

NO. 20-1080

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STEPHEN EDWARD MAY, Petitioner,

v.

DAVID SHINN; MARK BRNOVICH, Attorney General,  
Respondents.

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

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BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS  
IN SUPPORT OF PETITIONER STEPHEN EDWARD MAY

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## IDENTITY AND INTERESTS OF *AMICUS CURIAE*<sup>1</sup>

The National Association for Rational Sexual Offense Laws (“NARSOL”) is a national, nonprofit organization exclusively dedicated to advocating for rational, evidence-based, sexual offense prevention policies that minimize unnecessary collateral consequences while recognizing the need for public safety. It promotes research into sexual offense recidivism, maintains and aggregates data on recidivism and the efficacy of sexual offense registries, participates where appropriate in litigation related to sex offender registry laws, and hosts conferences around the country focusing on fact-based reform of sexual offense legislation.

NARSOL represents members of a particularly *unpopular or hated group* in American society who deserve effective representation by counsel in order to protect their right to due process of law, a right long recognized by this Court:

Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, *even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.*

*Von Moltke v. Gilles*, 332 U.S. 308, 725-26 (1948) (Black, J.).

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<sup>1</sup> No counsel for a party authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner May and the Arizona Attorney General Jim Nielsen consented to this filing on February 26, 2021. The petition was filed on February 9<sup>th</sup>; this brief is due on March 11, 2021.

## SUMMARY OF ARGUMENT

Arizona, alone among state jurisdictions, required the accused charged with child molestation to disprove that he acted with a sexual intent or interest in knowingly touching the genitalia, anus, or female breast of an individual under the age of 15 years. This shifting of the burden to disprove a necessary element of the prosecution's case violated Stephen May's right to due process of law in requiring him to negate sexual intent or interest, described as an affirmative defense, by Arizona courts prior to legislative repeal of the provision setting out this shift in the burden of proof. Petitioner May's trial counsel, while expressing his opinion that the statutory affirmative defense violated due process, failed to take action challenging the statute on federal constitutional grounds, resulting in procedural default of a direct constitutional attack in the state courts, and thus, also precluding federal review of his claim based on the application of the Arizona procedural default rule.

In holding that counsel rendered effective assistance in a state post-conviction, the state courts noted the procedural default, but held that counsel's performance was not unreasonable because an earlier version of the statutory scheme had previously been upheld, precluding proof of a reasonable probability of a different outcome had counsel challenged the statute. The District Court granted federal habeas relief on May's ineffective assistance claim, but the Ninth

Circuit, on rehearing, reversed the grant of relief. May now petitions for certiorari, contesting the disposition on both the argument that counsel's performance was deficient and the deference the Ninth Circuit panel afforded the decisions of the Arizona courts.

## ARGUMENT

Arizona law provides that the purpose of statutes defining criminal offenses lies, in part, in “proscribing conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests,” and affording “fair warning of the nature” of the proscribed conduct. ARIZ. REV. STAT. § 13-101(1) and (2), respectively. Section 13-101 also provides:

It is declared that the public policy of this state and the general purposes of the provisions of this title are:

....

3. To define the act or omission *and the accompanying mental state which constitute each offense* and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth.

(emphasis added).

The United States District Court, the Honorable Neil V. Wake presiding, granted Stephen May relief based on trial counsel's ineffective assistance. *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017). On appeal, the Ninth Circuit Court of Appeals initially sustained the grant of relief on an alternative ground asserted in May's petition, but rejected by the District Court, 766 Fed. Appx. 505, 509 (9<sup>th</sup> Cir.



2019). On rehearing the panel reversed its decision and denied relief on all claims. *May v. Shinn*, 954 F.3d 1194, 1208 (9<sup>th</sup> Cir. 2020).

NARSOL addresses Petitioner May's third question presented in his petition: Whether trial counsel's failure to challenge the constitutionality of the Arizona child molestation statute under which he was convicted reflected ineffective assistance warranting relief under the Sixth Amendment based on application of *Strickland v. Washington*, 466 U.S. 668 (1984).

Stephen May argued in state and federal post-conviction proceedings that trial counsel rendered ineffective assistance based on counsel's failure to challenge the statute upon which he was charged as unconstitutional within the context of the statutory scheme providing that an accused charged with sexual molestation of a child is required to prove his lack of sexual intent as an affirmative defense.

