to disregard the remark, and to remind the foreman that she should not decide the case based on what she thought would happen after sentencing. We ordinarily assume that the jurors follow their instructions. The remark is much like the remarks, or, at the least, unexpressed assumptions, that jurors routinely make about punishment in criminal cases and insurance in civil cases. That is why the admonition is generally given.

Grotemeyer v. Hickman, 393 F.3d 871, 880 (9th Cir. 2004). See Bayramoglu v. Estelle, 806 F.2d 880, 888 (9th Cir. 1986) ("It is also relevant that the trial judge gave a curative instruction to the newly-constituted jury to disregard penalty or punishment when considering guilt or innocence. ... We therefore conclude that [the juror's] misconduct was harmless beyond a reasonable doubt; that is, that there is not a 'reasonable possibility' that her brief introduction of the subject of penalties affected the jury's ultimate verdict of guilty of second degree murder.").

The Court finds that the state court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law.

8. Grounds 8 and 9B

Grounds 8 and 9B have been consolidated in this Recommendation. These claims seek relief on the following grounds:

> Ground 8: "The trial court's failure to properly instruct the jurors, on a critical legal principle concerning how they could use evidence of other acts charged in the multi-count indictment to assess guilt or innocence, denied Stephen May his federal constitutional rights to due process and a fair trial." (Doc. 1, at 25.)
>
> Ground 9B: The trial court's other-act-evidence instruction allegedly confused the jurors and led them to return guilty verdicts, based upon the clear-and-convincing-evidence standard. (Doc. 1, at 27; Doc. 2, at 116-21.)

On direct appeal, Petitioner failed to challenge the court's pretrial ruling on his motion to sever or the adequacy of the jury instructions as to whether evidence of the charged offenses against one victim could be considered while determining Petitioner's guilt on the charged offenses relating to other victims. (Doc. 1-2: Opening Brief, at 12-13; Doc. 1-3: Reply Brief, at 2-10; Doc. 1-4: Memorandum Decision, 1 CA-CR 07-0144, at 1-7.)

In his PCR petition, Petitioner sought post-conviction relief on the ground that "the Court did not fulfill its duty to explain, in understandable terms, the critical concept that the jury was required to consider each count separately, under the reasonable doubt standard, and not 'group it all together by clear and convincing evidence decide he must have done them all.'" (Doc. 1-9: PCR, at 34, quoting Exh. J: R.T. 1/12/07, at 7.) Citing the four corroboration-related questions the jury submitted during its deliberations and the post-verdict interview statements of Jurors Mayhew-Proeber and Rzucidlo, Petitioner asserted that Judge Stephens failed to give the jurors adequate guidance on the question of whether the testimony of one victim could be considered as "corroboration" of another's account, despite the instruction requiring that Petitioner's guilt on each count be determined separately—a contention that corresponds with Ground 8 in the instant habeas petition. (Id. at 35-39; Doc. 1, at 25.)

Petitioner raised his second instructional-error claim—one corresponding with Ground 9B of the instant habeas petition—in a different section of his PCR petition, one which he entitled, "The application of Arizona Rules of Evidence 404(b) and (c) in this case unconstitutionally lowered the State's burden of proof and allowed convictions by a non-unanimous jury." (Doc. 1-9: PCR, at 49.) Besides reiterating his previous complaint that the trial judge afforded the jury insufficient guidance on whether each count's evidence could be offered to corroborate another charge [raised here as Ground 8], this section of the PCR raised two new claims: (1) the trial court failed to determine whether clear and convincing evidence existed for each count before denying Petitioner's severance motion—an argument corresponding to Ground 9A of the pending § 2254 petition; and (2) the supplemental instruction that Judge Stephens gave the jury in response to its corroboration-related questions caused the jurors to convict Petitioner under the clear-and-convincing-evidence standard because "each of the 'other acts' was a separate crime being tried to the same jury." (Id. at 49-51; Doc. 1, at 27; Doc. 2, at 116-21.)

Because Petitioner had not challenged the adequacy of the jury instructions on direct appeal, the trial court found Ground 8 precluded:

> Defendant's allegation that the court failed to properly instruct the jury is precluded. This allegation was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interviews following the verdict and prior to his appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

(Doc. 1-11: Minute Entry, filed on January 3, 2011, at 2.)

The trial court likewise found precluded both claims that Petitioner submitted in "Point X" of his PCR, which included the contention corresponding to Ground 9B:

> Defendant's allegation that the court improperly applied Rules 404 (b) and (c) in denying his motion to sever counts is precluded. The claim was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient constitutional magnitude that the State is required to prove that he knowing, intelligently and voluntarily failed to raise the issue on direct appeal.

(Id. at 3.)

The Arizona Court of Appeals affirmed the trial court's preclusion ruling in its memorandum decision stating:

> ¶ 3 May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, at 3, ¶ 3.)

The Court finds that Grounds 8 and 9B are procedurally barred because the state courts explicitly found these other-act-related instructional challenges precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), as the result of Petitioner's failure to raise them on direct appeal. (Doc. 1-11: Minute Entry, at 2-3; Doc. 1-17: Memorandum Decision, 2 CA-CR 2012-0257-PR, at 3, ¶ 3.) Rule 32.2(a) is an adequate and independent state-law

ground for denying a federal constitutional claim. See Stewart, 536 U.S. at 860; Smith, 241 F.3d at 1195 n.2; Ortiz, 149 F.3d at 931-32.

Petitioner has not established that any exception to procedural default applies.

9. Grounds 9A and 4D

In Ground 9A, Petitioner alleges that he "was deprived of his federal constitutional rights to due process and an impartial jury where Arizona Rules of Evidence 404(b) and 404(c) were impermissibly employed to deny a severance of the counts, lessen the State's burden, and allowed evidence of each of the other alleged sexual offenses to be admitted at trial as proof of the other counts," in violation of the Fifth, Sixth, and Fourteenth Amendments. Petitioner states that "the trial court ... allowed the ... counts to be tried together without making the four specific findings required to admit other-act evidence under Rule 404(b)." (Doc. 1, at 27; Doc. 2, at 117-18.)

In Ground 4D, Petitioner asserts an ineffectiveness claim challenging trial counsel's failure to object to the sufficiency of Judge Stephens' Rule 404(b) and 404(c) findings. (Doc. 1, at 13, 16; Doc. 2, at 72.)

a. Ground 9A

Ground 9A is procedurally defaulted because the Arizona Court of Appeals affirmed the trial court's ruling that this claim was precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), for not having been raised on direct appeal. The pertinent state-court decision reads as follows:

> May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, at 3, ¶ 3.) And, preclusion under Rule 32.2(a) constitutes as an adequate and independent procedural bar. See Stewart, 536 U.S. at 860.

Petitioner has not established that any exception to procedural default applies. To the extent Petitioner attempts to establish cause by asserting ineffective assistance counsel (Ground 4D), said claim will be discussed below.

b. Ground 4D

This ineffective-assistance claim challenges Thompson's failure to object to the sufficiency of Judge Stephens' Rule 404(b) and 404(c) findings before trial. (Doc. 1, at 13, 16; Doc. 2, at 72.)

The pertinent state-court decision reads as follows:

> Defendant claims ineffective assistance of trial counsel for failing to require the trial court to make required findings for admission of evidence pursuant to Rule 404(b) and (c). He also claims ineffective assistance of appellate counsel in failing to raise this issue on direct appeal.
>
> Defendant presented nothing to show that Judge Stephens would have failed to make required findings for admission of evidence pursuant to Rule 404(b) and (c), Ariz. R. Evid., had they been requested. He has failed to show any likelihood of a different outcome if trial counsel had raised the issue with Judge Stephens.
>
> There is a presumption that trial courts know the law and apply it correctly in reaching rulings. *State v. Moody*, 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004). Defendant's appellate counsel was aware of that presumption. (R.T. of Sept. 7, 2011, at 68-69). Had appellate counsel raised the issue on appeal, it would have been unsuccessful based on *Moody*.

(Doc. 1-13: Minute Entry, filed on 11/10/11, at 4.)

Thus, the state court concluded that Petitioner could not prove prejudice because Petitioner failed to demonstrated that Judge Stephens would have erred by refusing to make the appropriate findings, had Thompson lodged a timely objection to the sufficiency of her ruling on the severance motion. The Court finds no error. Petitioner's speculation that Judge Stephens would have erred by disregarding a timely objection resulting in a reversal of his convictions is insufficient to establish prejudice. The state court's rejection of Ground 4D was neither contrary to, nor an unreasonable application of, Strickland.

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10. Ground 10

In Ground 10, Petitioner alleges, "The cumulative effect of the errors at trial and on appeal deprived Stephen May of his federal constitutional rights to due process, a fair trial and the effective assistance of counsel. U.S. Const. amends. V, VI and XIV." (Doc. 1, at 29.) It appears that Petitioner seeks to aggregate the errors alleged in Grounds 1, 2, 3, 4A, 4B, 4C, 4F, 4G, 4H, 5A, 6A, 6B, 6D, 7A, 7B, and 12B. (Doc. 1, at 29-30.)

Initially, the Court finds that Ground 10 is procedurally barred, in part. In his PCR petition, Petitioner invoked the cumulative-error doctrine with respect to the following alleged jury-related errors:

> In this case, the verdicts against [him] were returned by an unsworn jury after the judge had declared a mistrial [Ground 2], were reached only through an unconstitutional quid pro quo between juror factions [Ground 7A], and were coerced by the judge's failure to provide any instructions when allowing deliberations to continue. The jurors had undocumented ex parte communications with the bailiff [Ground 12B], considered during their deliberations information and material that was not introduced into evidence [Grounds 1 and 7B], and even expressed their confusion over a critical aspect of their duty—the meaning of beyond a reasonable doubt standard.

(Doc. 1-9: PCR Petition, at 43.)

Because Petitioner did not raise this claim on direct appeal, the trial court found it not only groundless, but also precluded, in its preliminary ruling on his PCR petition:

> Defendant's allegation that the cumulative effect of numerous serious issued [errors] interfered with the impartiality of the jury is precluded. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal. In addition, Arizona does not recognize the cumulative error doctrine. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

(Doc. 1-11: Minute Entry, filed on January 3, 2011, at 2.)

Because the Arizona Court of Appeals did not expressly address Petitioner's cumulative-error argument in its memorandum decision, Judge Hoffman's ruling constitutes the last-reasoned state court decision for federal habeas review purposes. Accordingly,

Petitioner's cumulative-error claim is procedurally defaulted, at least to the extent that Ground 10 is premised upon the jury-related arguments enumerated above.

Petitioner has not established that any exception to procedural default applies.

Moreover, although the Ninth Circuit has held that in some cases the cumulative effect of several errors may prejudice a defendant so much that his conviction must be overturned, see Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002), here, the Court has not identified any constitutional errors. Indeed, the errors he lists in Ground 10 stem from claims that are either procedurally defaulted or meritless. Thus, Petitioner is not entitled to relief on this claim.

11. Ground 11

In Ground 11, Petitioner claims that "[his] federal constitutional right to due process was violated when the trial court's instructions to the jury on Arizona's child molestation statute, and the defense that any touching was not sexually motivated, placed the burden of proof on the Defendant [in violation of] U.S. Const. amends. V and XIV." (Doc. 1, at 31.) Ground 11 alleges that Judge Stephens misconstrued A.R.S. §§ 13-1410(A) and 13-1407(E) and therefore gave the jury final instructions that unconstitutionally relieved the State of its statutory burden to prove an alleged element of child molestation—that any sexual contact was motivated by sexual interest—by incorrectly classifying the lack of sexual motivation as an affirmative defense that Petitioner had to prove by a preponderance of the evidence.

The Arizona Court of Appeals resolved this issue holding that motivation by sexual interest is not an element of child molestation, as defined by the version of Section 13-1410(A) in effect when Petitioner committed his offenses, and that the defense of lack of sexual motivation established by Section 13-1407(E) is an affirmative defense Petitioner was required to prove by a preponderance of the evidence:

> A. Defense of Lack of Sexual Motivation.
>
> ¶ 4 May first contends the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of evidence. [FN2: For purposes of this decision, we assume,

without deciding, that May was entitled to an affirmative defense instruction. *See State v. Gilfillan*, 196 Ariz. 396, 407, ¶ 40, 998 P.2d 1069, 1080 (App. 2000) (defendant not entitled to self-defense instruction because he denied committing the act underlying his aggravated assault charge).] May argues the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation.

¶ 5 Under A.R.S. § 13-1410(A) (2001), "[a] person commits molestation of a child by intentionally or knowingly engaging in ... sexual contact ... with a child under fifteen years of age." "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body ..." A.R.S. § 13-1401(2) (2001). Pursuant to A.R.S. § 13-1407(E) (Supp. 2007), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest." [FN3: We cite a statute's current version when no changes material to this decision have occurred since the relevant date.]

¶ 6 We rejected May's argument in a recent opinion, *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. 2007), in which we held that "[t]he 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather creates an affirmative defense regarding motive." *Id.* at 329, ¶ 19, 173 P.3d at 1030 (internal quotation and citation omitted). We see no reason why *Simpson* does not dispose of this issue. [FN4: The fact that we reviewed the purported trial error in *Simpson* under a fundamental error analysis does not mean the holding in *Simpson* does not apply here. We concluded in *Simpson* that the superior court's failure to *sua sponte* instruct the jury that the State had the burden to prove defendant's sexual motivation was not "error, fundamental or otherwise." *Simpson*, 217 Ariz. at 330, ¶ 23, 173 P.3d at 1031.] The cases May cites do not persuade us otherwise. *State v. Brooks*, 120 Ariz. 458, 586 P.2d 1270 (1978), and *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986), both addressed a prior version of § 13-1410 that made it a crime to "knowingly molest[ ]" a child. *See* 1977 Ariz. Sess. Laws, ch. 142, § 66 (1st Reg.Sess.) (amending and renumbering A.R.S. § 13-653 to § 13-1410); 1993 Ariz. Sess. Laws, ch. 255, § 29 (1st Reg. Sess.) (amending § 13-1410 to reflect its current version). Accordingly, the superior court did not abuse its discretion in instructing the jury that May had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes. *See State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (denial of a requested jury instruction is reviewed for an abuse of discretion).

(Doc. 1-4: Memorandum Decision, at 2, ¶¶ 4-6.)

Thus, given the Arizona Court of Appeals' state-law determinations that motivation by sexual interest is not an element of child molestation under Section 13-1410(A), and that the lack of sexual motivation is an affirmative defense under Section 13-1407(E), the Court finds no error regarding the final instructions at issue since they conditioned conviction upon the State proving every element of child molestation beyond a reasonable doubt and required

Petitioner to prove the affirmative defense of lack sexual motivation by a preponderance of the evidence:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

(Exh. A: P.I., Item 165, at 8; Exh. I: R.T. 1/10/07, at 107-08.)

The state court's rejection of said claim was neither contrary to, nor an unreasonable application of, federal law.

12. Ground 12

Petitioner raises four sub-claims in Ground 12:

Ground 12A: "Stephen May's federal constitutional right to an impartial jury, right to due process and guarantee against double jeopardy were violated when the trial judge permitted the jury to reconvene and deliberate further after declaring a mistrial and discharging the jurors. U.S. Const. amends. V, VI and XIV." (Doc. 1, at 34.)

Ground 12B: The jurors' communication with the bailiff constituted an ex parte communication with the court. (Id.)

Ground 12C: Judge Stephens never explored whether the jurors had been exposed to outside influences. (Id.)

Ground 12D: Judge Stephens "tacitly influenced the verdict by sending a loud and clear message that [she] wanted the jury to reach a decision" by "failing to take [the] rudimentary actions" of asking the jurors why they wanted to resume deliberations, re-charging the jurors, re-administering their oath, and ensuing that the jurors understood the acceptability of not being able to return a verdict at all. (Doc. 2, at 93.)

a. Ground 12A

Petitioner argues that his "federal constitutional right to an impartial jury, right to due process and guarantee against double jeopardy were violated when the trial judge permitted the jury to reconvene and deliberate further after declaring a mistrial and discharging the

jurors," in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (Doc. 1, at 34.) The following passage from the Arizona Court of Appeals' memorandum decision constitutes the pertinent state-court ruling on Ground 12A:

> ¶ 7 May argues the superior court erred by allowing the jury to reconvene to continue deliberating after the court had declared a mistrial. We review only for fundamental error because May failed to object when the superior court reassembled the jury and permitted it to resume deliberating. *See State v. Velazquez*, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, May must show that error occurred, the error was fundamental and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.
>
> ¶ 8 The only Arizona case cited to us (or which we have found) in which a jury reconvened after having been discharged is *State v. Crumley*, 128 Ariz. 302, 305-06, 625 P.2d 891, 894-95 (1981). In that case, it was discovered "almost immediately" after the jury was discharged that trial on the issue of prior convictions had been overlooked. *Id.* at 305, 625 P.2d at 894. The bailiff in short order located six of the eight jurors. The other two were reached at their homes, and all eight returned the next day to take up the prior conviction issue. Under those circumstances, our supreme court said:
>
> > Once discharged, we think this jury could not be properly recalled to further decide an issue of this case. It is simply too dangerous a practice to discharge the individual jurors from the duties and obligations of their oath, send them back into the community without admonitions or instructions, and then recall those same jurors to make a fair and impartial determination of any remaining issue connected with the case.
>
> *Id.* at 306, 625 P.2d 891, 625 P.2d at 895.
>
> ¶ 9 The facts in this case are different—the jury reconvened only a few minutes after having been discharged. Although nothing in the record tells us the jurors did not interact with the public in the meantime, the court had invited the jurors to gather again in the jury room. In any event, we know that they did not have the extended opportunity for contact with the public that occurred in *Crumley*.
>
> ¶ 10 Although the court in *Crumley* might have announced a rule that any verdict rendered after a jury once has been discharged is null and void, it did not; instead, it reasoned that under the facts of that case, a verdict issued after the jury had been "sen[t] ... back into the community without admonitions or instructions" could not stand. [Footnote omitted.] We take from *Crumley*, therefore, that under Arizona law, structural error requiring reversal does not occur whenever a jury that has been discharged reconvenes and issues a guilty verdict. *See State v. Ring*, 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (when structural error occurs, conviction is automatically reversed); *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926) ("the mere announcement of their discharge does not, before they have dispersed and mingled with the

> bystanders, preclude recalling" the jury); *Masters v. Florida*, 344 So.2d 616, 620 (Fla. App. 1977) (burden on defendant to prove outside influence on jury during period of discharge). *But see Blevins v. Indiana*, 591 N.E.2d 562, 563 (Ind. App. 1992) ("Any action of the jury after its discharge is null and void."); *Michigan v. Rushin*, 37 Mich.App. 391, 194 N.W.2d 718, 721-22 (Mich.App.1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green*, 995 S.W.2d 591, 614 (Tenn. 1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia*, 132 Va. 703, 111 S.E. 291, 294 (Va. 1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court"); *cf. Arnold v. Alabama*, 639 So.2d 553, 554-55 (Ala. 1993) (new trial granted when jury reconvened over defendant's objection; record did not disclose amount of time that elapsed between discharge and reconvening of jury or where jury was in the meantime).
>
> ¶ 11 May argues that we may presume that he was prejudiced when the jury was allowed to reconvene; at oral argument, for example, his counsel urged that we may take as common knowledge that jurors would reach for their cell phones to call friends or family immediately upon discharge. May points to nothing in the record that would demonstrate such prejudice, however, and, pursuant to *Henderson*, we will not presume prejudice when, by contrast to the facts in *Crumley*, the record does not disclose that the jury was "sen[t] back into the community" before reconvening. Accordingly, we may not reverse his conviction on this ground.

(Doc. 1-4: Memorandum Decision, at 3-4, ¶¶ 7-11.)

First, regarding Petitioner's contention that the continuation of deliberations after the mistrial request violated Double Jeopardy, the state-court record reflects that Judge Stephens declared a mistrial due to a hung jury: (1) the jurors had deliberated for nearly 2 days before sending a note reporting disagreement on whether the State's evidence proved Petitioner's guilt beyond a reasonable doubt; (2) Judge Stephens issued an impasse instruction and asked the jurors to consider whether agreement could be reached; and (3) less than 30 minutes later, the jurors sent another note reporting continued deadlock. (Exh. A: P.I., Items 214-19; Exh. J: R.T. 1/12/07, at 3-10.) On direct appeal, Petitioner contended that "the discharge of the jury" following this mistrial declaration constituted "a terminating event to the trial," in violation of his "double jeopardy protection." (Doc. 1-3: Reply Brief, 1 CA-CR 07-0144, at 7.) The Arizona Court of Appeals rejected this argument because the Supreme Court has never held that a mistrial based upon jury deadlock constitutes an event terminating jeopardy. Instead, the Supreme Court has "constantly adhered to the rule that a retrial following a

'hung jury' does not violate the Double Jeopardy Clause," Richardson v. U.S., 468 U.S. 317, 324 (1984), based upon the rationale that "a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled." Yeager v. U.S., 557 U.S. 110, 118 (2009). Because Judge Stephens' mistrial declaration was not a jeopardy-terminating event under Supreme Court precedent, the Arizona Court of Appeals reasonably concluded that Petitioner suffered no violation of the Fifth Amendment's Double Jeopardy Clause when Judge Stephens rescinded her mistrial order and allowed the jury to resume deliberations, with Petitioner's consent. The Court finds no error.

Next, Petitioner contends that allowing the jurors to resume deliberations after the mistrial declaration violated his right to an impartial jury and due process. The Court finds that the Arizona Court of Appeals' rejection of this portion of Ground 12A was objectively reasonable because the record demonstrates that no juror had entered public areas of the courthouse or had otherwise been exposed to external influences impairing their fairness: (1) after declaring a mistrial, Judge Stephens thanked the jurors for their service, reported that the attorneys wished to speak with them, and asked them "to wait back in the jury room" if they desired to talk to the lawyers; (2) the jurors left the courtroom at 3:25 p.m.; (3) while Judge Stephens, counsel, and Petitioner remained inside the courtroom to discuss a new trial date, "the bailiff ... received a communication from the jury that they do not wish to have a hung jury and wish to continue deliberating and wish to communicate that to counsel"; (4) during the ensuing discussion about the jury's request, neither Judge Stephens nor counsel reported that any juror had been observed exiting the courtroom and entering the adjacent public hallway; (5) after both parties had agreed to permit the jury continue its deliberations, Judge Stephens recessed the proceeding at 3:30 p.m.—just 5 minutes after the jury had left the courtroom; and (5) the jury took a 14-minute recess in its deliberations 3 minutes later, at 3:33 p.m. (Exh. B: M.E., Item 220; Exh. J: R.T. 1/12/07, at 9-11.)

The Arizona Court of Appeals' refusal to speculate that any juror was exposed to external influences during this brief 5-minute-long interval comports with precedent holding that the existence of error should not be presumed from a silent record. Accordingly, the appellate court's rejection of this portion of Ground 12A was neither contrary to, nor an unreasonable application of, clearly established federal law.

b. Ground 12B

This claim seeks habeas relief on the ground that the jurors' communication with the bailiff constituted an improper communication with Judge Stephens. (Doc. 1, at 34.) This contention concerns two separate statements between the jury and bailiff: (1) the jury's request that Judge Stephens be informed that it wished to continue deliberating; and (2) the bailiff's verbal transmission of Judge Stephens' message granting that request to the jurors. Ground 12B is procedurally defaulted.

First, Petitioner never raised this claim on direct appeal. (Doc. 1-2: Opening Brief, at 12-33; Doc. 1-3: Reply Brief, at 2-10; Doc. 1-3: Petition for Review, at 1-6.) Second, although Petitioner's PCR petition raised the claim that "[t]he judge, through her agent the bailiff, had substantive unrecorded ex parte communications with the jury" (Doc. 1-9: PCR Petition, at 25), he failed to include that claim in his petition for review by the Arizona Court of Appeals, wherein his sole jury-related contentions alleged that the jurors improperly considered extrinsic evidence, and that the mistrial declaration and verbal discharge of the jurors rendered the jury without jurisdiction to return a valid verdict. (Doc. 1-14: Petition for Review by Arizona Court of Appeals, at 1-2, 4-12.) Petitioner's failure to present Ground 12B to the Arizona Court of Appeals on direct review and during his PCR proceedings renders this claim unexhausted. See Castillo, 399 F.3d at 999; Swoopes, 196 F.3d at 1011. And, any attempt to return to state court would be futile. See Ariz.R.Crim.P. 32.2(a)(3) and 32.4(a).

Petitioner has not established that any exception to procedural default applies.

\\\

c. Ground 12C

This claim alleges that Judge Stephens should have explored whether the jurors had been exposed to outside influences and committed reversible error by not doing so. (Doc. 1, at 34.) Ground 12C is procedurally defaulted.

Petitioner failed to present this claim on direct review, in his PCR petition, or in his petition for review to the Arizona Court of Appeals. Not until he filed his petition for review with the Arizona Supreme Court did Petitioner suggest that reversible error occurred because Judge Stephens did not explore whether an external influence motivated the jurors to make their post-mistrial request to continue deliberations. Thus, Petitioner did not fairly present this argument to the state judiciary because he raised it, for the first time, to the Arizona Supreme Court.

Petitioner's failure to present Ground 12C to the Arizona Court of Appeals on direct review and during his PCR proceedings renders this claim unexhausted. See Castillo, 399 F.3d at 999; Swoopes, 196 F.3d at 1011. And, any attempt to return to state court would be futile. See Ariz.R.Crim.P. 32.2(a)(3) and 32.4(a).

Petitioner has not established that any exception to procedural default applies.

d. Ground 12D

Petitioner contends that Judge Stephens "tacitly influenced the verdict by sending a loud and clear message that [she] wanted the jury to reach a decision," allegedly because of her failure to "take such rudimentary actions" like inquiring why the jurors decided to continue deliberating after the mistrial declaration, re-administering the oath to the jurors, re-charging the jury with some unspecified instructions, and reiterating the acceptability of returning no verdicts whatsoever. (Doc. 2, at 93.)

Ground 12D is procedurally defaulted. Petitioner never raised this coercion claim on direct appeal, (Doc. 1-2: Opening Brief), or in his petition for review by the Arizona Court of Appeals in his PCR proceedings, (Doc. 1-14: Petition for Review by Arizona Court of Appeals). Petitioner's failure to present Ground 12D to the Arizona Court of Appeals on

direct review and during his PCR proceedings renders this claim unexhausted. See Castillo, 399 F.3d at 999; Swoopes, 196 F.3d at 1011. And, any attempt to return to state court would be futile. See Ariz.R.Crim.P. 32.2(a)(3) and 32.4(a).

Petitioner has not established that any exception to procedural default applies.

13. Ground 13

In Ground 13, Petitioner alleges that the trial court violated the Eighth Amendment by imposing consecutive 15-year prison sentences for each child-molestation conviction resulting in "the cumulative effect of 75 years' imprisonment [which] violated [his] federal constitutional right to be free from cruel and unusual punishment. U.S. Const. amends. VIII and XIV." (Doc. 1, at 35; Doc. 2, at 132.)

Petitioner raised this issue on direct appeal, and the Arizona Court of Appeals found, as follows:

> Finally, May contends that the individual sentences for each count and his lengthy aggregate sentence constitute cruel and unusual punishment. As May concedes, he did not raise this argument below. Therefore, he has waived this issue and we need not address it. *See State v. Navarro*, 201 Ariz. 292, 298 n.6, ¶ 22, 34 P.3d 971, 977 n.6 (App. 2001) (Eighth Amendment argument that was not raised before the trial court is waived on appeal). Even if we were to consider this argument, however, pursuant to *State v. Berger*, 212 Ariz. 473, 476, ¶¶ 15-16, 134 P.3d 378, 381 (2006), we would be compelled to conclude that his sentence is not grossly disproportionate to his crimes.

(Doc. 1-4: Memorandum Decision, at 5, ¶ 16.)

As to Petitioner's claim that the trial court erred by imposing a 15-year prison term for each conviction for child molestation, the Supreme Court in Harmelin v. Michigan, 501 U.S. 957 (1991), set forth the framework governing Eighth Amendment challenges to the length of non-capital sentences. See Graham v. Florida, 560 U.S. 48, 59-60 (2010); Ewing v. California, 538 U.S. 11, 23-24 (2003). Specifically, the Court stated:

> All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring). However, "outside of the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.... Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem v. Helm, 463 U.S. 277, 289-90 (1983). Generally, a court will not overturn a sentence on Eighth Amendment grounds if the sentence does not exceed statutory limits. See United States v. Zavala–Serra, 853 F.2d 1512, 1518 (9th Cir. 1988) (upholding sentence of ten years' imprisonment for conspiracy to possess and distribute 2,000 grams of cocaine when sentence was within statutory range).

In analyzing an Eighth Amendment proportionality challenge, a court must determine whether a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992) (citing Harmelin, 501 U.S. at 1001 (finding that sentence of life imprisonment without possibility of parole did not raise inference of disproportionality when imposed on a felon in possession of a firearm)).

The objective reasonableness of the Arizona Court of Appeals' ultimate conclusion that Petitioner's 15-year prison terms did not raise an inference of gross disproportionality is demonstrated by Supreme Court precedent upholding far lengthier prison terms for property and drug-related offenses that lack the gravity of crimes victimizing children. See Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (upholding two statutorily-mandated consecutive prison terms of 25 years to life for two counts of petty theft under California's recidivist statute); Ewing, 538 U.S. at 30-31 (upholding mandatory prison term of 25 years to life for California recidivist convicted of felony grand theft); Harmelin, 501 U.S. at 1005 (upholding mandatory life imprisonment without parole for a first-time offender who stood convicted of simple possession of 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 375 (1982) (upholding two consecutive 20-year prison terms imposed for selling 3 ounces of

marijuana and possessing 6 ounces of marijuana for distribution); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (upholding life sentence, with parole eligibility, imposed upon a Texas recidivist whose three theft-related crimes involved money and property having an aggregate worth of $229.11).

Here, the Court finds that Petitioner's mitigated 15-year sentence for each conviction was not grossly disproportionate to his crime.

Regarding Petitioner's challenge to the consecutive nature of his sentences which had "the cumulative effect of 75 years' imprisonment," the Eighth Amendment analysis "focuses on the sentence imposed for each specific crime, not on the cumulative sentence." United States v. Aiello, 864 F.2d 257, 265 (2nd Cir. 1988). As the Supreme Court has made clear, if the defendant

> has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.

O'Neil v. State of Vermont, 144 U.S. 323, 331 (1892).

Even if this Court did consider Petitioner's sentence in the aggregate, the Court still finds no error. Indeed, the Supreme Court has held in several contexts that consecutive sentences do not pose a constitutional problem where the legislature has specifically provided for such sentences. See Whalen v. United States, 445 U.S. 684, 689 (1980) (noting that it is fully within the power of Congress to provide cumulative punishments, the only question was whether or not it had done so); Gore v. United States, 357 U.S. 386, 392 (1958) (holding that Congress clearly has the power to determine separate sentences for separate offenses); Carter v. McClaughry, 183 U.S. 365, 394 (1902) ("Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute."). In addition, there is no constitutional right to receive sentences concurrently; rather, the "specification of the regime for administering multiple

sentences has long been considered the prerogative of state legislatures." Oregon v. Ice, 555 U.S. 160 (2009).

Therefore, Petitioner cannot establish that the state court's rejection of his Eighth Amendment claim was contrary to, or an unreasonable application of, clearly established federal law.

14. Ground 14

In his final ground for habeas relief, Petitioner contends that he "is actually innocent of the charges and, but for the trial errors and constitutional violations, no reasonable juror would have found him guilty beyond a reasonable doubt," and asserts that this claim is supported by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (Doc. 1, at 37.) In the memorandum accompanying his habeas petition, Petitioner elaborates that he "is actually innocent" because the State did not have any physical evidence to corroborate the victims' allegations, the prosecutor allegedly "coached" one victim, and Petitioner turned down an advantageous plea offer because he never touched any child with sexual motivation. (Doc. 2, at 139.) Petitioner also contends that his verdict was "impaired by a number of egregious errors including: (1) being tried under a statutory scheme that shifted the burden on sexual intent from the prosecution to the defense; (2) having jurors who exploited extrinsic evidence, smuggled into the jury room, to conduct unauthorized experiments and demonstrations regarding the dispositive issue of sexual intent; and (3) having a trial lawyer who, inexplicably, failed to introduce available evidence to support [Petitioner's] critical medical defense, and failed to call or confer with other experts, among other deficiencies." (Id. at 140.)

Assuming that Petitioner's freestanding actual innocence claim under Herrera v. Collins, 506 U.S. 390 (1993) is cognizable in these proceedings,[7] the Court finds that

[7] The United States Supreme Court has not explicitly held that a "freestanding" claim of factual innocence, i.e., one unaccompanied by a substantive claim of constitutional error in trial proceedings, provides a basis for federal habeas relief in a non-capital case. See Jones

Petitioner has not met his burden under this claim. "[T]he *Herrera* majority's statement that the threshold for a freestanding claim of innocence would have to be extraordinarily high, contemplates a stronger showing than insufficiency of the evidence to convict." See Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (internal citations omitted). "A habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Id. Petitioner has not done so.

While the State lacked physical evidence, each victim's testimony regarding his or her own sexual abuse was sufficient to support a conviction. And, the jury was not required to accept as true Petitioner's self-serving testimony that any contact with the children's genitals was not sexually motivated.

CONCLUSION

Having determined that Petitioner's claims are procedurally defaulted and/or fail on the merits, the Court will recommend that Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE.**

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right and because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

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v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014) ("We have not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although we have assumed that such a claim is viable.").

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 15th day of September, 2015.

Michelle H. Burns
Michelle H. Burns
United States Magistrate Judge

Supreme Court
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

Rebecca White Berch
Chief Justice

Janet Johnson
Clerk of the Court

April 24, 2013

RE: STATE OF ARIZONA v STEPHEN EDWARD MAY
Arizona Supreme Court No. CR-12-0416-PR
Court of Appeals Division Two No. 2 CA-CR 12-0257 PRPC
Maricopa County Superior Court No. CR2006-030290-001SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 23, 2013, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Justice Timmer did not participate in the determination of this matter.

There is no record to return.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Gerald R Grant
JoAnn Falgout
Herald Price Fahringer
Erica T Dubno
Stephen Edward May, ADOC #214465, Arizona State Prison, Florence - Eyman Complex-Meadows Unit
Cory Engle
Mikel P Steinfeld
Daniel Joseph Pochoda
Kelly J Flood
James Duff Lyall, ACLU Foundation of Arizona
Jeffrey P Handler
adc

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. STEPHEN EDWARD MAY, Petitioner.	2 CA-CR 2012-0257-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006030290001SE

Honorable Kristin C. Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant
Phoenix
Attorneys for Respondent

The Law Office of JoAnn Falgout, P.L.C.
By JoAnn Falgout
Tempe

and

Fahringer & Dubno
By Herald Price Fahringer and Erica T. Dubno
New York, NY
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Following a jury trial, petitioner Stephen May was convicted of five counts of child molestation. He was sentenced to consecutive prison terms totaling seventy-five years. He appealed, and this court affirmed the convictions and sentences imposed. *State v. May*, No. 1 CA-CR 2007-0144, ¶ 17 (memorandum decision filed July 24, 2008). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied relief on several of his claims. Following an evidentiary hearing on his remaining claims, which consisted primarily of claims of ineffective assistance of trial and appellate counsel, the court denied the petition in its entirety. This petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

Precluded and Waived Claims

¶2 May argues the trial court erred when it rejected his claim that his conviction must be reversed because A.R.S. § 13-1410(A), the statute under which he was convicted, shifts from the state to the defendant the burden of proving lack of sexual motivation and is, therefore, unconstitutional. But, as the court correctly concluded, May is precluded from raising this claim, having waived it by not raising it at trial or on appeal.[1] *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding"). Indeed, on appeal May argued the

[1]Although May does not argue to the contrary, we note the trial court correctly concluded this "claim does not implicate constitutional rights which are considered personal to the defendant . . . and is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal." *See Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d at 951.

court had erred when it instructed the jury that lack of sexual motivation was an affirmative defense he was required to prove, but he did not challenge the constitutionality of the statute. *See May*, No. 1 CA-CR 2007-0144, ¶¶ 4-6. Relying on *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), May asserts in his reply to the state's response to his petition for review that the error was fundamental and that this issue is, therefore, "ripe," and he is not precluded from raising it. But May misapplies *Henderson* and the fundamental error doctrine. Our supreme court explained in *Henderson* that error not raised at trial still may be addressed on appeal when the error is "fundamental." 210 Ariz. 561, ¶ 19, 115 P.3d at 607. However, a claim is not excepted from the rule of preclusion applicable to Rule 32 proceedings simply because the alleged error involved may be characterized as fundamental. *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958. The trial court did not abuse its discretion in finding this claim precluded.

¶3 May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

¶4 May contends for the first time on review that he is entitled to relief because "the jury did not have jurisdiction to reach a verdict." He bases this argument on

the fact that the jurors continued deliberating after a mistrial initially was declared.[2] The propriety of the continued deliberations was raised in May's direct appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11. And the trial court correctly found that his claim it had erred by permitting the jury to continue deliberating was precluded because it had been addressed and rejected on appeal. Consequently, to the extent May argues he is entitled to relief due to the jury's continued deliberations, his argument is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 May nevertheless contends he can raise this issue in his petition for review because, given the initial declaration of a mistrial, the jury lacked subject matter jurisdiction to decide his case. But in his petition for post-conviction relief before the trial court, May did not base his argument on subject matter jurisdiction. We will not consider May's argument because we do not consider issues raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review). Moreover, this is not a subject matter jurisdiction issue. *See State v. Maldonado*, 223 Ariz. 309, ¶ 14, 223 P.3d 653, 655 (2010) ("'subject matter jurisdiction' refers to a court's statutory or constitutional power to hear and determine a particular type of case").

[2]After extensive deliberations, the jury informed the trial court that it was deadlocked. The court dismissed the jury and declared a mistrial. A few minutes later, the jury asked to begin deliberations again, and both the prosecutor and May's attorney stated they did not object.

Alleged Juror Misconduct

¶6 May next contends the trial court erred in rejecting his claim of juror misconduct. The jury foreman brought a stuffed animal into deliberations for demonstrative purposes. May argues, as he did below, that the stuffed animal was "extrinsic evidence" and should not have been permitted in the jury room. He contends the court erred by finding he was not prejudiced by its use.

¶7 In neither his petition for post-conviction relief nor in his petition for review did May specify the subsection of the rule under which he was seeking relief for this purported misconduct. *See* Ariz. R. Crim. P. 32.5 ("The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him . . . ."). To the extent the claim fell under Rule 32.1(a), it clearly was precluded because it could have been raised on appeal. Ariz. R. Crim. P. 32.2(a). But May seemed to assert this claim under Rule 32.1(e) based on newly discovered evidence. In his petition for post-conviction relief, he stated that "significant relevant facts were not available until after trial and appeal." "Evidence is not newly discovered unless . . . at the time of trial . . . neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Thus, even assuming May was attempting to raise a claim of newly-discovered evidence, he did not show he exercised the requisite due diligence in attempting to secure the new evidence. *See* Ariz. R. Crim. P. 32.1(e)(2). Consequently, May has not sustained his burden of establishing the trial court abused its discretion by denying relief on this ground.

Ineffective Assistance of Counsel Claims

¶8 May also challenges the trial court's denial of relief on his claims of ineffective assistance of trial and appellate counsel, which the court rejected after an evidentiary hearing. To establish such a claim, a defendant must show that counsel's performance fell below prevailing professional norms and the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The Sixth Amendment does not entitle a defendant to mistake-free representation. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006); *see also State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (defendants "not guaranteed perfect counsel, only competent counsel"), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). And there is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel's conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶9 "Matters of trial strategy and tactics are committed to defense counsel's judgment . . . ." *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988); *accord State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) ("Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel."). And "'disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some

reasoned basis.'" *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), *quoting State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987).