The Ninth Circuit rejected May's argument that trial counsel's performance was deficient in its initial panel decision, later confirmed on rehearing. *Strickland* requires a showing both that counsel's performance was both defective in falling below "an objective standard of reasonableness," 466 U.S. at 668, and that but for counsel's defective performance, there was a reasonable probability of a different outcome of the proceeding. Because the Ninth Circuit did not find that counsel failed to provide reasonable representation, it did not address the issue of the

constitutionality of the Arizona child molestation statutory scheme. *May v. Ryan*, 746 Fed. Appx. at 506-07; *May v. Shinn*, 954 F.3d at 1208.

May was convicted on five of seven counts of violations of ARIZ. REV. STAT. § 13-1410(A), which provides:

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 who is under fifteen years of age.

This section required the prosecution to prove that an accused acted with general criminal intent, whether acting *intentionally* or *knowingly*. “Sexual contact” is defined in Section 13-1401(3), which states:

“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 or by any object or causing a person to engage in such contact.

Finally, the statutory scheme provided that an accused denying a sexual motivation for a physical act constituting “sexual contact” could rely on an affirmative defense to contest the prosecution evidence, a provision subsequently repealed:

It is a *defense* to a prosecution pursuant to § 13-1404 or 13-1410(A) that the defendant *was not motivated by a sexual interest*. It is a defense to a prosecution pursuant to § 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

ARIZ. REV. STAT. § 13-1407(E) (emphasis added), *repealed*, 2018 Ariz. Sess. Laws, ch. 266, §§ 1, 2. *See State v. Bolivar*, 477 P.3d 672, 688-89, n. 11 (Ariz.

2020). May argues that the Arizona child molestation statutory scheme is unconstitutional because it shifted the burden to the defense to disprove that he acted with a sexual interest, contrary to *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Petitioner May was sentenced to 15-year terms on each of the five convictions ordered to be served consecutively, for a 75-year sentence. *May v. Ryan*, 245 F. Supp. 3d at 1151.

A. *Trial counsel's deficient performance*

The District Court granted relief based on trial counsel's failure to challenge the constitutionality of the Arizona statutory scheme that expressly shifted the burden to the accused to disprove that his alleged physical acts were not motivated by a sexual interest, the *affirmative* defense provided by Section 13-1407(E), applicable at the time of May's charged offenses.

1. *The Ninth Circuit's decision reversing the grant of relief*

In rejecting the District Court's holding that trial counsel failed to provide effective assistance, the Ninth Circuit panel explained:

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*, 182 Ariz. 534, 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), we cannot conclude that trial counsel's failure to 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.

766 Fed. Appx. at 506-07 (emphasis added). The Ninth Circuit relied on the decision of Division 1, Department B of the Arizona Court of Appeals, *State v. Sanderson*, rendered in 1995, in holding that counsel provided effective representation in not challenging the express shifting of the burden of proof to the defense to disprove that his acts were motivated by sexual interest. It then cited in a footnote two Arizona decisions issued after May's trial to confirm its conclusion that counsel met the Arizona standard of practice at the 2007 jury trial, decisions that obviously could not have informed counsel's understanding of acceptable practice at the time of trial:

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. Holle*, 240 Ariz. 300, 379 P.3d 197, 202 (Ariz. 2016); *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007).

766 Fed. Appx. at 506, n. 1.

What the Ninth Circuit refused to do in reviewing the habeas court's grant of relief was to consider whether the Arizona statutory scheme violated May's right to due process of law in imposing on the burden on an individual accused of child molestation to prove that he acted without sexual motivation. Nor, did it engage in an appropriate degree of analysis of the *Sanderson* court's summary finding that *Mullaney v. Wilbur* did not require rejection of the imposition of the burden of

disproving sexual motivation on May because this burden operated as an affirmative defense under state law and did not recognize a presumption that the prosecution had proved that the accused acted with sexual intent when the accused failed to prove the affirmative defense.. Instead, the Ninth Circuit panel relied on a single panel of the Arizona Court of Appeals referencing a prior statute that did not require the defendant to disprove that he acted with sexual intent as an affirmative defense, but also did not require the State to prove that the accused acted with sexual intent. 898 P.2d at 491. Two years after *Sanderson* the legislature required defendants to carry the burden of proof on all affirmative defenses. *May v. Ryan*, 245 F. Supp. 3d at 1155 (1997 Ariz. Sess. Laws, ch. 136, § 4; Ariz. Rev. Stat. § 13–205(A) (2006).