¶10 Furthermore, even if counsel's strategy proves unsuccessful, tactical decisions normally will not constitute ineffective assistance. *State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975); *see also Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d at 636 ("strategic decision to 'winnow[] out weaker arguments on appeal and focus[] on' those more likely to prevail is an acceptable exercise of professional judgment"), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (alterations in *Febles*). And, when the trial court has held an evidentiary hearing, we defer to its factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶11 May advances several claims of ineffective assistance of trial and appellate counsel. Two of his claims—that counsel was ineffective for failing to raise a jurisdiction challenge to the continued deliberations and failing to object to a video of post-arrest questioning—are being raised for the first time on review.[3] Therefore, we do not address these claims. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶12 May also contends the trial court erred in rejecting his claim that trial counsel was ineffective for failing to object to the continued jury deliberations. But even

[3]May asserts in his reply to the state's response to his petition for review that the issue of the video was raised below. Although this claim was mentioned briefly in May's petition for post-conviction relief and during the evidentiary hearing, he did not present the trial court with sufficient argument to allow it to rule on the issue. *Cf. State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy").

assuming, without deciding, that counsel's performance was deficient, May cannot show prejudice because we rejected the underlying claim of error on appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11; *see also Strickland*, 466 U.S. at 694 (to establish prejudice, defendant must show "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Inability to show prejudice is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance.").

¶13 Similarly, the trial court correctly rejected his fourth claim—that trial counsel "did not adequately confer with [him]" before allowing the jury deliberations to continue. In rejecting this claim, the court found that counsel's decision was "a tactical and strategic decision" that cannot "form the basis for a claim of ineffective assistance." But the claim also fails because May does not assert he would have made a different decision had he been consulted further. *See id.* (defendant must prove prejudice; without it, court need not address counsel's performance); *see also Strickland*, 466 U.S. at 694.

¶14 With respect to the remaining claims of ineffective assistance of counsel, the trial court correctly identified and resolved them in a manner permitting this or any other court to review and determine the propriety of its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by restating the court's ruling, and because the ruling is supported by the record and the applicable law, we adopt it. *See id.*

¶15 Accordingly, although we grant the petition for review, we deny relief.

VIRGINIA C. KELLY, Judge

CONCURRING:

GARYE L. VASQUEZ, Presiding Judge

PHILIP G. ESPINOSA, Judge

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/10/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-030290-001 SE

11/07/2011

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT
D. Sanchez
Deputy

STATE OF ARIZONA

JOHN F BEATTY
GERALD R GRANT

v.

STEPHEN EDWARD MAY (001)

STEPHEN EDWARD MAY
ASPC - EYMAN #214465
PO BOX 3200
FLORENCE AZ 85132
JOANN FALGOUT

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-SE
FAHRINGER & DUBNO
120 EAST 56TH STREET
SUITE 1150
NEW YORK NY 10022

POST-CONVICTION RELIEF DENIED

The Court took this matter under advisement after an evidentiary hearing on Defendant's Petition for Post-Conviction Relief. This is Defendant's first Petition for Post-Conviction Relief.

The parties stipulated that instead of live testimony from jurors in the May trial, the Court could consider transcripts of recordings of juror interviews and transcripts of juror depositions.

The court heard the testimony of Joel Thompson, Tracey Westerhausen, Dr. Harry Goodman, M.D., Michael Piccarreta, Dr. Phillip Esplin, Ph.D., and Terry Borden.

The court has considered the testimony of the witnesses, the exhibits admitted at the evidentiary hearing, all pleadings filed in conjunction with this petition for post-conviction relief and the transcripts of the evidentiary hearing.

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MARICOPA COUNTY

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ALLEGATIONS OF JUROR MISCONDUCT

Two jurors allege vote trading. Those two jurors stated in open court that they agreed with the verdicts when jurors were polled after the verdicts were read in open court. Interviews and depositions of other jurors do not support the allegation of vote trading. The court finds that the defendant has failed to prove his allegation of vote trading.

Even if defendant had proved that jurors traded votes, jurors can compromise in reaching a verdict. *United States v. Powell,* 469 U.S. 57, 65 (1943); *State v. Zakahr,* 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. McKenna,* 222 Ariz. 396, ¶ 36 n. 14, 214 P.3d 1037, 1048 n. 14 (App. 2009); *State v. Lewis,* 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App. 2009).

The jury foreman brought a stuffed bear (or rabbit according to one juror) into the jury room during deliberations and used it briefly to demonstrate how defendant might have touched the victims and how he reached his conclusions in the case. (Hearing Exhibit 29 at 13:14; 14:11). Several other jurors handled the stuffed animal, and one juror also used it to give a visual of "what possibly could have happened." (Hearing Exhibit 31 at 11:12-13). One of the jurors said the presence of the stuffed animal helped the jurors to see "how he was holding the kids on his lap and how he put his hands between their legs and different things like that." (Hearing Exhibit 49 at 17:22-24). Another said "He was just showing how different way that could have been, if he could have held it on his lap or how things could have happened this way." (Separate Appendix to Defendant's Memorandum in Support of Petition for Post-Conviction Relief, Tab 73, 17:6-17:8). Another said, "[w]e brought it in to kind of discuss about it to kind of look at specifics where if a child points here does that really mean this and just kind of see exactly what that translates to in person instead of on the video." (*Id.,* Tab 76, 10:6-9). It was used "Just to develop a visual of, you know, different way that that—the person's hand could be if they were going to toss a child in a pool, for instance, and try to elaborate on how the children said that they had been touched as he threw them in a pool or that sort of thing." (*Id.,* Tab 77, 22:26-23:1).

Evidence presented during the trial established that a stuffed bear was used during forensic interviews of the alleged victims to demonstrate how they were touched by defendant. The stuffed animal in the jury room was used in the same manner as the stuffed bear was during the interviews of the alleged victims.

Because the jury considered extrinsic evidence (the stuffed bear), prejudice is presumed unless the State proved beyond a reasonable doubt that the extrinsic evidence did not taint the verdict. *State v. Hall,* 204 Ariz. 442, 447, ¶16, 65 P. 3d 90, 95 (2003); *State v. Poland,* 132 Ariz. 269, 283, 645 P. 2d 784, 798 (1982).

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There is no evidence that the presence of the stuffed animal was either favorable or unfavorable to defendant. The stuffed animal was a neutral object used by some of the jurors for demonstrative purposes. Because there is no evidence that the presence of the stuffed animal influenced the verdicts, the Court finds beyond a reasonable doubt that extrinsic evidence did not taint the verdicts.

One juror alleged that jurors considered the possible penalty in reaching their verdicts. That juror confirmed that the court had instructed the jurors to not consider the possible penalty. The record indicates that the trial court told the jurors that they were not to consider punishment. (R.T. of Jan. 10, 2007, at 105-106.) The other jurors do not support the allegation that the jurors considered the possible punishment in reaching their verdicts. The Court finds that defendant has failed to prove his allegation that jurors considered punishment in reaching their verdicts.

THE COURT FINDS no evidence that juror misconduct influenced the verdicts they reached in this case.

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Michael Piccarreta opined that trial counsel Joel Thompson was ineffective in (1) not filing a motion pretrial challenging the constitutionality of the Arizona child molestation statute and Arizona statute setting forth the burden of proof as set forth in A.R.S. §13-1407 and §13-1410, (2) not considering the use of experts, either for use as consulting experts or testifying experts, (3) not asserting a claim of prosecutorial vindictiveness after more charges were filed after a successful motion to remand to the Grand Jury, (4) not objecting to continued deliberation after a mistrial was declared, (5) not considering the use of character witnesses both as to defendant's character for truthfulness and honesty and his lack of possession of an aberrant sexual propensity to commit the offenses charged (Ariz.R.Evidence 404(a)(1), (c).

He opined that once the court has ruled that 404(c) evidence has come in, the prosecutor has opened the door to evidence under 404(a)(1), and that an effective trial attorney would gather evidence, make disclosure, see what happens, and then decide whether to use character evidence.

Dr. Harvey Goodman, M.D. reviewed the medical records of Defendant and opined that he has a congenital static encephalopomy.

Dr. Phillip Esplin opined that an expert in the area of child witnesses should have been consulted in this case noting that the case was complex to investigate given Defendant's work history, other history, four complaints within the apartment complex regarding events that were brief and not very complex, and the fragility of memory of complainant five at the time of the police interview. He opined that expert testimony would have been helpful to the jury as the

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testifying police detective was experienced but not a memory expert. He opined that an expert witness can let the jury know about vulnerabilities, memory contamination and age differences in memory. He stated that in thirty years of practice he has never seen a case like this without a pretrial consultation with an expert.

Terry Borden, defendant's stepfather from the time he was almost fifteen, testified that he and his wife provided trial counsel with Dr. Gold's medical records of this treatment of defendant, spoke to trial counsel about calling experts and was told that expert testimony was not needed, discussed calling character witnesses to testify that there was no inappropriate touching at other places defendant worked, that defendant was an honest, straight-forward and truthful person, and supplied trial counsel with people who had known defendant most of his life. He testified that defendant provided trial counsel with names of trait character witnesses.

Defendant presented no evidence that a failure to raise a claim of prosecutorial vindictiveness after more charges were added when the case was remanded to the Grand Jury was unreasonable conduct under the facts of this case. As defense expert Picarretta acknowledged, "It's a difficult motion to prevail on." (R.T. of Sept. 7, 2001, at 146.) He also failed to establish that there was a reasonable likelihood that he would have prevailed on the claim had it been made. *United States v. Goodwin,* 457 U.S. 368, 372-73, 381 (1982); *Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978); *State v. Brun,* 190 Ariz. 505, 507, 950 P.2d 164, 166 (App. 1997).

Defendant claims ineffective assistance of trial counsel for failing to require the trial court to make required findings for admission of evidence pursuant to Rule 404(b) and (c). He also claims ineffective assistance of appellate counsel in failing to raise this issue on direct appeal.

Defendant presented nothing to show that Judge Stephens would have failed to make required findings for admission of evidence pursuant to Rule 404(b) and (c), Ariz. R. Evid. had they been requested. He has failed to show any likelihood of a different outcome if trial counsel had raised the issue with Judge Stephens.

There is a presumption that trial courts know the law and apply it correctly in reaching rulings. *State v. Moody,* 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004). Defendant's appellate counsel was aware of that presumption. (R.T. of Sept. 7, 2011, at 68-69). Had appellate counsel raised the issue on appeal, it would have been unsuccessful based on *Moody*.

Defendant claims ineffective assistance of trial and appellate counsel in failing to challenge the constitutionality of the child molestation statute. His expert did not opine on whether such a challenge would have been successful. (R.T. of Sept. 7, 2011, at 122-125).

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Defendant must show a reasonable likelihood that a challenge to the constitutionality of the child molestation statute would have been successful in order to demonstrate prejudice. *State v. Berryman,* 178 Ariz. 617, 622, 875 P.2d 850, 855.

The Arizona Court of Appeals held that sexual interest is not an element of the crime of child molestation and that absence of sexual interest is an affirmative defenses regarding motive. *State v. Simpson,* 217 Ariz. 326, ¶¶ 18-19, 173 P.3d 1027, 1030 (App. 2007). Defendant's appellate attorney was aware of this opinion. (R.T. of Sept. 7, 2011, at 69-70.)

Arizona's child molestation statute is not significantly different that the murder statutes approved in *Patterson v. New York,* 432 U.S. 197(1997). Under *Patterson,* the Arizona child molestation statute does not violate the constitution of the United States.

Defendant has failed to show a reasonable likelihood that either his trial or appellate attorney would have been successful in challenging the constitutionality of the child molestation statute of the State of Arizona and has failed to establish prejudice.

Defendant claims his trial counsel was ineffective in failing to investigate and present testimony from expert witnesses and character witnesses.

Trial counsel testified that he thought he could point out any deficiencies in the forensic interviews of the victims through cross-examination of the officer who conducted the forensic interviews and through closing argument. (Hearing Exhibit 1 at ¶¶8-9, 12-13, R.T. of Sept. 7, 2011 at 39.)

He cross-examined each of the child victims, tested their memories of the events, pointed out inconsistencies in their testimony and elicited testimony that supported the defense theory of the case. Dr. Esplin, defendant's expert in the area of child witnesses, testified that he rarely testified for the prosecution. (R.T. of Sept. 8, 2011 at 20-21.) He also testified that trial counsel brought issues regarding credibility of the victims to the attention of the jury. (*Id.* at 34-37.) The Court has considered his testimony at the evidentiary hearing and does not find that his testimony established a reasonable likelihood of a different result had he testified at trial.

Defendant claims that his trial counsel was ineffective in failing to present character witnesses at trial. He presented recorded statements from two people who worked with defendant in the past. (Hearing exhibits 38 and 39.) No character witnesses testified at the evidentiary hearing. Trial counsel testified that there was a limited network of possible character witnesses. He also gave reasons for not presenting evidence of defendant's good character and good conduct with children. (Hearing exhibit 1 at ¶¶ 25-26.) Defendant has not demonstrated that trial

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MARICOPA COUNTY

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counsel was ineffective in failing to call character witnesses or a reasonable likelihood of a different result if he had called character witnesses.

Defendant claims that his trial counsel was ineffective in failing to present evidence about his neurological condition. Dr. Goodman testified that he never examined defendant, that defendant's neurological condition apparently did not require treatment between 1989 and 2008, and acknowledged that medical doctors who examined defendant prior to 1989 did not detect problems with fine motor control of his hands. (R.T. of Sept. 7, 2011 at 80-81, 85-86, 90-91, 106-107.) Defendant testified about his medical condition at trial. The court finds no reasonable probability that testimony of an expert witness on defendant's neurological condition would have resulted in different verdicts at trial.

Defendant claims that his trial counsel was ineffective in failing to consult with him regarding whether to object to resumption of jury deliberations and failing to object to resumption of jury deliberations. Trial counsel testified that he consulted with his client briefly before agreeing to allow the jury to resume deliberations (Hearing Exhibit 1, ¶ 38., R.T. of Sept. 7, 2011 at 20-21.) The decision on whether to object to resumption of jury deliberations was a tactical and strategic decision by defense counsel that can't form the basis for a claim of ineffective assistance of counsel. Actions of defense counsel attributable to trial tactics will not support a claim of ineffective assistance of trial counsel. *State v. Webb,* 164 Ariz. 348, 351, 793 P.2d 105, 108 (App. 1990.)

Defendant claims that his trial counsel was ineffective in failing to present expert testimony and character witnesses at sentencing. Defense counsel presented a letter from defendant's mother and medical records at sentencing. (Separate Appendix to Defendant's Memorandum in Support of Post-Conviction Relief, Tab 43.) He also presented numerous letters from friends, relatives and supporters of defendant. (*Id.*, Tabs 43 and 44.)

Defendant has not identified any additional information his trial attorney could have presented.

He has failed to establish ineffective assistance of trial counsel in failing to present expert testimony or character witnesses at sentencing. He has also failed to demonstrate that presentation of expert testimony or character witnesses at trial would have resulted in a different sentence.

THE COURT FINDS that there is no evidence that the performance of either trial or appellate counsel fell below prevailing objective standards. Even if it had, the Court finds no evidence of any resulting prejudice to defendant.

SUPERIOR COURT OF ARIZONA
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IT IS ORDERED denying defendant's Petition for Post-Conviction Relief as to all grounds raised at the evidentiary hearing.

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Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/04/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-030290-001 SE

01/03/2011

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT
N. Hannahoe
Deputy

STATE OF ARIZONA

GERALD R GRANT

v.

STEPHEN EDWARD MAY (001)

KATHLEEN O'MEARA
JEAN JACQUES CABOU

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-SE

MINUTE ENTRY

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

Defendant filed this petition for post-conviction relief after his convictions were affirmed on direct appeal. This is defendant's first petition for post conviction relief.

Defendant raises eleven grounds for post-conviction relief.

Defendant's claim that he was deprived of his right to trial by jury is precluded. The claim was considered on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal.

Defendant's claim that the trial court coerced the verdict by allowing the jurors to continue deliberations after a mistrial had been declared is precluded. Defendant agreed to the jury's request to continue deliberations. In addition, the claim was considered on direct appeal.

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MARICOPA COUNTY

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Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. The claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

Defendant's allegation that jurors traded votes is not precluded. However, only one juror states that the Foreman gave his opinion as to the possible length of sentence in order to persuade the juror to find defendant guilty.

Defendant's allegation that the court failed to properly instruct the jury is precluded. This allegation was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interviews following the verdict and prior to his appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

Defendant's allegation that the jury considered extrinsic material is not precluded.

Defendant's allegation that the cumulative effect of numerous serious issued interfered with the impartiality of the jury is precluded. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal. In addition, Arizona does not recognize the cumulative error doctrine. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

Defendant's claim that the Arizona child molestation statute is unconstitutional is precluded. Defendant did not raise the issue in the trial court. Because he did not raise the issue in the trial court, it is waived on direct appeal. *State v. Schwartz*, 188 Ariz. 313, 320, 819 P.2d 978, 985 (App. 1991). Because it is waived on direct appeal, it is also waived in a proceeding for post-conviction relief. It is also precluded under Rule 32.2(a)(3). The claim does not implicate constitutional rights which are considered personal to the defendant, and is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

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MARICOPA COUNTY

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Defendant's allegation of actual innocence because the child molestation statute unconstitutionally relieves the State of its burden of proving the "core element" of sexual motivation fails. Defendant's claim that the child molestation statute is unconstitutional is precluded. Defendant has not demonstrated by clear and convincing evidence, as required by Rule 32.1(h) Ariz. R. Crim. P, that the facts underlying this allegation claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offenses beyond a reasonable doubt.

Defendant's allegation that the court improperly applied Rules 404 (b) and (c) in denying his motion to sever counts is precluded. The claim was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient constitutional magnitude that the State is required to prove that he knowing, intelligently and voluntarily failed to raise the issue on direct appeal.

Defendant's allegation of prosecutorial misconduct is precluded. All of the materials defendant relies on in support of this claim were available at the time the notice of appeal was filed. Because the case was affirmed on direct appeal, there is a presumption that defendant's convictions were regularly obtained and are valid. Defendant bears the burden or rebutting that presumption. *Canion v. Cole,* 210 Ariz. 598, 601, 115 P.3d 1261, 1263 (2005). Defendant has made no showing that he is entitled to relief.

Defendant's allegation of ineffective assistance of counsel is not precluded.

It is ordered summarily dismissing defendant's petition for post –conviction relief with the exception of the following allegations: allegation of jury vote trading, allegation that jury considered extrinsic evidence, and allegation of ineffective assistance of counsel.

It is ordered setting this matter or Informal Conference pursuant to Rule 32.2, Ariz. R. Crim. P. on 01/06/2011 at 8:30 a.m.

It is ordered waiving defendant's presence at the Informal Conference.

February 10, 2009

RE: STATE OF ARIZONA v STEPHEN EDWARD MAY
Arizona Supreme Court No. CR-08-0281-PR
Court of Appeals Division One No. 1 CA-CR 07-0144
Maricopa County Superior Court No. CR2006-030290-001 SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 10, 2009, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 10th day of February, 2009.

Rachelle M. Resnick, Clerk

TO:
Robert A Walsh, Assistant Attorney General, Arizona Attorney General's Office
Tracey Westerhausen, Debus Kazan & Westerhausen LTD
Stephen Edward May, ADOC #214465, Arizona State Prison, Florence - Eyman Complex-Meadows Unit
West Publishing Company
Lexis Nexis
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
kg

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. STEPHEN EDWARD MAY, Appellant.	1 CA-CR 07-0144 DEPARTMENT D MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-030290-001 SE

The Honorable Sherry K. Stephens, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Randall M. Howe, Chief Counsel
Criminal Appeals Section
Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Debus, Kazan & Westerhausen, Ltd. — Phoenix
By Tracey Westerhausen
Attorneys for Appellant

J O H N S E N, Judge

¶1 Stephen Edward May appeals his convictions and sentences imposed after a jury found him guilty of five counts of child

molestation, all Class 2 felonies and dangerous crimes against children. May argues the superior court erred in instructing the jury that he had the burden of proving lack of sexual motivation as a defense to the alleged offenses. He also contends the superior court erred when it allowed the jury to reconvene after first ordering a mistrial. May also asserts his sentences are excessive. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 May was tried on seven counts of child molestation. During deliberations, the jury twice notified the court that it was deadlocked. Upon the second notification, the court declared a mistrial. The court then thanked the jurors for their service and told them that the lawyers had indicated they might want to speak with them. "You are certainly under no obligation to do so," the court told the jury. "If you are willing to speak with the lawyers, I would ask that you wait back in the jury room and they will be in shortly." The court announced that the jury was excused and then observed, "The record will show the jury has left the courtroom." According to the record, approximately four minutes later, the court noted that some of the jurors had informed the bailiff that they did not want a "hung jury," and they asked to continue deliberations. The court asked counsel if there was an

[1] We review the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against May. *State v. Long*, 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App. 2004).

objection to granting the jury's request. The prosecutor and defense counsel both responded that they did not object.

¶3 After several additional hours of deliberation, the jury returned guilty verdicts on five of the seven charges. May moved for a new trial, which the superior court denied. The court sentenced May to consecutive slightly mitigated 15-year terms for each conviction. After May's timely appeal, we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (2001).

DISCUSSION

A. Defense of Lack of Sexual Motivation.

¶4 May first contends the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of evidence.[2] May argues the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation.

¶5 Under A.R.S. § 13-1410(A) (2001), "[a] person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age."

[2] For purposes of this decision, we assume, without deciding, that May was entitled to an affirmative defense instruction. *See State v. Gilfillan*, 196 Ariz. 396, 407, ¶ 40, 998 P.2d 1069, 1080 (App. 2000) (defendant not entitled to self-defense instruction because he denied committing the act underlying his aggravated assault charge).

"'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body . . . . ." A.R.S. § 13-1401(2) (2001). Pursuant to A.R.S. § 13-1407(E) (Supp. 2007), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest."[3]

¶6 We rejected May's argument in a recent opinion, *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. 2007), in which we held that "[t]he 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather creates an affirmative defense regarding motive." *Id.* at 329, ¶ 19, 173 P.3d at 1030 (internal quotation and citation omitted). We see no reason why *Simpson* does not dispose of this issue.[4] The cases May cites do not persuade us otherwise. *State v. Brooks*, 120 Ariz. 458, 586 P.2d 1270 (1978), and *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986), both addressed a prior version of § 13-1410 that made it a crime to "knowingly molest[]" a child. *See* 1977 Ariz. Sess. Laws, ch. 142, § 66 (1st Reg. Sess.) (amending and

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[3] We cite a statute's current version when no changes material to this decision have occurred since the relevant date.

[4] The fact that we reviewed the purported trial error in *Simpson* under a fundamental error analysis does not mean the holding in *Simpson* does not apply here. We concluded in *Simpson* that the superior court's failure to *sua sponte* instruct the jury that the State had the burden to prove defendant's sexual motivation was not "error, fundamental or otherwise." *Simpson*, 217 Ariz. at 330, ¶ 23, 173 P.3d at 1031.

renumbering A.R.S. § 13-653 to § 13-1410); 1993 Ariz. Sess. Laws, ch. 255, § 29 (1st Reg. Sess.) (amending § 13-1410 to reflect its current version). Accordingly, the superior court did not abuse its discretion in instructing the jury that May had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes. *See State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (denial of a requested jury instruction is reviewed for an abuse of discretion).

B. Continuing Jury Deliberations After Discharge.

¶7 May argues the superior court erred by allowing the jury to reconvene to continue deliberating after the court had declared a mistrial. We review only for fundamental error because May failed to object when the superior court reassembled the jury and permitted it to resume deliberating. *See State v. Velazquez*, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, May must show that error occurred, the error was fundamental and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.

¶8 The only Arizona case cited to us (or which we have found) in which a jury reconvened after having been discharged is *State v. Crumley*, 128 Ariz. 302, 305-06, 625 P.2d 891, 894-95 (1981). In that case, it was discovered "almost immediately" after the jury was discharged that trial on the issue of prior

convictions had been overlooked. *Id.* at 305, 625 P.2d at 894. The bailiff in short order located six of the eight jurors. The other two were reached at their homes, and all eight returned the next day to take up the prior conviction issue. Under those circumstances, our supreme court said:

> Once discharged, we think this jury could not be properly recalled to further decide an issue of this case. It is simply too dangerous a practice to discharge the individual jurors from the duties and obligations of their oath, send them back into the community without admonitions or instructions, and then recall those same jurors to make a fair and impartial determination of any remaining issue connected with the case.

Id. at 306, 625 P.2d at 895.

¶9 The facts in this case are different – the jury reconvened only a few minutes after having been discharged. Although nothing in the record tells us the jurors did not interact with the public in the meantime, the court had invited the jurors to gather again in the jury room. In any event, we know that they did not have the extended opportunity for contact with the public that occurred in *Crumley*.

¶10 Although the court in *Crumley* might have announced a rule that any verdict rendered after a jury once has been discharged is null and void, it did not; instead, it reasoned that under the facts of that case, a verdict issued after the jury had been "sen[t] . . . back into the community without admonitions or

instructions" could not stand.[5] We take from *Crumley*, therefore, that under Arizona law, structural error requiring reversal does not occur whenever a jury that has been discharged reconvenes and issues a guilty verdict. *See State v. Ring*, 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (when structural error occurs, conviction is automatically reversed); *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926) ("the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling" the jury); *Masters v. Florida*, 344 So. 2d 616, 620 (Fla. App. 1977) (burden on defendant to prove outside influence on jury during period of discharge). *But see Blevins v. Indiana*, 591 N.E.2d 562, 563 (Ind. App. 1992) ("Any action of the jury after its discharge is null and void."); *Michigan v. Rushin*, 194 N.W.2d 718, 721-22 (Mich. App. 1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green*, 995 S.W.2d 591, 614 (Tenn. 1998) (convictions vacated; jury may not be reconvened if it

[5] The common-sense approach articulated in *Crumley* is like that taken by the court in *Washington v. Edwards*, 552 P.2d 1095 (Wash. App. 1976). As here, the jury in that case was reconvened minutes after discharge. The court said, "A discharge will occur in fact when a jury is permitted to pass from the sterility of the court's control and allowed to separate or disperse and mingle with outsiders." Although the court noted that "contamination is presumed" when the discharged jury mingles with the public, it did not reverse the verdict because "the jury did not pass from the control of the court but merely exited the courtroom to the adjacent jury room," to which no member of the public had access. *Id.* at 850-51.

has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia*, 111 S.E. 291, 294 (Va. 1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court"); *cf. Arnold v. Alabama*, 639 So. 2d 553, 554-55 (Ala. 1993) (new trial granted when jury reconvened over defendant's objection; record did not disclose amount of time that elapsed between discharge and reconvening of jury or where jury was in the meantime).

¶11 May argues that we may presume that he was prejudiced when the jury was allowed to reconvene; at oral argument, for example, his counsel urged that we may take as common knowledge that jurors would reach for their cell phones to call friends or family immediately upon discharge. May points to nothing in the record that would demonstrate such prejudice, however, and, pursuant to *Henderson*, we will not presume prejudice when, by contrast to the facts in *Crumley*, the record does not disclose that the jury was "sen[t] back into the community" before reconvening. Accordingly, we may not reverse his conviction on this ground.

C. Sentencing Issues.

¶12 Finally, May argues the superior court abused its discretion in sentencing him to only "slightly mitigated" sentences because his "conduct was far milder than the usual child molest case." We find no abuse of discretion.

¶13 A superior court has broad discretion to determine the sentence to impose, and we will not disturb a sentence that is within statutory limits, as is May's, unless the court clearly abused its discretion. *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *Id.* Provided the superior court fully considers the factors relevant to imposing sentence, we generally will find no abuse of discretion, and the weight to be given any factor asserted in mitigation rests within the superior court's sound discretion. *See id.*

¶14 Prior to sentencing, the court announced it had considered the nature and circumstances of the offenses and May's contact with the victims, the position of trust May enjoyed with the victims' families, the ongoing relationship he had with them, the impact the offenses had on the victims and their families and the need to protect the community. In mitigation,[6] the court considered May's social background, his physical impairment,[7] lack of criminal history, his extensive family and community support and the letters submitted on May's behalf. We discern no abuse of

[6] The State dismissed its allegation of aggravating circumstances prior to the sentencing hearing.

[7] May has a neurological condition that causes his head to uncontrollably "tick" and other physical manifestations.

discretion in the court's imposition of consecutive 15-year prison sentences, two years less than the presumptive 17-year term for a single offense. *See* A.R.S. § 13-604.01(D) (Supp. 2007).

¶15 May alternatively requests we exercise our authority under A.R.S. § 13-4037(B) (2001) to order that certain of his sentences run concurrent with each other, so as to effectively reduce his aggregate sentence by 30 years. A sentence that is within the statutory limits will not be reduced absent a showing that it was the result of "arbitrariness, capriciousness, or failure to conduct adequate investigation into facts relevant to sentencing." *State v. Ramos*, 133 Ariz. 4, 7, 648 P.2d 119, 122 (1982). Having determined the superior court properly considered the facts relevant to sentencing, we decline to order May's sentences to run concurrently in the manner he requests. *See State v. Fillmore*, 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App. 1996) (court of appeals' statutory discretion to reduce excessive sentences must be exercised with great caution).

¶16 Finally, May contends that the individual sentences for each count and his lengthy aggregate sentence constitute cruel and unusual punishment. As May concedes, he did not raise this argument below. Therefore, he has waived this issue and we need not address it. *See State v. Navarro*, 201 Ariz. 292, 298 n.5, ¶ 22, 34 P.3d 971, 977 n.6 (App. 2001) (Eighth Amendment argument that was not raised before the trial court is waived on appeal).

Even if we were to consider this argument, however, pursuant to *State v. Berger*, 212 Ariz. 473, 476, ¶¶ 15-16, 134 P.3d 378, 381 (2006), we would be compelled to conclude that his sentence is not grossly disproportionate to his crimes.

CONCLUSION

¶17 May's convictions and sentences are affirmed.

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

JON W. THOMPSON, Judge

ANN A. SCOTT TIMMER, Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEPHEN EDWARD MAY, Petitioner-Appellee, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellants.	No. 17-15603 D.C. No. 2:14-cv-00409-NVW District of Arizona, Phoenix ORDER

STEPHEN EDWARD MAY, Petitioner-Appellant, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 17-15704 D.C. No. 2:14-cv-00409-NVW District of Arizona, Phoenix

Before: IKUTA and FRIEDLAND, Circuit Judges, and BLOCK,* District Judge.

* The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

The panel has unanimously voted to deny appellee/appellant's petition for rehearing. Judge Ikuta and Judge Friedland have voted to deny the petition for rehearing en banc, while Judge Block recommends that it be granted. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 9 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEPHEN EDWARD MAY, Petitioner-Appellee, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellants.	No. 17-15603 D.C. No. 2:14-cv-00409-NVW District of Arizona, Phoenix ORDER
STEPHEN EDWARD MAY, Petitioner-Appellee, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellants.	No. 17-15704 D.C. No. 2:14-cv-00409-NVW

Before: IKUTA and FRIEDLAND, Circuit Judges, and BLOCK,* District Judge.

The Motion to Stay the Mandate (ECF No. 121) is GRANTED. Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure, the mandate is stayed for 150 days to permit Petitioner-Appellee to file a petition for writ of certiorari in the Supreme Court. Should the Supreme Court grant certiorari, the mandate will be

* The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

stayed pending disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this Court immediately upon the Supreme Court's decision.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. STEPHEN EDWARD MAY, Defendant.	COURT OF APPEALS DIVISION ONE NO. 1 CA-CR 07-0144 SUPERIOR COURT NO. CR 2006-030290-001 SE

Mesa, Arizona
January 12, 2007

BEFORE: THE HONORABLE SHERRY K. STEPHENS,
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Jury Trial)

REPORTED BY:

Dana D. Smith, RPR, CSR
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

A P P E A R A N C E S

For the State:

JOHN BEATTY,
Deputy County Attorney

For the Defendant:

JOEL THOMPSON,
Attorney at Law

Mesa, Arizona
January 12, 2007

(The following proceedings were held in open court out of the presence of a jury before the Honorable Sherry K. Stephens, Judge of the Superior Court, County of Maricopa, State of Arizona, Mesa, Arizona.)

THE COURT: We have three questions on the jury on the May matter. The first is, why didn't Cruz testify for the prosecution and the second is, must a charge originate from a complaint from a citizen? Does the State have the power to charge someone without a signed complaint from a citizen? And the last question is, in May of 2005, the police investigated the Luis case and not pursued by the State and that was due to lack of corroborated detail.

Are we to assume that Danielle Shedron and Taylor are not corroborated?

Those are the three questions. Would you like me to reread any of them?

MR. THOMPSON: No. I got the context of them.

THE COURT: Why didn't Cruz testify for the prosecution, the first one. I'm open to suggestion for responding.

MR. BEATTY: It's not for their consideration.

THE COURT: Mr. Beatty said, it's not for their

consideration.

Any objection to that response?

MR. THOMPSON: I think it should be more in terms of you have been presented with the evidence you are to consider.

THE COURT: All right. All right. So I will respond, you should rely on the evidence presented.

Is that good?

MR. THOMPSON: Yes.

THE COURT: Any objection.

MR. BEATTY: No.

MR. THOMPSON: No. That sounds good to me.

THE COURT: All right. On the next one, must a charge originate from a complaint from a citizen?

MR. THOMPSON: I would suggest simply, that's not a matter for your consideration.

THE COURT: Any objection?

MR. BEATTY: No.

THE COURT: And does the State have the power to charge someone without a signed complaint from a citizen?

And again, this is not a matter for your consideration?

MR. THOMPSON: Yes.

MR. BEATTY: We can tell them, yes, we do have that power.

THE COURT: All right. I assume that you would object

to that, Mr. Thompson?

MR. THOMPSON: I didn't hear what he said.

THE COURT: We could tell them, yes, the State has the power.

MR. THOMPSON: Yes. I would object to that.

THE COURT: In May of 2005, the police investigated the Luis case and that was due to lack of corroborated detail. Are we to assume that Danielle Shedron and Tyler are not corroborated?

MR. BEATTY: I think we should tell them, they should not assume that.

MR. THOMPSON: They should assume nothing.

THE COURT: They should make no assumptions.

How is that?

MR. THOMPSON: Right.

MR. BEATTY: Right.

MR. THOMPSON: Also, for scheduling purposes, I have a medical appointment for noon today. If it's anytime before noon, could we bring them back at 1:30 for a verdict?

THE COURT: Absolutely.

MR. THOMPSON: Thank you.

THE COURT: Bye.

(Recess taken from 11:08 a.m. to 1:35 p.m.)

THE COURT: We're on the record with the May case. Mr. Beatty is here. We have four jury questions.

First of all, seven counts are distinct in separate counts, but all involve the same subject. Can we use -- I think trying to say corroboration?

Next question, evidence that we have heard on certain counts appears to corroborate the information on other counts. The instructions say each count charges separate and distinct offenses, but must decide on any counts. Page 7 of instructions.

Third is, can we use corroborating evidence or no? Again, referring to the separate, distinct and offenses.

Last question is, the information labeled separate count on page 7 of the Final Instructions, one in the same term, corroboration?

What I propose to do is give them this instruction, evidence of other counts has been presented. You may consider this evidence only if you find the State has proved by clear and convincing evidence that the defendant committed these acts. You may consider this evidence to establish a defendant's motive, opportunity intent, plan, absence of mistake or intent. You must not consider this evidence to determine the defendant's character or character trait or to determine that the defendant acted in conformity with the defendant's trait or character trait and therefore committed the charged offenses.

It's another acts instructions, basically modified.

MR. THOMPSON: Okay.

THE COURT: From the State?

MR. BEATTY: Judge, I think that's appropriate. They are obviously looking for real guidance on this.

THE COURT: They are confused by the separate counts instruction and the concepts of corroboration.

MR. THOMPSON: I am a little bit concerned about the element of proof that you are giving them, which is clear and convincing. It would seem to me that we should tell them that if they find that one act has been proven beyond a reasonable doubt, they can use that to corroborate another act.

MR. BEATTY: But I don't think that's accurate.

MR. THOMPSON: But I don't think they should be able to group it all together and by clear and convincing evidence decide he must have done them all.

THE COURT: I think this is the standard instruction and appropriate standard of proof. So I think this is -- unless you have another objection, other than that part of it, I think this is the appropriate instruction to give them.

Do you have another suggestion, Mr. Thompson?

MR. THOMPSON: No. I have made my record and could I ask your JA to either e-mail me or fax me a copy of what you are going to send back to them?

THE COURT: Absolutely. Give me your fax number and she will send it to you.

MR. THOMPSON: Thank you.

(Recess taken from 1:38 to 2:55 p.m.)

THE COURT: Bring in the jury.

(Jury enters the courtroom.)

THE COURT: Please be seated. The record will show the presence of the jury, counsel and the defendant.

Ladies and gentlemen, I have reached -- I have received your note indicating that you are at a deadlock in your deliberations. I have some suggestions to help you in your deliberations but not to force you to reach a verdict. I am trying to be responsive to your apparent need for help. I do not wish or intend to force a verdict. Each juror has a duty to consult with one another to deliberate with a future reading, an agreement if it can be done without violence, to individual judgment, know his or her honest judgment to the weight or solely because of the opinion of other jurors or for the purpose of reaching a verdict; however you may want to identify areas of agreement and disagreement and discuss the law and the evidence as they relate to those areas of disagreement.

If you still disagree, you may wish to tell the attorneys and me which issues, questions of law or facts that you need assistance with. If you decide to follow this suggestion, please write down those questions of fact or law and give the note to the bailiff.

Please ask the foreperson -- who is the foreperson?

I'm going to ask that you go back with your fellow jurors, discuss the most recent instruction that I have given and you can send a note back to me through the bailiff and let us know how you would like to proceed.

THE FOREMAN: Okay. Thank you.

THE COURT: Thank you.

(Jury exits the courtroom.)

(Recess taken from 3:00 to 3:26 p.m.)

THE COURT: Let's bring in the jury.

(Jury enters the courtroom.)

THE COURT: Please be seated. The record will show the presence of the jury, counsel and the defendant.

Ladies and gentlemen, I have received your most recent note and based upon the information contained in that note and discussing it with the attorneys, I'm going to declare a mistrial. I know you are disappointed not to be able to reach a verdict, but sometimes that happens. Some cases are more difficult to resolve than others.

On behalf of the members of the participants in this trial, I want to thank you for your service to the community. You have gone above and beyond what we typically ask jurors to do and most grateful for your time and attention. The attorneys indicated that they may wish to speak

with you. You are certainly under no obligation to do so. If you are willing to speak with the lawyers, I would ask that you wait back in the jury room and they will be in shortly.

Again, thank you very much for your time and attention. You are excused. Have a good weekend.

(Jury exits the courtroom.)

THE COURT: All right. The record will show the jury has left the courtroom. Ordered setting this matter for trial on April 2nd, 10:30 a.m. for jury selection. We'll do a Trial Management Conference on the 29th. That's a Thursday, March 29th.

Are you both available that day, counsel?

MR. BEATTY: I should be.

MR. THOMPSON: I am available.

THE COURT: March 29th at 8:30.

Mr. May, you need to be back in court. If you don't appear, a bench warrant will issue for your arrest. If you don't appear for trial, it could go forward in your absence.

Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: Continue on the same terms and conditions of release as previously imposed.

Thank you. Have a good weekend.

MR. BEATTY: Thank you.

MR. THOMPSON: Thank you.

(Off the record.)

THE COURT: Well, we're back on the record. 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.

Any objection from the State?

MR. BEATTY: Not from the State.

THE COURT: Any objection, Mr. Thompson?

MR. THOMPSON: No, your Honor.

THE COURT: All right. I'm going to then advise the bailiff to communicate with the jury that they may continue deliberating and to let us know.

(Recess taken at 3:32 p.m.)

(Whereupon, this proceeding was concluded at this time.)

I, DANA D. SMITH, Official Court Reporter herein, do hereby certify that the foregoing pages are a true and correct transcript of the proceedings had in the above-entitled matter, all done to the best of my skill and ability.

DATED this 12th day of July, 2007.

Official Court Reporter, RPR, CSR No. 50566

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	
vs.	No. CR2006-030290-001
STEPHEN EDWARD MAY (001)	

Phoenix, Arizona
September 7, 2011

BEFORE THE HONORABLE KRISTIN HOFFMAN

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING ON DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF

PREPARED FOR:
Counsel
(Copy)

PREPARED BY:
Rochelle L. Dobbins, RPR
AZ Certified Court Reporter #50721

A P P E A R A N C E S

For the State:

Gerald Grant, Esquire

John Beatty, Esquire

For the Defendant:

Herald Price Fahringer, Esquire

Erica Dubno, Esquire

JoAnn Falgout, Esquire

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Honor.