The Ninth Circuit panel found that counsel’s failure to challenge the statutory structure as violative of due process of law, did not fall below “an objective standard of reasonableness.” It relied on *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009), in concluding that trial counsel was required only to perform within the standard of reasonable practice at the time of his representation. The issue there, however, involved a retroactive application of professional standards for performance in capital cases adopted by the ABA eighteen years after the 1985 trial, significantly expanding upon counsel’s obligations in earlier pronouncements and virtually holding that the expanded expectations for counsel’s performance

were mandatory. *Id.* at 7-8. Particularly important in this regard is that fact that counsel in *Sanderson* had failed to preserve error on the *Mullaney* challenge argued on appeal:

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, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). This constitutional argument was not raised in the trial court and, as a result, has been waived on appeal.

*Sanderson*, 898 P.2d at 491. Although the court rejected the due process claim under *Mullaney*, this disposition hardly established a norm for reasonable professional practice governing counsel's performance at May's 2007 prosecution, other than the requirement that counsel preserve error to avoid procedural default of the client's constitutional claim.

It is this Court--not a panel of the Arizona Court of Appeals--that has the ultimate authority and responsibility for interpretation and application of federal constitutional protections. *Michigan v. Long*, 463 U.S. 1032, 1042, esp. n. 8 (1983). In federal habeas actions, the decisions of the Court are controlling in the determination of whether state courts have deviated by issuing rulings contrary to or departing unreasonably from this Court's precedents. 28 U.S.C. § 2254(d)(1)–(2) (2018). At the time of May's trial, the single authority noted by the Ninth Circuit considering the possible merit to a burden shifting claim based on *Mullaney v. Wilbur*, was *Sanderson*. The panel relied on that single decision of an

intermediate state court to rationalize that trial counsel's failure to challenge the burden shifting statutory scheme was acceptable in terms of reasonable practice by defense counsel. It then deferred to the state post-conviction courts' finding that counsel's failure did not demonstrate deficient performance under *Strickland* to avoid consideration of the merits of the *Mullaney* challenge because there was no need to go further under *Strickland* to determine whether there was a reasonable probability that the *Mullaney* argument would prevail, meeting *Strickland*'s second prong. This legal "Catch 22" reflects a perversion in appellate process, permitting a reviewing court to avoid an uncomfortable decision on the merits of a claim by holding that the claim had not been preserved, yet excusing the deficiency evidenced by the failure to preserve error because a lower court had already addressed the claim, ruling adversely to the accused's claim.

2. *Counsel's explanation for his failure to contest the statutory scheme on due process grounds*

Trial counsel testified at the evidentiary hearing conducted on May's state post-conviction relief. [State post-conviction relief hg. TR/5; APP. 290, 293]. He testified that he questioned the constitutionality of the child molestation statute and the shift in the burden of proof to require the defendant to disprove that he acted with sexual motivation. [TR/19; APP. 294]. He admitted, however, that he did not file a motion challenging the constitutionality of the statute, although he did request a jury instruction addressing the burden. [TR/19-20; APP. 294-95]. The

State then offered counsel's sworn Declaration, which included the following:

3. Before the May case, I had wide experience representing clients charged with sex offenses.

[APP. 299]

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.

[APP. 304-05]. Counsel's only action addressing the shifting burden of proof to his client to disprove that he acted without sexual motivation was to request an instruction advising jurors that the State bore the burden of proof. The court of appeals denied relief on his argument on direct appeal, *State v. May*, 2008 WL 29171111, Not Reported in P.3d (Ariz. App. 2008), *affirmed* [APP. 262, 264-66] (no error by trial court in instructing jury on affirmative defense of lack of sexual motivation in child solicitation prosecution), and the Arizona Supreme Court



denied discretionary review. *State v. May*, No. CR-08-0281-PR (Ariz. Feb. 9, 2000), *Petition for Review to Arizona Supreme Court—Denied* [APP. 261].