THE COURT: All right. Mr. Piccarreta, you've heard the Rule for years, I know. It's been invoked, so you need to wait outside.

MR. PICCARRETA: Yes, your Honor.

THE COURT: Okay. Are you going to call Mr. Thompson at this time?

MR. FAHRINGER: Yes.

JOEL ERIK THOMPSON,

Called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FAHRINGER:

Q Mr. Thompson, would you identify yourself, please.

A I'm Joel Erik Thompson.

Q What is your profession?

A I'm a practicing lawyer in the State of Arizona.

Q May I ask you when you were admitted?

A In Arizona, in 1975.

Q Okay. And have you been practicing ever since that time?

children, by way of example?

A Yeah. I recall telling them that we can't bring in witnesses to testify that he had 15 other opportunities to molest somebody and didn't.

Q The statute that were operating under, paraphrasing, shifts the burden of proof on -- let me start this over again. I'm sorry. That was rather poorly done.

In a case involving child abuse or molestation, the section -- the statute you were operating under places the burden on the defendant to indicate he had no sexual intention, sexual motivation in touching, that the touching, in fact, was innocent. Do you remember that?

A I do, indeed.

Q All right. And did you question the constitutionality of that statute and that requirement of shifting the burden to the defendant in substantiating that element?

A I did, yes.

Q Was there a motion?

A I don't know that there was a motion specifically. I know there was a discussion, I know, in terms of the jury instructions to be given at the end of the case.

Q But no motion was made to have the statute declared unconstitutional or pretrial to in any way challenge that aspect of the statute?

A I did not.

Q When the trial commenced and the jury began its deliberations, do you recall the Court after several days declaring a mistrial?

A Yes.

Q And after she had declared a mistrial, did it come to your attention that the jury has reassembled and were back deliberating?

A Yes.

Q All right. And were you notified of that by the Court calling the lawyers up and saying, the jury is back deliberating?

A No. What we -- we were called up to the bench and told that the Court had been advised through the Court's bailiff, I believe, that the jury wanted to continue to deliberate.

Q And this was after they had been discharged, correct?

A Yes.

Q And did you object to that?

A No.

Q And did you discuss it at all with your

client?

A Very, very briefly.

Q All right. Was it 20 seconds? 30 seconds, I believe has been reported.

A I believe that would be appropriate.

Q And, again, ultimately, you did not object to the jury going back to its deliberations?

A Yes.

Q Mr. Thompson, while you were working at Phillips and had your own offices as well, was there an awful lot of cases or a number of cases that were being turned over to you to handle at the same time the May case was being handled?

A I probably in my -- in those years at Phillips, I probably had from Phillips anywhere from 25 to 35 cases that were active at one time.

THE COURT: At any one time?

A At any one time.

Q And given your best judgment right now, if -- looking back on the May trial, if you had not been in that situation with that number of cases, is it your view that you would have done some of these things differently?

A No, I don't think it was a time issue. I wasn't overwhelmed with the numbers, although I had no

control of the number of cases they assigned to me. No.

Q You would have done everything the same today as you did back then?

A Oh, I would do it very differently today if it was my case today.

Q Now, you said if it was my case, meaning that actually, the case was Phillips' case?

A That was -- that was something of a factor. They made some decisions for me.

Q Like, for instance, the funds for expert witnesses. Can you think of any other decision they made for you?

A Well, they provided services of an investigator. They had a staff -- several people on staff as investigators that did investigating on the case. I believe they also did the pretrial interviews of witnesses. That was their protocol. That was their way of kind of maximizing my time so that I was available for the courtroom aspects of things by providing investigators and paralegal staff and that sort of back-up to do other things that sometimes lawyers do.

Q Had you had an experience where you had tried a case, another case, and there had been a mistrial and you had to retry the case without any additional funding

or financing?

A I've done that several times in the cases I had from Phillips. I had one case that we tried three times.

Q And you would not be paid for the additional trials, if I understand?

A I would not be paid separately for that, but with the exception of one case, I was being paid a monthly retainer, so whether I was in trial or not in trial would not affect my income. Whether I was in trial with one case or another case would not affect my income.

Q In this instance, when it came time for the discharge -- when the jury was discharged and the question was whether you were going on, were there any considerations on your part in terms of having to retry the case again and not being compensated for it?

A I would not have been compensated for a second trial, but I can tell you honestly it was not something that I gave any thought to at the time.

MR. FAHRINGER: All right. I think that's all I questions I have, your Honor.

THE COURT: Cross-examination.

MR. BEATTY: Thank you, Judge. The State moves to admit Exhibit 1.

Declaration of Joel Erik Thompson

I, Joel Erik Thompson, declare as follows:

1. I am an attorney. I represented Stephen E. May in State v. May, Maricopa County Superior Court case number CR2006-030290.

2. At the time of the May case, I was associated with the firm of Phillips & Associates. I was at that time Chief Trial Attorney for that firm.

3. Before the May case, I had wide experience representing clients charged with sex offenses.

4. Upon learning of the facts of Mr. May's case, I thought it would be a difficult case to successfully defend in light of society's overall tendency to want to protect children above all else. In other words, as a defendant facing charges of sexually abusing children, Mr. May was already tacking into the social wind of early 21st century America and Arizona.

5. From the outset of the case, I decided not to engage an expert of any kind, consulting or testifying, on any subject. Quite simply, I did not feel there was an expert to bring in because Mr. May denied touching the children intentionally and/or with sexual intent.

6. Under those circumstances, I just did not feel it was a case that lent itself to expert witness testimony.

7. The only expert I even considered was an expert to evaluate Mr. May's risk factors for aberrant sexual behavior. That said, if a defense expert somehow found or felt that Mr. May did show an attraction to children, that could become a bad fact for his defense, while evidence that he was not attracted to children (a pedophile) would have been irrelevant, hence inadmissible.

8. I never considered hiring a consulting expert to assist me in analyzing the investigative tactics, interrogation techniques, and procedures of the police.

9. I never considered hiring a consulting expert to assist me in understanding the science behind childhood memories of sexual abuse, false recollections, "piecemeal disclosure" or the like.

10. The lead detective on the May case, Detective Verdugo, testified about "piecemeal disclosure" of sexual abuse by children who had suffered such abuse.

11. "Piecemeal disclosure," as I understand it, is the tendency of some children to put out only a small bit of information to adults at any one time about sexual abuse, possibly to see if that small piece of information will lead to trouble for them before disclosing more information.

12. Based on my prior experience in this area, I consider myself well-versed and current on literature concerning children's testimony in child sexual

abuse cases, with sufficient recognized expertise that I had presented a 1992 CLE seminar for the State Bar of Arizona, entitled "The Child Witness".

13. I felt that any deficiencies in the techniques of the forensic interviews conducted in the May case (e.g., leading the children or implanting memories that did not happen) could be better pointed out by me in later argument based upon simply cross-examining the police officer who testified about forensic interviewing (Phoenix Police Department Detective Phil Shores) rather than an outside expert.

14. My theory of Mr. May's defense was that Stephen May was a nice guy at the swimming pool at the apartment complex and that moms and dads would drop their kids off with him and walk away. We planned to, and did argue, that Mr. May had not touched the children's private areas, and that, if there had been contact, it was inadvertent in the context of boisterousness during activities at the Gentry's Walk swimming pool.

15. From the beginning of the representation, I received regular emails from Mr. May and his parents, Terry and Pat Borden.

16. Among the many things raised in those emails was the fact that Stephen had, since birth, been afflicted with a neurological disorder that affected his coordination and movement.

17. During the preparation of the case, Stephen and his parents questioned me about retaining an expert to testify about the neurological disorder, but I did not do so because it was so distant in time, going back to his infancy.

18. They also queried me, including several times by email, about introducing Stephen's medical records, which document the condition as dating from his early childhood. I did not do that, in part because it would have been difficult to document records from a long-deceased physician.

19. On November 21, 2006, I explained via email to Stephen and his parents that "I [was] not planning to introduce Stephen's neurological condition because it does not create a defense."

20. I understand that Stephen's neurological condition can lead to clumsiness or lack of coordination and might explain why Mr. May did not always have precise control of his movements. We argued at trial that his clumsiness could have led to inadvertent contact with the children's private parts.

21. Early in the case, we filed motion under Criminal Rule 12.9 seeking to remand the case to the grand jury because of the State's failure to advise the grand jury that Stephen wanted to testify. That motion was granted.

22. When the case was eventually re-indicted, a day or two later, Mr. May was indicted on four additional charges that were not a part of the first indictment.

Despite that fact, I gave no thought to the notion that we should object to those new charges on the ground of prosecutorial vindictiveness.

23. At that time, I was focused on a motion to sever the counts in the supervening indictment. These counts alleged sexual abuse of children in three different, isolated, and separate venues over time: (1) the Gentry's Walk apartment swimming pool complex (for victims Taylor Shadron, Danielle Antkiewicz, and Sheldon Haracksing), (2) Tavan Elementary school's computer area (Luis Alfaro), and (3) the Children's World day care center (Nicholas Martin).

24. As we neared trial, we were hanging in between defenses. Overall, we focused on arguing that Stephen May simply did not touch the victims' genitals. Second, we argued that there was a "lack of sexual intent" in any possible touching of any children – that any touching, that might have occurred, was fleeting, inadvertent and by mistake.

25. In addition to discussing the issue of the neurological disorder with me, Mr. May and his parents also asked me if we could call witnesses as to Stephen's good character and good conduct with children. These witnesses would have included relatives, co-workers, and others who had observed Stephen around children.

26. I informed Stephen that much of what they considered "good character" evidence would be generally inadmissible at trial; beyond his reputation

for truthfulness. On November 21, 2006, in a written response to an email on this subject, I explained to Stephen that "we cannot call a witness to testify about Stephen's failure to molest a child" on other occasions. **(Ex. A.)**

27. At trial, the State introduced, without objection, the videotape of Stephen May's interrogation. I had watched the entire interrogation tape well before trial, and I knew the interviewing detective made references during the interview to an incident involving Mr. May in the State of New York in the mid-1990s.

28. Throughout the case, I believed that the State had the burden of proving the sexual nature of the crime with which Mr. May was charged. I was also aware that the statute under which he was charged had been recently amended and the State was arguing the statute as amended created a purported shifting in the burden of proof to the defense to disprove a presumption of sexual motivation.

29. While I believed such a shift was fundamentally wrong, I did not cite any specific authority to support that belief, because the recently amended statute had not yet been the subject of any interpretive appellate opinion of which I was aware. Accordingly, I never wrote any motion or memorandum for the court on this specific issue, though I submitted a requested jury instruction involving the issue.

30. Beyond 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.

31. During the trial, Luis Alfaro, the first child witness, was originally unable to identify Mr. May in court and was unable to remember Mr. May touching him inappropriately.

32. After a recess, which included the taking of testimony from another out-of-order witness, Luis resumed the stand and suddenly was able to identify Mr. May. His memory of the incident had also greatly improved.

33. I thought this curious, though I did not inquire further about this change while cross-examining Luis.

34. The jury had spent several full days deliberating before the judge declared a mistrial. Prior to the mistrial, the judge had given one "impasse instruction" to the jury.

35. Judge Stephens' 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.

36. I do not precisely recall all details after three years, but a few minutes after the judge had excused the jury and declared the mistrial, the bailiff returned to

the courtroom and whispered to Judge Stephens. I do not recall being aware of any written communication on this subject from the jury to the judge or from the judge back to the jury, nor do I recall being given the opportunity to see any note from the jury to the judge or having any discussion of any written response being sent back to the jury.

37. At the moment Judge Stephens informed the courtroom of the jury's desire to continue deliberating, I was standing at counsel table, where Mr. May was sitting.

38. While I do not recall precisely how long it lasted, in a very brief conversation, I spoke with Mr. May about the situation. Essentially, our discussion 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.

39. Caught in the moment by a circumstance I had never before encountered in almost 300 previous felony jury trial, 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 admonitions – could even be reconstituted.

40. I also did not consider the fact that the jurors were no longer under oath, having been released from all admonitions and their oaths by the judge upon discharging them, though I do not recall the jury being re-admonished or re-sworn.

41. I was advised, in late 2009, that the jurors conducted experiments in the jury room using a stuffed animal brought into the jury room by the jury foreman. I had no knowledge of that fact at or near the time of trial.

42. No stuffed animal was ever offered as a trial exhibit.

43. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 23rd day of March, 2010.

Joel Erik Thompson

STATE OF ARIZONA

VS.

Stephen Edward May

FILED

1-12-07 @ 3:58 P.M.

MICHAEL K. JEANES, Clerk

By _____ Deputy

Superior Court – Maricopa County

TO: JUDGE STEPHENS

Cause No. CR 2006-030290-001SE

DATE: 1-12-07

JUROR QUESTION

MESSAGE: We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is.

REPLY: _____

DATE: _____

_____
JUDGE

TIME: _____

JUROR QUESTION # _____

0218

-2512-

STATE OF ARIZONA

VS.

Stephen Edward Hay

FILED

1-12-07 @ 3:30 P.M.

MICHAEL K. JEANES, Clerk

By _____ Deputy

Superior Court – Maricopa County

TO: JUDGE STEPHENS

Cause No. CR2006-030290-001SE

DATE: 1-12-07

JUROR QUESTION

MESSAGE: PART OF THE JURY BELIEVES THEY HAVE HEARD SUFFICIENT EVIDENCE AND THE EVIDENCE IS OF SUFFICIENT QUALITY TO RESOLVE 'REASONABLE DOUBT'. PART OF THE JURY BELIEVES THE QUANTITY AND QUALITY OF THE EVIDENCE IS NOT SUFFICIENT TO RESOLVE REASONABLE DOUBT.

WE DO NOT HAVE SIGNIFICANT DISPUTE OVER THE FACTS OR THE ELEMENTS OF LAW, OR HOW TO APPLY THE LAW TO THE FACTS. WE FEEL WE NEED SOME GUIDANCE TO 'PROOF BEYOND REASONABLE DOUBT'.

REPLY:

DATE: _____

_____
JUDGE

TIME: _____

JUROR QUESTION #_____

0219

-2513-

OSBORN MALEDON
A PROFESSIONAL ASSOCIATION ATTORNEYS AT LAW
The Phoenix Plaza
21st Floor
2929 North Central Avenue
Phoenix, Arizona 85012-2793
P.O. Box 36379
Phoenix, Arizona 85067-6379
Telephone 602.640.9000
Facsimile 602.640.9050

Interview of Lisa Proeber
December 3, 2009
Interview conducted by Lew Ruggiero of R3 Investigations

Ruggiero: There we go. Alright. My name is Lew Ruggiero. I'm a private investigator with R3 Investigations in Mesa working for attorney Jean-Jacques Cabou and Kathleen O'Meara from Osborn Maledon. They represent Stephen Edward May in post conviction relief based on the trial in 2007 you were a juror in, Lisa, and it's Lisa Proeber, right? Is that right?

Proeber: Correct.

Ruggiero: Okay. Let me put this down here close to you and I want -- Now, you understand that this digital recorder is recording our conversation.

Proeber: Yes.

Ruggiero: Do you give your consent to be recorded?

Proeber: Yes.

Ruggiero: Okay. Let's, if I could, move a little bit closer to you so we don't have to share the recorder quite so much. What do you remember about the deliberations with the Stephen May jury? Were you able to come to any decision right away or was there a clean split in the jury?

Proeber: There was definitely a clean split before we even discussed it. There was one person who was adamant on being the foreman for the whole group, adamant about it. So, you know, we said okay, fine, and he, the minute he was elected foreman said there is only one way I'm going to vote and that is guilty.

Ruggiero: Now this person expressed a desire right away to be foreman?

Proeber: Oh, yeah.

Ruggiero: Made it very clear.

Proeber: Very clear.

Ruggiero: To all the jurors.

Proeber: Uh-huh.

Ruggiero: Was there anyone else who challenged him at all?

Proeber: I did a little bit but I'm young and blonde and they thought that there would be no right for me to be in a position of --

Ruggiero: And who was the person that, if you will, tried to lay claim to the title here?

Proeber: I don't remember his name. It was an accountant. Middle age, dark hair, glasses.

Ruggiero: Would you say his manner was forceful or laid back or what?

Proeber: Yes. Definitely a strong-minded, well-opinionated individual.

Ruggiero: And so he was elected foreman.

Proeber: Yes.

Ruggiero: And you said he immediately expressed an opinion as to the outcome of the case?

Proeber: Yes.

Ruggiero: What did he say?

Proeber: Well, he said let's all put in what our vote is off the hand, guilty, not guilty or undecided. We all put ours in and there was maybe a handful, two to three, I would say that said guilty and there was maybe one or two that said not guilty. The rest of us were undecided. And then once he read through them he goes oh, I thought this was going to be a lot easier, he's obviously guilty and that's the only way that I'm going to vote. There was another African American gentleman who was on his side and said yeah, there's no way I'm going to vote that he's not guilty because he was there and that puts him as much as fault, you know, blah blah blah. And, you know, there was a couple of us, myself and John, who were like well, we were told to vote based on the evidence we had.

Ruggiero: Well, let me ask you. In that initial hand vote you said two or three said guilty and a couple people said not guilty --

Proeber: Uh-huh.

Ruggiero: -- and then there must have been five, six, seven people that were --

Proeber: The majority were undecided.

Ruggiero: -- undecided at that point..

Proeber: Because our rules were that we needed to listen to the evidence, listen to the entire trial, take notes, listen to the evidence on hand and make our decision that way, not based on what we feel. It's based on what we know. And I think that all of us that were undecided were the ones that had followed the rules.

Ruggiero: Did you take notes yourself?

Proeber: Yes.

Ruggiero: Were they extensive notes or less extensive?

Proeber: On some of them -- on more of the solidified actual concrete details I would take notes. A lot of the trial was hearsay. A lot of the trial was, you know, little kids that years have gone by that you could tell, you've got their parents sitting in the back like mouthing things. I mean, it was complete --

Ruggiero: Did you see parents mouthing?

Proeber: The parents were in back showing so much emotion that I don't see how it's possible for a small child to not echo their family's emotion. I don't think the parents should have even been allowed in the room.

Ruggiero: Did you feel that these childrens' testimony was believable?

Proeber: No, none of them. Not one.

Ruggiero: None of them?

Proeber: No.

Ruggiero: And how many testified, four?

Proeber: Yes.

Ruggiero: And why did you not feel they were believable?

Proeber: They just -- it sounded like a group of kids who got together, their parents said something and they were scared that their parents were putting words in their mouth and they were going to get in trouble if they didn't say what they were supposed to. One of the kids, the one that most of us with the exception of the two people who were no, this man is guilty and we're voting guilty on all counts no matter what. One of the kids his testimony went something like, yeah and then he put his hand on my dick. Hee hee hee Laughing and I mean, it was completely, there was no believability whatsoever. The few --

Ruggiero: So you think --

Proeber: -- of us that, there was a few of us who, we called a mistrial because there was people that wanted to vote guilty on that kid and there was no way we were going to vote guilty on that kid because there was no evidence. That kid's testimony was completely unbelievable. There was no, nothing. Not a leg to stand on.

Ruggiero: You found none of the children to be convincing.

Proeber: I did not. No.

Ruggiero: Did you believe you had a reasonable doubt as to Mr. May's guilt?

Proeber: I did. I did have a reasonable doubt but when we were asking the judge questions I was trying to read her responses and her responses, this is my first time on a trial, okay? All I wanted to do was follow the rules, do what I'm supposed to do and that's what I felt I did. When we called the mistrial I was very relieved because there was not, in my opinion, there was not enough evidence to have a case against Stephen May. There was not enough concrete evidence. I'm a very black and white type of person and it was all gray, the whole trial. There were testimonies I feel that were

missing, that would have been literally, it would have swayed my vote one way or the other most definitely had I had those testimonies.

Ruggiero: For example.

Proeber: The teacher. Luis' teacher. Was that the one?

Ruggiero: Luis Alfaro's teacher.

Proeber: The first kid that testified his teacher who witnessed it or something like that. There was two or three like an aunt or a neighbor, there was a neighbor who witnessed something that wasn't there to testify.

Ruggiero: You clearly have said that you did not find any of the children believable. You felt they were under pressure from their parents because the parents were there. Do you believe that any of these children might have been coached?

Proeber: Absolutely. I believe every one of the children was coached.

Ruggiero: By whom?