3. *The “quintessential example of unreasonable performance”*

Counsel conceded that he took no action the shifting of the burden to the accused to disprove that he acted with the required criminal intent and demonstrate that he did not act with sexual motivation because he was “not aware of any supporting legal authorities, *other than the Constitution.*” Yet, the *Sanderson* court cited *Mullaney v. Wilbur* in rejecting the argument that the prosecution’s effective reliance on a presumption to prove an element of its case violated due process. 898 P.2d at 491.

Moreover, Arizona courts have consistently recognized *Mullaney* and its significance. See, e.g., *State v. Jensen*, 785 P.2d 781, 786 (Ariz. 1987); *State v. Moya*, 672 P.2d 964, 966-67 (Ariz. 1983); *State v. Mincey*, 636 P.2d 637, 645 (Ariz. 1981); and *Norton v. Superior Court in and for County of Maricopa*, 829 P.2d 345, 347 (Ariz. App. 1992) (all recognizing *Mullaney* rule against shifting burden of proof on element of the offense to accused as violative of due process).

Thus, while claiming expertise in sex cases [Declaration, ¶¶ 3, 12; APP. 299, 300-01], and his opinion, as an experienced attorney, that the Arizona statutory scheme violated due process by requiring his client to prove that he did not act with sexual motivation, trial counsel did not file a motion challenging the scheme

on federal constitutional grounds. He did not do so because he was not aware of any case law that he could cite in a “written brief” supporting the challenge. Nor, did he apparently engage in the most basic legal research that would have disclosed *Mullaney* or even, *Sanderson*, which would have logically led him to *Mullaney* and *Patterson v. New York*, 432 U.S. 177 (1977), upon which the *Sanderson* court relied. 898 P.2d at 491.

Additionally, had trial counsel read *Sanderson* in preparing to defend May, he would necessarily have realized that a failure to file a motion contesting the statutory scheme on due process grounds would result in a procedural default of the constitutional claim. 898 P.2d at 481. Instead, May was limited on appeal to arguing—unsuccessfully--that the trial court erred in instructing jurors on the affirmative defense requiring him to prove that he lack of sexual interest in touching the complainants. *State v. May*, 1-CA-CR 07-0144 (July 24, 2008), Memorandum [APP. 264-66].

May’s ineffectiveness claim was not one in which trial counsel faced alternative options in terms of defenses or trial strategy, viewed in hindsight because the strategy pursued by counsel proved to be unsuccessful. *Strickland* warns against retrospective judgments in assessing constitutional effectiveness when counsel’s decisionmaking is critical because so many decisions confronting defense counsel may, in fact, be reasonable in light of the facts of an individual

case. 466 U.S. at 688-89. In May's case, however, there was no reasonable strategic alternative that might have ultimately proved more favorable than one chosen by counsel. There was, moreover, no possible downside to challenging the constitutionality of the statutory scheme under which May was convicted. Instead, a challenge would have served to protect May's option of pursuing relief on appeal in the state courts, and if unsuccessful, in this Court by petitioning for certiorari, or be seeking relief in federal habeas corpus having exhausted state remedies in losing on the merits in the state direct appeal or post-conviction process. In short, this is not a case in which counsel's explanation for his failure to pursue a particular course of action required deference, assuming that the option was "within the range of professionally reasonable judgments." 466 U.S. at 691.

The significance of a challenge to the constitutionality of a criminal statute cannot be understated. A conviction based on an unconstitutional statute scheme warrants relief, as the Court explained in holding that a federal defendant pleading guilty still does not waive the right to challenge the statute under which he has been convicted on direct appeal in *Class v. United States*, 138 S.Ct. 798, 803 (2018). The Court's holding was limited in two important respects: first, it applied only to a constitutional challenge made by federal defendants; and second, it applied only to a challenge made on direct appeal. It is not certain that a state court defendant would have a similar right to challenge a statute on federal

constitutional grounds on a plea of guilty. However, absent application of a state procedural rule providing for an express waiver of the claim, it is difficult to comprehend how an accused could ever waive a claim that the law upon which the conviction rests is, in fact, unconstitutional, thus somehow validating the conviction by waiver. May was convicted following jury trial, not upon a guilty plea and his ability to contest the validity of the Arizona affirmative defense was procedural defaulted due to counsel's inaction.

Here, trial counsel's failure to protect May's interest in contesting the statutory scheme under which he was convicted by preserving his claim for relief based on constitutional error reflects the same kind of "unreasonable performance" warranting relief in *Hinton v. Alabama*, 571 U.S. 263 (2014). In *Hinton*, counsel inexplicably refused the trial court's offer of additional funds to obtain assistance of a qualified expert witness, *id.* at 265, instead, proceeding to a capital trial with an unqualified "expert" whose testimony was shredded by the prosecution on cross-examination, leading to Hinton's conviction and death sentence. *Id.* at 269.

On review from denial of post-conviction relief by the state courts, the Court discussed the obligation of counsel to properly investigate the case and applicable law. Hinton's counsel failed to research state law that should have led him to accept the trial court's offer to obtain assistance from a qualified expert. *Id.* at 274. In finding counsel's performance unreasonable, the Court explained:

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*.

May's counsel was not ignorant of the critical point regarding the prosecution's burden of proof. He understood the constitutional issue involving the shifting of the burden to his client to disprove that he acted with a sexual motivation—or sexual intent. Instead, he simply failed to take necessary action to preserve May's right to due process under the Fourteenth Amendment. *Hinton* did not impose some requirement for diligence retroactively, as in *Bobby v. Van Hook*; counsel's duty to investigate was grounded in the decisions in *Williams v. Taylor*, 529 U.S. 362, 359 (2000) and *Kimmelman v. Morrison*, 475 U.S. 365, 385 (1986). Those decisions similarly described the requirements for reasonable performance by counsel when May was prosecuted in 2007.

The state post-conviction court and Ninth Circuit panel dispositions finding that trial counsel's performance did not meet the first prong of *Strickland* requiring May to demonstrate deficient performance by counsel. In light of *Hinton* and other decisions of this Court, the deference seemingly accorded counsel's wholly inadequate explanation for his failure to preserve May's constitutional argument, reflects a conclusion contrary to this Court's precedents or an unreasonable application of precedent, meeting the test for federal habeas relief pursuant to 28 U.S.C. § 2254(d)(1) or (2).

*B. A “reasonable probability of a different outcome” of the proceeding*

The prejudice test required to establish a Sixth Amendment violation under *Strickland* requires a showing that but for counsel’s errors or deficient performance there would have been a reasonable probability of a different outcome of the proceeding. 466 U.S. at 694. First, had counsel challenged the statutory scheme as unconstitutional May’s due process claim arising from the impermissible burden shifting would have been preserved for review on direct appeal and for federal review without being subject to a state rule of procedural default. On the merits of the due process claim, moreover, there would have been a reasonable probability of a different outcome based on the sheer weakness of analysis and conclusions of the state courts given deference by the Ninth Circuit panel. The legal theory advanced by the *Sanderson* court; subsequently embraced by the Arizona Supreme Court in *State v. Holle*, 379 P.3d 197, 201-02 (Ariz. 2016); and afforded deference by the circuit panel, was that Section 13-1407(E) recognizes an affirmative defense permitting an accused charged with child molestation to prove, by a preponderance of evidence, that the accused’s act in engaging in sexual contact by the:

. . . direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body . . . .

as defined in Section 13-1401(3), *was not motivated by a sexual interest*. The state courts held that this characterization of an affirmative defense was consistent with *Patterson*.

*Patterson*, however, distinguished the New York homicide statute from Maine's murder with malice law reviewed in *Mullaney*, referring to the lack of any reference to the accused's motivation apart from intent to cause the death of another person and a second element of second degree murder, that the accused's act did cause that death, and noted that the New York statute did not require proof that the accused acted with malice, the key intent element proving murder committed with malice under Maine law. 432 U.S. at 198. In *Mullaney*, the failure of the accused to disprove that he acted with the requisite malice necessary for the prosecutor to sustain its burden of proof resulted in the prosecution benefitting from an impermissible implied presumption establishing that the killing was done with malice. This effectively resulted in a shift in the burden of proof to the accused to negate this essential element of the prosecution's case in violation of due process. *Patterson*, 432 U.S. at 215.