Proeber: Their lawyers, their parents, I don't know. I don't know what they went through. I mean even some of the interviews were a little bit, what's the word, where you kind of push somebody to say something. You know, like you ate ice cream last night, right? You know, something like that. It just, it was just very strange to me.

Ruggiero: Let me try the technique. Would you call that a leading question?

Proeber: Yes. Yeah, and even if I didn't know the right word or if that was what we were talking about I would have said yes because that's how you, you made me sound like, you made it sound like that is what I was looking for. That was the answer I'm supposed to say.

Ruggiero: Now Stephen May also testified, correct?

Proeber: Yes.

Ruggiero: What was your impression of Mr. May's testimony on the stand?

Proeber: I felt that he was, he was horrified that he was even in the situation. He

was trying to be completely professional. He didn't, you know, I know that his whole life was on the line when he was testifying and he was trying to answer every question he could. You know. I mean, his testimony was the only one that I felt like he, you know, he was just being honest.

Ruggiero: Did you at all hear evidence about Stephen May's neurological condition called ataxia which can bother his coordination or make him seem clumsy.

Proeber: I briefly remember something like that. I don't remember that being an influencing part of my vote.

Ruggiero: But do you think that here's a man who may not be able to control his hands as well as --

Proeber: I don't think that's -- I think that would just be a defense strategy. I'm not -- I didn't take that into any kind of consideration.

Ruggiero: Well, you thought Mr. May presented himself well on the stand?

Proeber: I listened to what he had to say and I mean, he just defended himself. All the kids looked like they were coached, looked like they were having fun, doing what mom and dad told them to, they were teaming up. I mean, it was, the little girl, the little brown haired girl crying, I mean, I felt so bad for her that she's going to have to go through her whole life thinking somebody did this to her when she, her first testimony, the one that was tape recorded was like what is going on? Like she was way more emotional on the stand because they built it up in her head. This little girl's going to spend her whole life thinking something happened when in reality it may or may not have.

Ruggiero: This was Taylor Shadron or Danielle Ankowitz?

Proeber: I don't remember the difference.

Ruggiero: Brown haired girl.

Proeber: Brown haired girl and there was a blonde haired girl. Older, younger.

Brown haired girl was younger. Is that right?

Ruggiero: Alright. So you felt that her videotaped interview with the police was less emotional?

Proeber: Yeah. As far as I can remember. I remember sitting in the stands and just being an emotional wreck.

Ruggiero: So as time goes on we've said the initial vote of the jury, how does it come down after a couple of days? I mean, now you've had a few days to talk about this.

Proeber: Well, we deliberated -- there was -- a couple of us that were like -- I mean, every few hours we would take a new vote and it wouldn't change because there were people that were not going to change their mind no matter what. A couple of us were like listen, we were told to look at the hard core evidence so let's make a list for each person of actual evidence that we have and we did. And we made pros and cons and we did everything we could. And the fact of the matter is it should have been a mistrial because there was not enough evidence and that's what we had come to but there was people that were like I'm not calling a mistrial, that man is guilty.

Ruggiero: Why were they so strongly committed to that?

Proeber: I believe it was because they have children at home and they just saw their kids in the little kids' eyes instead of actually listening to the evidence. I don't -- I'll tell you this right now. I don't know if he is guilty. I don't know if he is innocent. I do not know. He could be guilty, he could be innocent. But because of the facts presented to me I do not know. I am undecided. Mistrial.

Ruggiero: One of the things in Arizona law says that all the prosecution must do under Arizona law is prove that an adult touched a child in certain places.

Proeber: But there -- how do you prove that?

Ruggiero: Well now, wait. Wait. Wait.

Proeber: There was no evidence.

Ruggiero: So all the, all the prosecution must do is under the law as it's written here is to show them an adult touched a child in their private places. It is then up to the defendant to prove that he may have touched them there but the intent was not sexual.

Proeber: Correct and I completely agree that the intent was not sexual but --

Ruggiero: Do you think so --

Proeber: -- there is no evidence and the judge with her responses basically made it seem like it was a political thing and you make your decision however you want to make your decision. Like some of the things that she was saying was making me think what, am I just supposed to, you know, debate, just like give it up, like give up half of mine to get half of what I want? I mean, it was really up in the air. It was very unclear to me what the judge wanted of us.

Ruggiero: How does it make you feel that the defendant must prove that his touch was not sexually intended?

Proeber: It doesn't matter how I feel, it's, you know, I just think the whole thing was just the weirdest thing I've ever been to. It was like a circus parade of people saying things and back and forth that there was no -- the actual witnesses to each one of the children, the actual witnesses they said there were were not there to testify. There was no witnesses to any of it.

Ruggiero: Does it make any difference to you that this was more than one child? That if one child had come in and said this, well, but it's different when three or four children come in and tell a similar story.

Proeber: I think the biggest thing that the guilty party fought for and I agree was the fact that there were three kids from one group but there was one that did not know them. That was the biggest thing. But correct me if I'm wrong, that incident was never taken to trial but it was recorded where somebody

could, a private investigator like yourself who could find out where I am after my name change, two moves in an apartment building can find me, I'm sure that some sort of lawyer can find something to find something that's relevant to the case that they can bring in to join it and give it some sort of -- I mean, there was both sides were not fair. It was chaotic. It should not have been a trial.

Ruggiero: Well, what is the -- do you think it made a difference that there were four children rather than if just one child had come forward and made these statements and then Mr. May had testified?

Proeber: Sure. Well, for the people that were, for the two or three people on the jury who were gung ho about the guiltiness, I am sure that it doesn't matter if it was half a child there they would have said guilty. And I know for a fact that they said several times in the jury room, you don't have kids so you don't know. I'm sorry, when they picked the jurors I answered all my questions honestly. I'm guessing they were lying when they said that they could have an open mind about the case. I'm guessing that they wanted to be on the jury so bad so they could convict somebody of something even though they had no idea. He was judged, I'm sure, by the people that were adamantly guilty and I'm sure this happens on every single trial, every single case and that's what gets me through the day. That I'm sure this happens all the time.

Ruggiero: Do you remember the word --

Proeber: But it should have been a mistrial.

Ruggiero: Do you remember the word corroboration coming up?

Proeber: Uh-huh.

Ruggiero: In other words that --

Proeber: Yeah, it was a word that was heavily talked about.

Ruggiero: Well, tell me about that a little bit, Lisa.

Proeber: That was the word that we were supposed to use. That was the word we were supposed to use to decide. You know, get together all our, you know. You know, it's not even clear to me now. I mean, and it's just --

Ruggiero: But what I'm saying if witness A comes in and says this story, witness B says a story that's similar to that, witness C says a story that's similar to that, do they corroborate, do they back each other up?

Proeber: And that was the thing that we kept trying to find out from the judge. We never got a clear answer on it. If we were supposed to look at -- because how many counts were there, 8, 7?

Ruggiero: There were 8. One was dismissed.

Proeber: There were 8. We were supposed to, we were supposed to have a vote for each and every count but we were also, so we were supposed to look at each and every one individually. But we asked if we were supposed to corroborate and use them all and we never got a clear answer. So we didn't know if we were supposed to. If we were supposed to look at every one. I mean, it was -- we, you -- because I know the judge has ruled she can't answer questions like we need to hear them in layman's terms. There's lots of legal, you know, matters and I understand that but we never got an answer. We never got a clear answer of that's what we were supposed to do.

Ruggiero: In other words, one charge or one allegation would tend to corroborate --

Proeber: Exactly.

Ruggiero: -- or back up the other.

Proeber: Exactly.

Ruggiero: Rather than here's one allegation, let's decide that and here's a separate one independent of it, let's decide that on their own independent merits.

Proeber: Uh-huh.

Ruggiero: Question. When you were deliberating were people angry and upset?

Proeber: Oh, yeah. It was a zoo.

Ruggiero: Well, tell me a little about that.

Proeber: I mean, there was -- there were -- I mean, I, I, -- John and I, I mean, we're pretty vocal, you know, that one point he'd be like okay, yeah, you're right, he's guilty and then I'd be like well, what about this and then I'd sit down and be like no, you're right. I mean, it went back and forth. John and I really tried to make the best decisions we could. The girl next to me that was really undecided, too, she kept swaying back and forth. But there were two people in the room who wouldn't speak, wouldn't give any input, that would just say guilty.

Ruggiero: And who were they?

Proeber: An African American man and a woman and I cannot for the life of me remember what she --

Ruggiero: Can you describe her?

Proeber: No. I want to say she was African American as well but I can't remember exactly.

Ruggiero: Was there a time --

Proeber: But they were sitting right next to each other.

Ruggiero: Was there a time that any kind of a doll or stuffed animal was brought into the jury room?

Proeber: Yes, actually, the foreman brought that in as a prop along with some other stuff.

Ruggiero: Was that an exhibit that was introduced at trial?

Proeber: No.

Ruggiero: Where did the foreman get that?

Proeber: He brought it in from home.

Ruggiero: Did he say I brought --

Proeber: From his child's collection of stuffed animals.

Ruggiero: Did he tell the jury that?

Proeber: Apparently the foreman knew because he had to approve him bringing it into the room but he brought it in.

Ruggiero: The foreman knew or the judge knew?

Proeber: I don't know if the judge knew. I know the foreman knew because he's the one who lets us into the room, right? No, I'm sorry.

Ruggiero: The bailiff.

Proeber: The bailiff knew.

Ruggiero: The bailiff knew that the foreman was bringing in this stuffed animal.

Proeber: I don't know if he knew ahead of time but I know he knows it was there because he's the one that let it into the room.

Ruggiero: Describe that stuffed animal for me.

Proeber: It was a large bunny.

Ruggiero: How big?

Proeber: I would say three feet by one-and-a-half foot.

Ruggiero: And what was this used for in the deliberations?

Proeber: Absolutely nothing because it's a stuffed animal. He just kept touching it on its privates and trying to prove a point or something. I don't even remember what it was used for. It was used for a very brief moment.

Ruggiero: But he definitely was there.

Proeber: It just kept getting brought up and, you know, I mean, there's no, there was no need for it to be there.

Ruggiero: Was it there to try to illustrate how --

Proeber: Yes.

Ruggiero: Go ahead.

Proeber: That's what it was there for. Like if it was here or here, was his hand here or was it here and that's something we don't know.

Ruggiero: But that bunny was never part of the trial.

Proeber: No.
Ruggiero: Did anybody ever ask if he had permission to bring that in?
Proeber: I don't remember ever hearing anybody ask.
Ruggiero: Now, what about notes? You said you had taken some notes.
Proeber: Uh-huh.
Ruggiero: There was an alternate juror who apparently took very extensive notes but then she was excused.
Proeber: Yes.
Ruggiero: She didn't get to deliberate.
Proeber: Yes.
Ruggiero: Do you remember anybody saying hey, can we use her notes because she took a lot?
Proeber: Yes.
Ruggiero: Tell me about that.
Proeber: Yes, somebody asked if we could use her notes because she took a lot.
Ruggiero: And what happened?
Proeber: I don't think we were allowed to have them because I don't remember ever looking through them.
Ruggiero: Mr. May is kind of an interesting looking guy.
Proeber: I don't judge people by their looks so I wouldn't even ask me about that.
Ruggiero: Okay.
Proeber: I'm in sales. If I were judgmental about anybody, then I wouldn't be as successful as I am. Yes.
Ruggiero: That's him?
Proeber: Yep.
Ruggiero: That's his Department of Corrections web site. Was his hair about that long at the time or is his hair --
Proeber: That's appropriate. Maybe a little longer.

Ruggiero: Did he seem to you to be nervous or --

Proeber: A little bit. I would be, too.

Ruggiero: So you come to the mistrial. Was there, were people --

Proeber: Relieved?

Ruggiero: Well, no, no. Pressuring each other? Like did anybody say we --

Proeber: When we came to the mistrial there was such a large force of argument in the room at that point. I mean, we were screaming at each other. There were like, I mean, it was bad. And so we decided we were going to call a mistrial.

Ruggiero: Did anybody --

Proeber: Because there was no way that we were going to back down. There was no way we were going to back down.

Ruggiero: Did anybody threaten anybody or call names?

Proeber: I'm sure -- no, there was no threats. I mean, it was just anger. It was just, you know, I can't believe that you are going to do this, I can't believe that you can't change your mind on this. There was, I mean, it was just normal, what I would expect to be a normal situation.

Ruggiero: And you said that some jurors made comments about you don't know because you don't have children.

Proeber: Oh, yes. I got that a lot.

Ruggiero: And the point of that was is that you would feel differently about your convictions if you did have a child.

Proeber: I have lots and lots of friends with kids and I mean, I have little brothers. I have attachments to children in my life. I went in following the rules that were told to me to leave my entire personal views at the door and listen to exactly what I heard and make my decision from that. I followed the rules. When I was asked questions if I could be an open-minded person and listen to what I'm hearing and make my decision versus that when they

asked every single juror if they could do that I answered truthfully.

Ruggiero: Final vote before the mistrial, how did you vote?

Proeber: Not guilty.

Ruggiero: Was the foreman upset with you personally?

Proeber: I'm sure he was. I mean, we were both upset with each other and actually I was, the entire time, and I just voted not guilty because I didn't have enough evidence to convict a man guilty. So I was the entire time to this day, always will be, undecided because there was not enough information.

Ruggiero: In other words, it was not beyond a reasonable doubt?

Proeber: No. But I went not guilty because I wanted to make sure that we weren't just going to accuse him of guilty on all these counts, every single one of them. I mean, I was completely convinced not guilty on the one kid. Completely not guilty.

Ruggiero: Sheldon Haracksing?

Proeber: Yes. Completely not guilty. There is no way in my entire life I would have let that particular count be guilty. There is no way. And that's how we finally came to a settlement.

Ruggiero: Well, that's what I wanted to ask you about. So you --

Proeber: It should have been a mistrial.

Ruggiero: Okay. In fact, it was a mistrial.

Proeber: Yes, it was. We all packed up our stuff.

Ruggiero: I can read you from the transcript from January 12 --

Proeber: Yes, and it should have been a mistrial.

Ruggiero: Well, the judge said I'm declaring a mistrial, I believe. This is the transcript from --

Proeber: Yep. She declared it a mistrial.

Ruggiero: From January 12, page 9.

Proeber: We got back in the room, started packing up our stuff and the foreman

goes you know what guys? This is ridiculous. We have spent two weeks, blah blah blah we need to come to -- We should be able to -- This is our job. This is what we were here for. We need to blah blah blah. You know he did a little pep talk, pep rally. And so, he's like c'mon, are you on board? We can do this. We can do this. And, you know. It's coercion. One person says yes, and everybody's like okay, yeah, fine, okay, okay. You know, and he gets on to me and John and we're like okay we can talk about it some more.

Ruggiero: So now you're -- after the judge has already said on the record it's a mistrial --

Proeber: Yes.

Ruggiero: -- what's going on in that jury room in those few minutes?

Proeber: We're exhausted. We want to get out of there. So we plea bargained with each other.

Ruggiero: Explain that, please.

Proeber: It means like there was like myself personally, my biggest thing, was that Sheldon thing. I was not going to convict him of those cases because there was no way that he was guilty of those. No way. So I said I am not ever going to vote guilty on that and the other guys are like well, we're not either and then like well, then it's still a mistrial. We pack up our stuff and then the foreman goes okay, fine what if I were to go not guilty on that and I could get him to go not guilty, too, and it was basically, it was ridiculous. I mean it was absolute -- I felt just -- but we had -- it's not like. We had asked the judge what we were supposed to do if we were going to be torn. We asked her what to do. And she couldn't answer us in layman's terms. So basically she gave us responses that we took like yeah, well, I guess maybe we are supposed to kind of just lean whichever way and come to the decision together. I mean, she made us, she made it seem like it was

okay to sway yourself a little bit on this if we give in to this. I mean, it made it seem like, I don't know. It was ridiculous. I can't describe -- If I had everything in front of me I could tell you what made me think this way, what made me think that way.

Ruggiero: Direct question. Did you trade your vote on Sheldon Haracksing to get the other people to trade their vote?

Proeber: I was only speaking with the foreman.

Ruggiero: Well, what was that conversation?

Proeber: And the foreman was only speaking with John and I.

Ruggiero: What was that converastion?

Proeber: Because he had complete control over everybody in the room and could have gotten them to go whatever way he wanted. John and I were the only people who were like we were told to follow the rules. There's no evidence so therefore we cannot make a decision.

Ruggiero: What did the foreman propose to you, Lisa?

Proeber: He said if you vote guilty on this then if I can convince that guy to vote not guilty on that would that, would we be able to go that route?

Ruggiero: So essentially what you're telling me is votes were traded.

Proeber: Uh-huh.

Ruggiero: You would vote guilty on the first three children but he and the others would vote not guilty on the Sheldon Haracksing.

Proeber: Uh-huh. When in fact if I were to convict any -- no, none of them were complete. I mean, we didn't have the teacher _____, I mean, none of them were complete testimonies to me. I'm sorry. If I could go back and change a thing I would have been like no, she called a mistrial and walk out of that room. But I can't.

Ruggiero: Now, how long were you back in the room deliberating after the mistrial was called?

Proeber: Maybe half an hour, an hour.

Ruggiero: And then you went back into the courtroom.

Proeber: Yes.

Ruggiero: And the jury delivered its verdict. Guilty on certain counts.

Proeber: Yeah, they broke John and I down. We were the only ones who had our own opinion based on fact. Because John had kids, too. John has children. They never yelled at him.

Ruggiero: Now, the question comes up. Once you had delivered the verdict was the jury polled? In other words, did the judge or the bailiff --

Proeber: Yes.

Ruggiero: -- ask each juror is this your verdict?

Proeber: Yes.

Ruggiero: And did they ask you?

Proeber: Yes.

Ruggiero: And what did you say?

Proeber: I said yes but obviously with apprehension in my voice.

Ruggiero: Did you or John or anyone else indicate well, I'm not really sure or I've got some questions about this? Did you verbalize that?

Proeber: No, because we plea bargained with each other in the deliberation room.

Ruggiero: You say you plea bargained. You mean --

Proeber: Yeah. We traded, we traded, we came to a, we came to an agreement. We decided to agree to disagree because the foreman convinced us that that's what we were supposed to do. And honestly, some of the judge's responses made it sound like that's what we were supposed to do. That sounded like what we were supposed to do.

Ruggiero: Now. You delivered this verdict. It's been almost three years since the trial. What are your feelings about that experience in that jury room?

Proeber: I don't think about it at all. I feel that I did what I was supposed to do and,

you know, whatever the judge was writing back about us coming to a decision, you know, was enough to put me through the day but it was called a mistrial and I was relieved because I felt that sure, they can bring that trial back into fruition if they have more evidence. If they would have had those two or three witnesses that should have been there. I mean, there were --

Ruggiero: Yeah, but then you're forced to assume or guess at what those witnesses who never showed up might have said.

Proeber: I know.

Ruggiero: But you don't know what they would have said.

Proeber: I know. So I don't know if he's guilty or innocent.

Ruggiero: And yet you voted guilty.

Proeber: Yeah. And there's nothing I can do about it to change it now, is there? I plea bargained or whatever you want to call it because that's what it sounded like the judge wanted us to do. We asked her probably 100 questions trying to figure out how we were supposed to come to a decision if there were people who were absolutely guilty and absolutely not guilty. And she responded with very cryptic responses. Every response was very cryptic so we were trying to in our minds think of what she meant. And in my own mind what the judge is saying is most juries just come to a decision and, you know, maybe some are happy with it, some aren't, but you get together and you just do the best you can. I mean, I'm sure if you look at some of the notes there was one that actually said do the best you can. You know, I'm sure if you had looked at one of her millions of little sheets that went back and forth.

Ruggiero: Did you trade your vote?

Proeber: I don't know. Yes.