Section 13-1410(A) required the prosecution to prove that May molested the complainants "by intentionally or knowingly engaging in or causing a person to engage in sexual contact." Inclusion of the reference to "sexual contact" necessarily injected an element of intent in the statutory definition of the molestation offense. Failure of an accused to disprove sexual motivation resulted in the prosecution meeting its burden of proof that the accused's improper "touching, fondling or manipulating any part of the genitals, anus or female breast

by any part of the body.” The prosecution benefitted from the assignment of the burden to disprove sexual motivation or intent under Section 13-1410(A) as an implied presumption that the sexual motivation of the accused had been proved. This implied presumption operated just the failure of the accused charged with murder in Maine to prove that he acted “in the heat of passion on sudden provocation,” permitted the prosecution to prove its case by the presumption that the accused’s failure established that the offense was murder committed with malice instead of the lesser offense of manslaughter.

While the *Sanderson* court dismissed the applicability of *Mullaney* on the argument that the affirmative defense set forth in Section 13-1407(E), 898 P.2d at 491, the Arizona Supreme Court never mentioned *Mullaney* in rejecting the burden shifting due process violation argument in *Holle*, the 3-2 decision in which the majority upheld the affirmative defense suggesting it as consistent with *Patterson*. 379 P.3d at 205. The *Holle* majority conceded that Section 13-1410(A) required proof that the accused “intentionally or knowingly engage[ed] in sexual contact, 379 P.3d at 199, while then explaining that the definition of the offense did “not mention, imply, or require sexual motivation.” Instead, the majority explained:

And although the definition of “sexual contact” is broad as it includes “any direct or indirect touching, fondling or manipulating” of another’s private parts, it does not implicate the defendant’s motivation.

379 P.3d at 303 (emphasis in original). The *Holle* dissenters concluded the



statutory scheme was impermissibly vague, noting the *Patterson* Court's warning:

Although states have discretion in assigning to defendants the burden of proving affirmative defenses, the Supreme Court has noted "there are obviously constitutional limits beyond which the States may not go in this regard."

379 P.3d at 209, citing *Patterson*, 432 U.S. at 209-10. They concluded, however, as the intermediate court had that the error was controlled by *Neder v. United States*, 527 U.S. 1, 10-11 (1999), involving omission of a necessary element of the offense that could be deemed harmless because of the overwhelming evidence of Holle's guilt. 379 P.3d at 313; *State v. Holle*, 358 P.3d 639, 648 (Ariz. App. 2015).

The state courts wholly failed to appreciate the significance of *Mullaney* and *Patterson*, taken together, as precedent critical to assessing the constitutional implications of assignment of the burden of proving lack of sexual motivation to the accused under the Arizona statutory scheme. In contrast to the state court construction given deference by the Ninth Circuit, Judge Wake's thorough and completely documented analysis decimated the state court decisions. His review of Arizona law and analysis of the statutory scheme relying on the affirmative defense demonstrated that the scheme could not survive *Mullaney* and *Patterson*. Nevertheless, Judge Wake's skillful reasoning was avoided by the Ninth Circuit in not addressing *Strickland*'s prejudice prong by deferring to the state post-conviction finding that trial counsel's performance was not defective. 245 F. Supp. 3d at 1154-72. In light of *Hinton*'s admonition that failure to investigate the law

applicable to the case is a *quintessential example of unreasonable performance* the Ninth Circuit's deference to the state courts' conclusion was wholly unjustified.

Yet, the state post-conviction court rejected the ineffective assistance claim, holding, in part, that in order to meet *Strickland*'s probable prejudice prong:

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.

*State v. May*, No. CR2006-030290-001 SE (Ariz. Super. Nov. 10, 2011), Order Denying Post-Conviction Relief [APP. 251, 255, 257]. The post-conviction court followed the language of *Berryman*, concluding:

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.

[APP. 255]. *Berryman* cited *Kimmelman v. Morrison*, 477 U.S. 365 (1996), but in doing so altered the test for proof of prejudice. *Strickland* never speaks in terms of “a reasonable likelihood” that counsel would have been successful in challenging the statutory scheme. The test for prejudice is “a reasonable probability of a different outcome” in the proceeding. 477 U.S. at 375; *Strickland*, 466 U.S. at 694.

The District Court's order granting May federal habeas relief; the dissenting of two justices of the state supreme court in *Holle*; and the decision of the state court of appeals agreeing with the challenge to the statutory scheme shifting the

burden to disprove sexual intent to the accused, all demonstrate that there was a reasonable probability that a challenge to the burden shifting statutory scheme would have resulted in a different outcome had trial counsel asserted a due process challenge preserving the issue for review in the direct appeal process.

Thus, the state post-conviction court subtly altered the prejudice burden in *Strickland* to focus on a failure to prove *success*, instead of requiring proof of only a reasonable probability of a different outcome, reflecting a failure to consider May's ineffective assistance claim in strict compliance with the Court's precedent. It did so while also failing to apply the strict requirement for counsel's professional competence in light of acceptable performance in the community articulated in *Hinton*. Instead, it ignored the “*quintessential example of unreasonable performance*” in counsel's failure to assert his client's claim of due process violation, a substantial and meritorious claim demonstrated by those jurists who did not subscribe to the notion that the affirmative defense under Section 13-1407(E) was consistent with the Court's holding in *Patterson*.

The state post-conviction court decision ultimately influenced the Ninth Circuit panel's rejection of the skillful analysis by the federal habeas court based on undue deference to its denial of relief. Its decision was summarily upheld on appeal without discussion. *State v. May*, 2012 WL 3877855, Not Published in P.3d (Ariz. App. Sept. 12, 2012), *Petition for Review, Review Granted, Relief Denied*

[APP. 242, 247-49, esp. ¶14]. The state supreme court denied review. *State v. May*, No. CR-12-0416-PR (Ariz. April 24, 2013), Order *Denying Petition for Review* [APP. 241]. The Ninth Circuit failed to assess whether the state courts' rejection of May's ineffective assistance claim based on trial counsel's failure to attempt to protect his right to due process of law in not challenging the Arizona burden shifting statutory scheme.

## CONCLUSION

NARSOL moves the Court grant certiorari to review May's claims in his petition, particularly his third question presented addressed in this amicus brief. Review is warranted for the following reasons:

1. The deference afforded the decision of the Arizona Court of Appeals in finding counsel's performance reasonable by the Ninth Circuit fails to comply with the Court's explanation of counsel's duty to investigate the law governing the case in *Hinton v. Alabama, supra*;

2. The state courts' conclusion that the Arizona child molestation scheme, including designation of a statutory affirmative defense requiring an accused to prove that their actions were not based on a sexual motivation, is contrary to, or reflects unreasonable application of the decisions of this Court in *Mullaney v. Wilbur* and *Patterson v. New York, supra*; and

3. The 75-year prison term imposed on Petitioner May based on the

order that the 15-year terms imposed on the five counts on which the jury convicted be served consecutively reflects a substantial violation of due process resulting from his convictions on an unconstitutional statute, as well as convictions and sentences imposed on other Arizona defendants convicted under this statute.

NARSOL respectfully moves the Court reverse the judgment of the Ninth Circuit and afford plenary review of the issue of unconstitutional burden shifting under the Arizona statutory scheme, or alternatively grant the petition, vacate the judgment of the Ninth Circuit and remand for reconsideration of its decision in light of the decisions of this Court in *Mullaney*, *Patterson*, and *Hinton*, *supra*.

Respectfully submitted this 10<sup>th</sup> day of March, 2021.

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## CERTIFICATE OF COMPLIANCE

I, J. Thomas Sullivan, counsel for NARSOL, amicus curiae, hereby certify that the Brief for the Amicus Curiae contains a total of 5,838 words, including footnotes, based on information supplied by Microsoft Word, Word Count function, excluding cover, table of contents, table of cases and signature with counsel's professional information.

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## CERTIFICATE OF SERVICE

I, J. Thomas Sullivan, an attorney admitted to this Court, hereby certify that, pursuant to the agreement of the parties dated January 7, 2021, a copy of this Brief for the Amicus Curiae was served by electronic mail ([jim.nielsen@azag.gov](mailto:jim.nielsen@azag.gov)) on Counsel for Respondents—Jim Nielsen, Arizona Attorney General’s Office, 2005 N. Central Avenue, Phoenix, Arizona, 85004, (602) 542-8587. A copy was also served by electronic mail ([erica.dubno@fahringerlaw.com](mailto:erica.dubno@fahringerlaw.com)) on Counsel for Petitioner—Erica T. Dubno, Fahringer & Dubno, 43 West 43rd Street, Suite 261, New York, New York 10036, (212) 319-5351. All parties required to be served have been served.

I further certify that one copy of this Brief for the Amicus Curiae was filed electronically and by Priority Mail, Two Day Service, to the U.S. Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on March 10, 2021.

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