Ruggiero: And did the foreman trade his vote? In other words --

Proeber: Absolutely. There was no way -- He still thinks that kid is guilty.
Ruggiero: But he voted not guilty on the Sheldon Haracksing charges.
Proeber: Absolutely. And there was no way -- I couldn't even believe it.
Ruggiero: Did he think that Mr. May was also guilty on Sheldon Haracksing?
Proeber: Oh, yes. Oh, absolutely. He was adamant about it.
Ruggiero: So he was willing to say I'll go not guilty on Haracksing if you change your mind as to the other three, Danielle, Taylor and Luis.
Proeber: Yeah, but one of them we only gave him one count, right?
Ruggiero: I believe.
Proeber: I think we agreed to split down the middle.
Ruggiero: So is the idea sort of a half a loaf was better than no loaf at all?
Proeber: Yeah, which, you know, and we kept asking what, you know, we kept asking what the punishments were because that would have been a big thing. Like I don't think he deserves to go to jail for the rest of his life. Yes, I think bad place, wrong -- wrong place, wrong time. You know, there's lots of factors in it. But, you know, that's, I think that was the biggest thing that they used to convince us. Yeah, he should be slapped on the wrist, you know, there was speculation about how much time he would get by the foreman. And he'd be like you know, he'll probably only get a year or two.
Ruggiero: Did the foreman -- wait a minute. Whoa Whoa Whoa. The foreman said that in jury deliberations?
Proeber: Oh, absolutely. He was trying to speculate with us, you know, if we, you know, blah blah blah he needs to get something because he was in the wrong place at the wrong time. Even if he wasn't guilty, wrong place, wrong time.
Ruggiero: And he'd get a year or two.
Proeber: Yeah, I mean, there was speculation as to how much time he would be in

jail for or, you know, blah blah blah. There was lots of that exchanged.

Ruggiero: Did anyone know what the law was?

Proeber: No and we asked and no one would tell us. We asked what the time frame would be and she said the judge decides that after the case.

Ruggiero: In other words, you're not supposed to consider the penalty --

Proeber: Correct.

Ruggiero: -- you're just supposed to consider the situation whether he's guilty or innocent --

Proeber: Right.

Ruggiero: -- of these charges.

Proeber: I don't even want to know. Don't tell me.

Ruggiero: Do you know what a dangerous crime against a child is under Arizona law?

Proeber: No.

Ruggiero: Do you know how it affects sentencing?

Proeber: No.

Ruggiero: And how it, if you will, cuts down on the latitude that the judge has and sort of forces a judge's hand if a person is convicted of a dangerous crime against a child?

Proeber: No. I know nothing about it.

Ruggiero: You've never heard that phrase before, dangerous crime against children?

Proeber: No.

Ruggiero: Do you think Mr. May was dangerous?

Proeber: No.

Ruggiero: And if you had it to do over again --

Proeber: They didn't -- there was nothing that said dangerous crime against a child.

Ruggiero: That's what he's convicted of.

Proeber: Yeah, but there was nothing that said that in the sheet we were given. It

was just State of Arizona v. Stephen May.

Ruggiero: If you had this to do over again knowing now --

Proeber: I would call a mistrial.

Ruggiero: You think it should have stopped right there.

Proeber: Yes. Those two or three witnesses that were supposedly alive but not there to testify, if those people were there that would have completed the trial. But the fact that we knew that there was somebody who witnessed it but we didn't get to hear their witness that was like negative evidence.

Ruggiero: In other words, somebody that supposedly saw Mr. May touch the children.

Proeber: Where is that person to testify?

Ruggiero: This adult --

Proeber: Yeah.

Ruggiero: -- who supposedly witnessed this --

Proeber: Should be there.

Ruggiero: -- who was alive and supposedly could have been available.

Proeber: Yeah. Even if it was one witness that I knew existed but that wasn't there to testify that would make me have enough evidence to make my decision. But the fact that I knew that person existed but they weren't there gave me, there's no way I can make this decision. Gave me, completely unknown.

Ruggiero: You said it was kind of an negative. It's like --

Proeber: And, I'm sorry, correct me if I'm wrong but we were told that he is not guilty or he's innocent until proven guilty. So not guilty is innocent so that's what I was sticking with because I know he's innocent means not guilty. I don't know if he's guilty or not so he's still not guilty because he hasn't been proven --

Ruggiero: But the trick is, the trick is --

Proeber: -- guilty.

Ruggiero: -- if he touched those children is one thing but to convict him it's sexual intent. Do you believe Mr. May's intent if he did touch those children --

Proeber: No, I thought it was accidental touching in the pool. Throwing him in the pool. I mean, right over here.

Ruggiero: In other words, you don't believe he was getting sexual gratification out of this?

Proeber: Absolutely not. There's no way. If you're throwing someone you have them in your hand for a second. If they're sitting on your lap your hands are out of the water or on their back making sure they don't fall over. I mean, I've been in a pool with kids before. You know, you're in a swimming pool and you're wet and there's lots of skin.

Ruggiero: Last question. When you guys were back in the jury room between the time the mistrial was declared and the time you came back, did anyone make any phone calls, get on their cell phones?

Proeber: Absolutely every one of us.

Ruggiero: Did you call out?

Proeber: I'm sure I did.

Ruggiero: Who did you call?

Proeber: I don't remember.

Ruggiero: Did you talk about the trial?

Proeber: My friend, something, saying oh my God it's over.

Ruggiero: Did you --

Proeber: Thank God I'm coming back to work now. I mean, I'm sure.

Ruggiero: Did others make calls?

Proeber: Every one of us was on our cell phones walking out.

Ruggiero: And then suddenly the jury foreman kind of pulled everybody back.

Proeber: Absolutely.

Ruggiero: Gave you a pep talk, your words.

Proeber: Yep.

Ruggiero: Anything else you'd like to add, Lisa?

Proeber: No. I think if she called it a mistrial then I think anything after that should have been banished from the records. Because isn't it the judge's decision to call a mistrial?

Ruggiero: That I suppose is one major question in this case.

Proeber: Yeah.

Ruggiero: Lisa, thank you very much. I'm going to turn off the tape.

Proeber: You bet.

Ruggiero: And I appreciate your time.

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No. 17-15603(L), 17-15704(XAP)

United States Court of Appeals
For the
Ninth Circuit

STEPHEN EDWARD MAY,
Petitioner-Appellee,

v.

CHARLES L. RYAN, Warden; MARK BRNOVICH, Attorney General,
Respondents-Appellants.

STEPHEN EDWARD MAY,
Petitioner-Appellant,

v.

CHARLES L. RYAN, Warden; MARK BRNOVICH, Attorney General,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (PHOENIX) IN CASE NO. 2:14-cv-00409-NVW

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER-APPELLEE STEPHEN MAY

MIKEL PATRICK STEINFELD
620 W. Jackson, Suite 4015
Phoenix, Arizona 85003
(602) 506-7711
steinfeldm@mail.maricopa.gov
Attorney for Arizona Attorneys for Criminal Justice

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CONSENT OF THE PARTIES

This brief is being filed with the consent of both parties, per Rule 29(a)(2), Fed. R. App. P. Undersigned counsel received consent from Robert Walsh, attorney for Charles Ryan and the Arizona Attorney General, on March 29, 2018, via email. Counsel received consent from Erica Dubno, counsel for Stephen May on March 29, 2018, via email.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

[1] Per Rule 29(a)(4)(E), Fed. R. App. P., no party's counsel authored this brief in whole or in part and no party, party's counsel, or person other than the amicus curiae, contributed money that was intended to fund the preparation or submission of this brief.

AACJ offers this brief in support of petitioner Stephen May because the issue on which the district court granted relief touches the core of AACJ's mission to protect individual rights guaranteed by the federal Constitution and to resist efforts to curtail such rights. Indeed, AACJ has repeatedly submitted *amicus curiae* briefs on this subject. AACJ submitted a brief on this issue to the Arizona Court of Appeals and then the Arizona Supreme Court in connection with Mr. May's postconviction proceedings. AACJ also submitted *amicus* briefs on this topic to both the Arizona Supreme Court and the U.S. Supreme Court in *State v. Holle*, 379 P.3d 197 (Ariz. 2016) (*Holle II*), *cert. denied*, 137 S. Ct. 1446 (2017).

Specifically, Arizona's child-molestation statutes presume that a person who has contact—direct or indirect—with a child's genitals does so with sexual intent. The government does not bear the burden to prove sexual intent; rather, the mother or babysitter who changed a diaper or the uncle who carried a nephew on his shoulders must instead prove the contact was *not* sexually motivated. This burden shifting implicates one of the most important due process protections guaranteed to criminal defendants by the Fifth and Fourteenth Amendments: the right to be convicted only if the state is able to prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). And this statutory scheme creates very real harms for the criminally accused.

ARIZONA, THROUGH ITS FREAKISH CHILD MOLESTATION STATUTES, IS THE ONLY STATE THAT REQUIRES THE DEFENDANT TO PROVE HER INNOCENCE. THIS UNCONSTITUTIONAL BURDEN SHIFT CARRIES VERY REAL IMPACTS FOR THE PUBLIC.

The briefing in this case has comprehensively considered the constitutionality question and the district court correctly concluded that Arizona's scheme unconstitutionally shifts the burden of proof to the criminally accused. Because the parties have extensively briefed this issue before the district court and this Court, *amicus curiae* does not seek to repeat what has already been said. Rather, AACJ seeks to provide insight on three issues.

First, the district court's comprehensive multi-jurisdictional analysis, although largely correct, incorrectly concluded that Hawaii does not require the government to prove a sexual purpose in molestation cases; Hawaii does require the State to prove an improper purpose. Arizona is the only jurisdiction to presume a sexual motivation.

Second, the district court's decision is consistent with other courts that have considered similar issues. Hawaii, New Mexico, California, and Alaska all considered a question similar to the one that faced the district court in this case. And the lower court's decision fell in line with each of these jurisdictions.

Third, this unconstitutional burden shift has real-world impacts on the criminally accused. People are convicted based upon the misallocated burden.

People are forced to take their cases to trial even when they can carry their burden. People are held in custody pretrial or have restrictions placed upon their freedom. And people are forced to live with a record for a sexual offense even if they are able to prove their innocence or convince the prosecutor to dismiss before trial.

1. Arizona is the only jurisdiction that requires the defendant to prove her innocence for sexual offenses.

The district court looked to the pertinent statutes of every jurisdiction to determine if Arizona's structure was an outlier. Order, 18-19. After conducting this evaluation, the district court correctly concluded, "Today the statutes or case law of 48 out of 50 states, the District of Columbia, three U.S. territories, and the federal government require some sexual purpose for the crime of child molestation." Order, 18. The district court concluded that the only other state that did not require a sexual purpose was Hawaii. However, Hawaii also requires a sexual purpose.

Hawaii defines sexual contact as the touching "of the sexual or other intimate parts" of another person. Haw. Rev. Stat. § 707-700. The Hawaii Supreme Court has applied the interpretation maxim of *ejusdem generis* when interpreting this statute to construe "intimate parts" as "only parts of the body similar in nature to 'sexual parts.'" *State v. Kalani*, 118 P.3d 1222, 1227 (Haw. 2005). To this extent, the statute still requires the government to prove that the body part touched

was intimate or sexual in nature. *State v. Silver*, 249 P.3d 1141 (Haw. 2011) provides an adequate example.

In *Silver*, two separate contacts with a victim's buttocks were charged: a touching that occurred during a late-night massage and a touching that occurred when the defendant threw an alleged victim back and forth in a swimming pool. *Id.* at 1143-44. The Hawaii Supreme Court concluded that context largely governed the determination of whether the body part touched was an "intimate part." *Id.* at 1147. Where a youth-team coach gives a player "a congratulatory pat on the buttocks" or a parent hugs or carries a child, the buttocks is not an "intimate part." *Id.* Thus, the Hawaii Supreme Court separated the two instances: the contact with the victim's buttocks that occurred during the late-night massage constituted contact with an "intimate part;" the contact with the victim's buttocks that occurred during horseplay in the pool did not. *Id.* at 1148.

Silver demonstrates that prosecutors in Hawaii must still present proof beyond a reasonable doubt that the context of an alleged offense supports the conclusion that contact was with an "intimate part." Put simply, the prosecutor must prove a sexual purpose or motivation.

Because of the way in which the state's court of last resort interpreted the text of the statute, not even Hawaii aligns with Arizona's requirement that a defendant prove her innocence. *See Schad v. Arizona*, 501 U.S. 624, 640 (1991)

(plurality) ("[A] freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden."). The upshot is that in fact 49 out of 50 states, the District of Columbia, three U.S. territories, and the Federal Government all require a sexual or otherwise improper purpose.

2. The district court's decision is consistent with the reasoning and conclusion reached by every other court that has considered a similar question, with the sole exception of Arizona.

The decision of the Hawaii Supreme Court in *Silver*, discussed above, is illustrative of how other jurisdictions have handled similar questions. The Hawaii Supreme Court interpreted its definition of "sexual contact" to include a requirement that the State prove that the body part contacted is, under the context of the contact, intimate in nature. In doing so, the Hawaii Supreme Court ensured that defendants are not required to prove their innocence.

The New Mexico Supreme Court engaged in an even more similar evaluation in *State v. Osborne*, 808 P.2d 624 (N.M. 1991). There, the New Mexico Attorney General argued that an "unlawfully" element established a defense "providing the defendant with the opportunity to introduce evidence showing that his actions were within the scope of lawful activities such as routine childcare." *Id.* at 627. The court rejected this interpretation, in part because it was concerned that such a construction would sweep in innocent conduct. *Id.* at 628. The court refused

to "sanction an interpretation of a statute which would allow the state to impose such unjustifiable hardships upon presumptive innocent defendants." *Id.*

The New Mexico court further concluded: "The necessity of establishing an excuse or justification for an act should not be imposed upon a defendant until the state has established that conduct has occurred which, under common standards of law and morality, may be presumed criminal." *Id.* at 630. In supporting this conclusion, the court relied, in part, upon due process. *Id.* (citing W. LaFave & A. Scott, *Handbook on Criminal Law* § 21 (1972) for "due process and statutory presumptions, defenses, and exceptions"). This language echoes the Supreme Court's holding in *In re Winship* that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 364. Accordingly, the New Mexico Supreme Court concluded "unlawfulness" was an element as to which the government bore the burden of proof, and expressly recommended a standard instruction that clearly excepted "nonabusive parental or custodial child care." *Osborne*, 808 P.2d at 630-31 (internal brackets omitted).

The California Court of Appeal reached a similar decision in *People v. Pallares*, 246 P.2d 173 (Cal. App. 1952). In *Pallares*, the court considered a statute that stated: "Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable … by" a term of imprisonment. *Id.* at 174. The court

concluded, "[w]hen the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender." *Id.* at 177. Thus, while the statute did not provide a *mens rea*, the court concluded "that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children." *Id.* Thus, California requires the State to prove the conduct was "motivated by an abnormal sexual interest in children in general or a specific child …." *People v. Phillips*, 188 Cal. App. 4th 1383, 1396 (Cal. App. 2010).

And while Alaska defines "sexual contact" in a manner that does not include sexual intent, Alaska also does not saddle the defendant with the burden of proving her own innocence. Alaska's definition of "sexual contact" does not include an element of "intent to obtain sexual gratification." Alaska Stat. § 11.81.900(b)(59); *Braun v. State*, 911 P.2d 1075, 1078 (Alaska App. 1996). Nevertheless, a defendant does not bear a burden to prove his contact was innocent. The definition for "sexual contact" expressly provides an exception for "normal caretaker responsibilities." Alaska Stat. § 11.81.900(b)(59)(B). This exception operates as a defense, but not an affirmative defense. *Peratrovich v. State*, 903 P.2d 1071, 1074-75 (Alaska App. 1995). Thus, a defendant must merely present "some evidence" that places the defense at issue. Alaska Stat. § 11.81.900(b)(19); *Peratrovich*, 903 P.2d at 1075. Once "some evidence" puts the defense at issue, the government

must prove, beyond a reasonable doubt, that the contact was not within the ambit of "normal caretaker responsibilities." Alaska Stat. § 11.81.900(b)(19); *Peratrovich*, 903 P.2d at 1075.

In each of these jurisdictions, the courts considered whether a similar statute relieved the government of its burden to prove beyond a reasonable doubt that the defendant's conduct was improper. And in each, the courts placed the burden of proof squarely on the government, either by construing the operative terms of the statute in that way or by otherwise resorting to federal due-process rules. The district court's ruling here thus was consistent with nearly every court to have addressed a similar decision. The only court to differ: the Arizona Supreme Court in *Holle*.

3. The improper allocation of burden has a real world impact that negatively impacts people.

The law at issue in this case has an impact. Real people are harmed by the improper allocation of the burden of proving innocent contact. This harm stretches through all phases of the criminal process: jury deliberations, trial, and even pretrial release.

The most striking example of this harm is illustrated by *State v. Holle*, 379 P.3d 197 (Ariz. 2016) (*Holle II*) & 358 P.3d 639 (Ariz. App. 2015) (*Holle I*). Jerry Holle's granddaughter accused him of touching her. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641. The granddaughter first brought this accusation up to a

friend and school counselor. *Holle I*, 358 P.3d at 641. During an investigation, she also told police that Jerry had inappropriately touched her. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641. The State charged Jerry with three sex offenses (molestation of a child, sexual abuse of a minor under fifteen, sexual conduct with a minor under fifteen) and one count of aggravated assault. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641.

Before trial, Jerry objected to the statutory elements of the sexual offenses and asked the trial court to instruct the jury that the State was required to prove that any touching was sexually motivated to prevail on the charged sex offenses. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641. The trial court refused. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641.

After the State's case closed, the trial court entered a judgment of acquittal on the aggravated-assault count. *Holle I*, 358 P.3d at 641. The trial court refused to enter a judgment of acquittal on any of the other counts. *Id.*

Jerry presented a number of witnesses who testified that Jerry was sexually normal. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641-42. Both of Jerry's "daughters testified that he never sexually assaulted them or any other children." *Holle II*, 379 P.3d at 198; *accord Holle I*, 358 P.3d at 642. The alleged victim's uncle also testified that he "had no reason to believe Holle was sexually interested in [the victim] or other children." *Holle I*, 358 P.3d at 642; *accord Holle II*, 379

P.3d at 198. All-in-all, Jerry argued the allegations were "blown out of proportion." *Holle I*, 358 P.3d at 642.

In line with its prior ruling, the trial court instructed the jury that Jerry bore the burden of proving "the affirmative defense of no sexual interest by a preponderance of the evidence." *Holle I*, 358 P.3d at 642; *accord Holle II*, 379 P.3d at 198.

Despite this instruction, the jury asked, early in its deliberations: "For these accusations to be a crime, must there be sexual intent proven?" *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 642. The trial court referred the jury to the original instructions. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 642.

The jury's question illustrated that the evidence presented a close call and the jury was concerned with which party bore the burden of proof. The instruction, which told the jury to presume sexual motivation unless Jerry could prove a lack of sexual motivation by a preponderance of the evidence, carried the day. Jerry was convicted because he could not adequately prove his innocence.

Fortunately, not everyone suffers conviction because of the burden. But that is not to say that the improper burden has no impact. The Motion for Reconsideration filed in *Holle II* discussed the charge and acquittal of David Zupan. David Zupan and his wife took in two foster children who suffered from psychological problems and had a history of lying; including fabricating an

allegation of sexual misconduct against David's four-year-old son that Child Protective Services investigated and determined was unfounded. As a result of the psychological problems, the foster children had to wear diapers and would soil themselves. But the children also would not admit to having soiled themselves, meaning David and his wife had to check the diapers regularly in order to make sure the children were kept clean. David's wife also kept a very thorough account of the foster experience, including several instances when the children were dishonest.

Even though all of this information was presented to the prosecution before an indictment, the prosecution took the case to the grand jury. The prosecution also minimized the soiling problems and never mentioned the psychological problems or history of lying.

Like in Jerry Holle's case, the trial court instructed the jury that David had to prove his innocence—David had to prove any contact was not motivated by a sexual interest. Fortunately for David, he was able to carry this burden.

But accusation alone is so serious that it can be disqualifying for some activities or careers. And even if the charge is not automatically disqualifying, David must forever live with the obloquy of being an accused sexual predator of children.

A person in David's position has their freedom of movement restrained. Many must stay in jail pending trial. Even if they are not confined the entire time, pretrial release conditions nonetheless restrict movement. This last legislative session, Arizona State Representative Anthony Kern proposed a bill designed to fix the molestation statute. HB 2463. The Bill proposed to insert an additional element: that the molestation was motivated by sexual interest. On February 15, 2017, the Arizona House Judiciary and Public Safety Committee held a hearing on the bill.

During that hearing, Christopher Manberg, a Phoenix attorney whose practice focuses on the defense of sex crimes, testified that the current law in Arizona created a very real problem beyond just potential outcomes after trial. http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18767&meta_id=390869, 4:14:00-4:15:00. While prosecutors are restrained by their responsibility to bring charges only if there was a reasonable likelihood of conviction, that ethical duty did not avoid all harms. *Id.* at 4:15:00-4:16:00. First, police officers are not restrained by the same ethical responsibility. *Id.* at 4:15:08-4:15:20. Thus, a person who engages engages in conduct as innocent as changing a diaper could still be arrested. *Id.* at 4:15:20-4:16:00.[2]

[2] This echoes Chief Justice Bales's dissent in *Holle II*, wherein he observed that "[p]arents and other caregivers who have changed an infant's soiled diaper or bathed a toddler will be surprised to learn that they have committed a class 2 or 3

That is when the second problem arises: a person can then be held in custody for a substantial period of time before the prosecution decides not to pursue charges. *Id.* at 4:16:00-4:16:44. Mr. Manberg shared the story of one of his clients who was arrested for just that sort of innocuous conduct. *Id.* at 4:16:00-4:16:19. After arrest, this person was held non-bondable. *Id.*[3] He had to wait in jail for seven days before the prosecution decided not to proceed with molestation charges. *Id.* at 4:16:20-4:16:28. After those seven days the charges were dropped and he was released. *Id.* But that does not mean the charges were harmless. *Id.* at 4:16:28-4:16:44. He lost that time with his family. *Id.* He lost that time at work, potentially risking employment. *Id.* And when he came out, he had an arrest for molestation on his record—a devastating impact on its own. *Id.*

felony. They also will likely find little solace from the majority's conclusion that although they are child molesters or sex abusers under Arizona law, they are afforded an 'affirmative defense' if they can prove by a preponderance of the evidence that their toughing 'was not motivated by sexual interest.'" 379 P.3d at 208.

[3] The Arizona Constitution excepts molestation of a child under the age of 15 from the requirement for bail. Ariz. Const. Art. 2, § 22(A)(1). Additionally, Ariz. Rev. Stat. § 13-3961(A)(4) directs that persons charged with molestation of a child under the age of 15 "shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged …." Only recently was this provision held unconstitutional as applied to child molestation charges. *Chantry v. Astrowsky*, 395 P.3d 1114 (Ariz. App. 2017).

CONCLUSION

The district court correctly concluded that Arizona's child molestation statutory scheme improperly shifts the burden to the criminally accused. The impropriety of such a scheme is illustrated by the fact that Arizona is the only jurisdiction that presumes a sexual motivation and requires the defendant to prove her innocence. And the shifted burden has real impacts upon people accused of a horrible crime. Accordingly, *amicus curiae* asks this Court to affirm the district court's ruling.

RESPECTFULLY SUBMITTED this 30th day of March, 2018.

By /s/ Mikel Steinfeld
MIKEL STEINFELD
Arizona Attorneys for Criminal Justice

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 30, 2018.

I certify that all participants in this case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Erica T. Dubno
Fahringer & Dubno
767 Third Avenue, Suite 3600
New York, NY 10017
(212) 319-5351
Erica.dubno@fahringerlaw.com

Michael D. Kimerer
1313 E. Osborn Road, Suite 100
Phoenix, AZ 85104
(602) 279-5900
mdk@kimerer.com

Robert Walsh
Assistant Attorney General
Criminal Appeals Section
2005 N. Central Avenue
Phoenix, AZ 85004
(602) 542-3881
CADocket@azag.gov

By /s/ Mikel Steinfeld
MIKEL STEINFELD
Arizona Attorneys for Criminal Justice

CERTIFICATE OF COMPLIANCE

This brief was written in fourteen-point Times New Roman and thus complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as required by Fed. R. App. P. 29(a)(4). This brief contains 3,464 words, in compliance with Fed. R. App. P. Rules 29(a)(5) and 32(a)(7)(B).

DATED this 30th day of March, 2018.

By /s/ Mikel Steinfeld
MIKEL STEINFELD
Arizona Attorneys for Criminal Justice

No. 17-15603(L), 17-15704(XAP)

United States Court of Appeals

For the

Ninth Circuit

STEPHEN EDWARD MAY,
Petitioner-Appellee,

v.

CHARLES L. RYAN, Warden; MARK BRNOVICH, Attorney General,
Respondents-Appellants.

STEPHEN EDWARD MAY,
Petitioner-Appellant,

v.

CHARLES L. RYAN, Warden; MARK BRNOVICH, Attorney General,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (PHOENIX)
CASE NO. 2:14-cv-00409-NVW

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306

Counsel for the National Association of Criminal Defense Lawyers

CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers does not have a parent corporation and no publicly held corporation owns ten percent or more of any stake or stock in it.

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CONSENT OF THE PARTIES

This brief is being filed with the consent of both parties. *See* Ninth Cir. R. 29-2(a).

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] The NACDL has thousands of members nationwide and, when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. The NACDL's members include criminal defense lawyers, public defenders, U.S. military defense counsel, law professors, and judges.

NACDL is acutely interested in this case because the conviction rests on a principle that is antithetical to criminal law in American tradition. The Arizona criminal statute at issue here places on the defendant the burden of *dis*proving the *mens rea* that can transform a lawful physical act into an abhorrent criminal violation. That is a

[1] No party's counsel authored this brief in whole or in part and no party, party's counsel, or person other than the amicus curiae, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App P. 29(a)(4)(E).

constitutional violation that should not go unremedied, even if counsel somehow fails to preserve it.

And counsel here failed to preserve it.

NACDL does not routinely weigh in on ineffective assistance issues. But this was, or should have been, an easy case. One learns early in law school that the prosecution bears the burden of proof in a criminal case as a matter of due process informed by centuries of common-law tradition. The reversed burden here was no subtle technicality, but a constitutional violation that is obvious on the face of the statute and should have prompted an objection from any competent criminal defense lawyer. Criminal defendants are constitutionally entitled to better. And it is a slur on NACDL's members and other members of the criminal defense bar to find that so fundamental a failure of the defense function is sufficient to meet the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

WHY REHEARING SHOULD BE GRANTED.

Rehearing *en banc* is warranted here because of the clarity and gravity of two constitutional errors, each with profound implications for the accused in criminal trials. In a recent opinion, the Supreme Court noted that "[c]ourts sometimes make standing law more complicated than

it needs to be." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020). So it is with the panel majority and the law of due process and ineffective assistance presented here. When the most basic and universal first principles are at issue, sometimes the right answer is the obvious one, rather than the answer that requires complex and masterly reasoning.

The presumption of innocence is a fundamental part of due process, and manifests in the prosecution's burden to prove the essential elements of any crime. The Supreme Court's *In re Winship* decision 50 years ago broke no new ground when in holding that each element also much be proved beyond a reasonable doubt. *See* 397 U.S. 358 (1970). That had long been the nearly universal practice, reflected in many Supreme Court opinions. *See id.* at 362 (collecting cases). *Winship* merely confirmed that the burden and the high standard were compelled by the Due Process Clause.

Yet the Arizona criminal statute at issue here does not merely lower the standard, but *reverses* the burden of proof on the mental state required for the crime of molestation of a child. And the mental state makes all the difference: without it, any parent who changes diapers would be risking criminal prosecution. The principle that the prosecution bears a heavy burden of proof on each element of a crime is not

complicated or abstruse, and its application to the *mens rea* element here is straightforward. A conviction under the Arizona statute cannot withstand constitutional challenge. The contrary Arizona state-court decisions contradict *Winship* and other clearly established Supreme Court precedent.

But the panel decision in the present case did not reach this issue. Defense trial counsel here did not raise the unconstitutionality of the statute's reallocation of burdens in state court, so the state courts held the issue waived.

That waiver should have opened the door to habeas relief, not slammed it shut. Any law student who passed classes in criminal law and criminal procedure should know that the prosecution bears the burden of proving each element of an offense beyond a reasonable doubt. The principle is not easy to overlook, having been drummed into millions of nonlawyer television viewers from the time of *Perry Mason* to the present.

Yet the panel reasoned its way to a holding that the Sixth Amendment right to effective assistance of counsel does not require counsel to recognize and preserve one of the most fundamental objections to any criminal proceeding: that the defendant has been forced to prove

his innocence rather than forcing the government to bear its burden of proving his guilt.

Rehearing *en banc* is warranted to provide clear guidance to the district courts, defendants, and their counsel that counsel cannot stand idly by while a client is convicted because he failed to overcome a presumption of guilt, merely because aberrant local precedent presents a hurdle.

Rehearing is additionally warranted because the issue is recurring and important. The panel decision sends a harmful message to both legislatures and counsel. Legislatures may repeat what Arizona did here, and unconstitutionally ease the path to conviction for especially unpopular crimes, knowing many convictions will avoid review both because of plea bargains and because to path to collateral review by this Court is full of obstructions. Counsel now may avoid the trouble of raising obvious but socially unpopular challenges to unconstitutionally defined crimes without risking a later finding that their conduct fell below the minimal standards of effectiveness in *Strickland*.

Criminal defendants are entitled to better, and the criminal defense bar should be held to a higher standard—here, one that almost all its members can easily meet. The panel decision should be reheard *en banc*

and the decision of the district court affirmed.

A. Reversing the Burden of Proof on the *Mens Rea* of a Crime Plainly Deprives a Criminal Defendant of Due Process.

The due process principle at issue here has underlain our law from its mistiest origins: the prosecution has to prove the elements of a crime, including (especially) the mental state required to impose criminal liability. The Supreme Court's *Winship* decision—itself now 50 years old—was notable only because it confirmed that, as a matter of due process, the prosecution not only must prove each element of a charged criminal offense, but prove it beyond a reasonable doubt. That the prosecution bore the burden of proof to at least some degree was beyond dispute, even by the lower courts in *Winship* itself. *See* 397 U.S. at 370. And the reasons for allocating this burden to the prosecution are necessarily stronger versions of the reasons enunciated in *Winship* for applying both the burden and the highest standard of proof.

Making the prosecution prove rather than presume the essential elements of its case "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. And the allocation of that burden to the prosecution "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary'

principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.* (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Indeed, the focus of the pertinent historical disquisition in *Coffin* was the presumption of innocence, which the Court traced to Deuteronomy and Roman law, and which the Court described as "evidence in favor of the accused." *Coffin*, 156 U.S. at 460; *see id.* at 453-460. The Court explained that the presumption of innocence "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Id.* at 459.

And the Court further held in *Coffin*—directly on point for present purposes—that a "fundamental" error infected an instruction "that the burden of proof had shifted" so that "it was incumbent on the accused to show the lawfulness of their acts." *Id.* at 461.

Yet Arizona's child-molestation statutes presume that a person who has contact—direct or indirect—with a child's genitals does so with sexual intent. The government does not bear the burden to prove sexual intent; rather, the mother or babysitter who changed a diaper or the uncle who carried a niece or nephew on his shoulders must instead prove

the contact was *not* sexually motivated. This allocation of burden turns a core principle of criminal due process upside down. Rather than having to prove every element of a criminal offense beyond a reasonable doubt as the Due Process Clause requires, *see Winship*, 397 U.S at 364, the prosecution need not prove criminal mental state at all. The government can sit silent, confident that, if the defendant cannot convince the jury of his innocent state of mind, he will be convicted.

Although states have some limited flexibility in defining the elements of a crime, the prosecution at a minimum bears the burden of proving the basic constituents of any crime—the *actus reus* and the *mens rea*. The child molestation statute at issue here comprised an *actus reus* of touching a child's genitals and a *mens rea* of sexual intent or interest. The limiting *mens rea* is universal; otherwise a parent, caregiver, or health care provider would commit a crime by cleaning or treating a child's genital area, for example by changing a diaper.

Arizona redefined the *mens rea* as an affirmative defense, presuming sexual interest from the contact itself. And (long after May's trial), the Arizona courts approved the change, adopting an extreme view that permits reversing the burden of proving *mens rea*. *See State v. Holle*, 379 P.3d 197 (Ariz. 2016) (*Holle II*), *aff'g* 358 P.3d 639 (Ariz. App. 2015)

(*Holle I*).

But Arizona is an outlier. Court after court has recognized that the Due Process Clause precludes similar efforts to force criminal defendants to prove their innocent mental state. For example, in *State v. Osborne*, 808 P.2d 624 (N.M. 1991), the New Mexico Supreme Court rejected an argument that an "unlawfully" element established a defense "providing the defendant with the opportunity to introduce evidence showing that his actions were within the scope of lawful activities such as routine childcare." *Id.* at 627. The court refused to "sanction an interpretation of a statute which would allow the state to impose such unjustifiable hardships upon presumptive innocent defendants." *Id.* at 628. "The necessity of establishing an excuse or justification for an act should not be imposed upon a defendant until the state has established that conduct has occurred which, under common standards of law and morality, may be presumed criminal." *Id.* at 630. Accordingly, the New Mexico Supreme Court concluded "unlawfulness" was an element as to which the government bore the burden of proof. *Id.* at 630-31.

The California Supreme Court similarly construed a statute prohibiting conduct that "annoys or molests" a child to include as "motivation by an abnormal sexual interest or intent as an element of the

offense." *In re Gladys R.*, 1 Cal.3d 855, 868 n.24 (1970) (citing *People v. Carskaddon*, 49 Cal.2d 423, 426 (1957), and *People v. Pallares*, 112 Cal.App.2d Supp. 895, 901 (1952)). And while Alaska defines "sexual contact" in a manner that does not include sexual intent, *see* Alaska Stat. § 11.81.900(b)(59); *Braun v. State*, 911 P.2d 1075, 1078 (Alaska App. 1996), a defendant does not bear a burden to prove that his contact was innocent. The definition for "sexual contact" expressly provides an exception for "normal caretaker responsibilities." Alaska Stat. § 11.81.900(b)(59)(B). So long as a defendant presents "some evidence" that puts the defense at issue, the government must prove, beyond a reasonable doubt, that the contact was not within "normal caretaker responsibilities." Alaska Stat. § 11.81.900(b)(19); *Peratrovich v. State*, 903 P.2d 1071, 1074- 75 (Alaska App. 1995).

In short, the Arizona statute under which May was convicted and sentenced to 75 years was plainly unconstitutional as a matter of first principles, and should not sustain his conviction. Rehearing is warranted.

B. Defense Counsel Who Fails to Challenge a Reversal of the Burden of Proof on *Mens Rea* Provides Constitutionally Ineffective Assistance.

Nor is counsel's waiver at trial a barrier to reaching the obvious

conclusion about the statute's unconstitutional reversal of the burden. The failure to object and preserve that plain and fundamental point rendered counsel's assistance unconstitutionally ineffective. Burdens of proof are among the most elementary topics of a legal education. It should have been obvious to any criminal lawyer that the statute was at least potentially unconstitutional.

There is no way to paper over the failure of assistance here. This was not a tactical choice that should be excused from hindsight second-guessing. If counsel can meet the *Strickland* standard without noticing that the burden of proof of mental state has been reversed, and without preserving an objection on that purely legal ground, it is hard to imagine what would fall below that standard.

It is true that the Arizona Supreme Court adopted an extreme outlier view and subsequently approved the statutory reversal of the burden of proving *mens rea*. *See Holle II*, 379 P.3d 197. But that does not excuse counsel from presenting and preserving the constitutional challenge. This is not a close case turning on arcane constitutional doctrines. The flaw here struck at the core of the presumption of innocence. And it did so in a setting where millions of people engage in the *actus reus* every day, so that their *mens rea*—their *lack* of sexual

interest or motivation—is all that keeps humanity from being a race of criminals.

Sometimes the simple and obvious answer is the correct one. Rehearing is warranted to ensure that the accused in this Circuit are protected from the most fundamentally ineffective assistance of counsel.

C. The Panel Decision Provides Harmful Incentives to Legislatures and Defense Counsel.

Each ruling on the burden issue has harmful real-world consequences. Criminal defense lawyers have notice that they need not make the most basic objections in order to meet the standard for effective assistance of counsel. A plainly unconstitutional reversal of the burden of proof by a state legislature escapes the condemnation that would deter similar legislative efforts in the future.

But most harmful practical results fall upon the wrongly accused, whether under this statute or other efforts to deny the presumption of innocence. The misallocation of the burden on the very mental element that separates genital touching by a responsible parent or relative from child molestation has real-world effects that persist beyond the partial amendment of the statute at issue here. Anyone in regular contact with children could be hauled into court at a prosecutor's discretion and forced

to convince a jury that sexual interest was absent when there was no evidence that sexual interest was present. They may be held in pretrial custody or have restrictions placed upon their freedom. And even if they can prove their innocence or convince the prosecutor to dismiss before trial, they must live with an arrest record for a sexual offense.

As Chief Justice Bales observed in his dissent in *Holle II*, "[p]arents and other caregivers who have changed an infant's soiled diaper or bathed a toddler will be surprised to learn that they have committed a class 2 or 3 felony." 379 P.3d at 208 (¶ 52). And it is cold comfort indeed that, "although they are child molesters or sex abusers under Arizona law, they are afforded an 'affirmative defense' if they can prove by a preponderance of the evidence that their toughing 'was not motivated by sexual interest.'" *Id.*

The harm from this reversal of burdens is illustrated by *Holle*, where the defendant was charged with three sex offenses and one count of aggravated assault against his granddaughter. *Holle II*, 379 P.3d at 198. The trial court refused to instruct the jury that the State was required to prove that any touching was sexually motivated to prevail on the charged sex offenses. *Id.* After the State's case closed, the trial court entered a judgment of acquittal on the aggravated-assault count, but

declined to do so on the other counts. *Holle I*, 358 P.3d at 641. The defendant presented testimony of several witnesses that he lacked sexual interest in minors.

After being instructed that the defendant bore the burden of proving "the affirmative defense of no sexual interest by a preponderance of the evidence," *Holle I*, 358 P.3d at 642; *accord Holle II*, 379 P.3d at 198, the jury asked, early in its deliberations: "For these accusations to be a crime, must there be sexual intent proven?" *Holle II*, 379 P.3d at 198. The trial court referred the jury to the original instructions. *Id*.

That instruction told the jury to presume sexual motivation unless the defendant could prove a lack of sexual motivation by a preponderance of the evidence, carried the day. From all appearances, he was convicted because he could not prove his innocence.

Nor is it mere speculation that parents may be prosecuted for child molestation in reliance on their burden of disproving sexual intent. The rehearing petition cites the case of David Zupan, a foster parent charged with molesting his four-year-old son. *See* Pet. 3-4. The son and another foster child were incontinent and had to wear diapers because of psychological problems. They also would not admit to having soiled themselves, so that the foster parents had to check the diapers regularly

in order to make sure the children were kept clean. Zupan was charged with molesting his son, although Child Protective Services (which had a record of the children's condition and prior dishonest conduct) had previously found no basis for the allegations. Zupan was fortunate enough to carry his burden of proving that any contact in checking the diapers and cleaning his son was not motivated by a sexual interest. Yet he must forever live with the stain of being an accused sexual predator of children.

As detailed in the merits brief of *amicus* Arizona Attorneys for Criminal Justice (at 13-14), in February 2017 hearings before the Arizona House Judiciary and Public Safety Committee included testimony about the deleterious effects beyond potential trial outcomes. *See* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18767&meta_id=390869, 4:14:00-4:16:44. The ethical restraints on prosecutors, who are not supposed to bring charges unless there is a reasonable likelihood of conviction, do not apply to the police officers. Thus, a person who engages in conduct as innocent as changing a diaper could still be arrested as a sex offender.

A person arrested on flimsy grounds may remain in custody for a

substantial period before the prosecution decides not to pursue charges. One witness gave an example of a client arrested for just that sort of innocuous conduct. Because bail was denied, the client had to wait in jail for seven days before the prosecution dropped the molestation charges. He was then released, but only after sustained substantial harm. He lost time with his family and time at work, risking his employment. And he has an arrest for molestation on his record—a devastating consequence standing alone. Indeed, the accusation itself is enough to end a career in many fields, as a matter of practice if not as a matter of law.

Rehearing is warranted to remedy these widespread effects and prevent their recurrence in the future.

CONCLUSION

Rehearing *en banc* should be granted and the judgment of the district court affirmed.

Respectfully submitted.

/s/ Donald M. Falk
Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306

Counsel for the National Association of Criminal Defense Lawyers

August 19, 2020

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Dated: August 19, 2020

By /s/Donald M. Falk