No. 20-8476

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT CHARLES BAUER — PETITIONER
(Your Name)

vs.

CHARLES L. RYAN, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Charles Bauer #297583
(Your Name)

ASPC-Florence, South Unit
(Address)

P.O. Box 8400, Florence, AZ. 85132-8400
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

In Arizona, when a crime is statutorily defined as one "committed against another person," the victim is an essential element of the offense and the state must allege and prove the identity of the victim as an element of the offense. State v. Olquin, 165 P.3d 238, 232-33 (Ariz. Ct. of Appeals 2007). Bauer's indictment for sexual exploitation of a minor — a "Dangerous Crime Against Children" — failed to allege the identity of any "actual minor" victim(s). On habeas, Bauer argued that the unpublished memorandum decisions against his inadequate notice claims were untenable under law and contrary to Apprendi v. New Jersey, 530 U.S. 466, 495, 501 (2000).

1. Whether a Certificate of Appealability should issue where the district court failed to conduct *de novo* review of "the portions of the Report and Recommendation to which [Bauer] objected," Klamath Siskiyou Wildlands Ctr. v. U.S.B.L.M., 589 F.3d 1027, 1032 (9th Cir. 2009), and thus (1) jurists of reason — under a correct analysis of Bauer's cites to this Court's caselaw — would find the district court's ruling on the constitutional claim debatable, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); or (2) jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. 537 U.S., at 327.

2. Whether a Certificate of Appealability should issue because Bauer has at least made a "substantial showing of the denial of a constitutional right." 28 USC 2253 (C)(2).

LIST OF PARTIES

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

[■] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Charles L. Ryan, former Director of the Arizona Dept. of Corrections; David Shinn, Director of the Arizona Dept. of Corrections; and Mark Brnovich, Arizona Attorney General

RELATED CASES

There are no related cases pending in any other court(s).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (cont'd.)

CASES — PAGE NUMBER

STATUTES

U.S. CONSTITUTION

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

■ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

■ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 9, 2021.

■ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 6 - Rights of the Accused

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

U.S. Const. Amend. 14 - Sec. 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 USCS § 2253 - Appeal

sec. (a) "In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."

sec. (c)

(1) "Unless a circuit justice or judge issues a certificate of appealability, an an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255."

(2) "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

(3) "The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

STATEMENT OF THE CASE

On December 19, 2014, Bauer was convicted of nineteen 19 counts of sexual exploitation of a minor in violation of A.R.S. §13-3553. (Appx. D at 1-2.) He timely appealed *pro-se* after his counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and raised three issues: (1) whether the State's failure to allege and prove the identities of the "actual minor" victims required reversal; (2) whether the indictment deprived the trial court of jurisdiction by failing to state the identities of the minor victims; and (3) whether the trial court committed reversible error by reading the permissive inference jury instruction drawn from A.R.S. § 13-3556[1] (*Id.* at 2.)

The Arizona Court of Appeals affirmed Bauer's convictions and sentences, concluding that the actual identities of the "children" appearing in the images did not need to be proven under A.R.S. § 13-3553; the indictment did not deprive the trial court of jurisdiction; and the jury instruction, while erroneous, was harmless error. (Appx. D at 2.) the Arizona Supreme Court denied review (*Id.*), and this Court denied Bauer's petition for Certiorari thereafter. (*Id.* at 3.)

Next, Bauer filed for Post-Conviction Relief ("PCR") and submitted a *pro-se* brief (after his counsel withdrew) raising a claim for ineffective assistance of counsel for failing to object to the indictment and failing to object to the trial on jurisdictional grounds. (Appx. D at 3.) The PCR court denied Bauer's claims and determined that even if counsel had made errors at trial, the errors were not prejudicial. (*Id.*) A petition for review was filed in the Arizona Court of Appeals, which granted review but denied relief. (*Id.*) At no time in Bauer's state proceedings did the State or any court discuss or analyze the application of this Court's precedent as cited to determine the claims on appeal or PCR.

1 Held to be "unconstitutionally overbroad" in State v. Hazlett, 93 P.3d 1258, 1264, ¶ 17, n. 10 (Ariz. Ct. App. 2003).

On February 19, 2019, Bauer filed a Petition for Writ of Habeas Corpus which asserted four grounds for relief: (1) the indictment was insufficient as a matter of law as to notice of all elements, and the trial court therefore lacked subject-matter jurisdiction over his case -- citing Hamling v. U.S., 418 U.S. 87, 117 (1974); Russell v. U.S., 369 U.S. 749, 769-70 (1962); and U.S. Const. Amend. 14; (2) the evidence was insufficient to convict -- citing Fiore v. White, 531 U.S. 225, 228-29 (2001); In re Winship, 397 U.S. 358, 364 (1970); and U.S. Const. Amend. 14; (3) the trial court committed reversible error when it gave an unconstitutional "permissible inference" jury instruction at trial -- citing Francis v. Franklin, 471 U.S. 307, 317 (1985); and U.S. Const. Amend. 14; and (4) trial counsel was ineffective for failing to advocate on Bauer's behalf as to the insufficient indictment and allowing the trial to proceed in the absence of subject-matter jurisdiction -- citing Strickland v. Washington, 466 U.S. 668, 691-92 (1984); and U.S. Const. Amend. 14. *See* Bauer v. Ryan, et al., No. CV-19-01155-PHX-JAT (Doc. 1 at 6-9).

The Magistrate's Report and Recommendation ("R & R"), without analysis of Bauer's cites to Hamling and Russell, *supra*, determined that Ground One had no merit insofar as multiple state court unpublished memorandum decisions have rejected similar claims. (Appx. D at 7-8) Also, Bauer's analysis of Apprendi v. New Jersey, 530 U.S. 466, 495 (2000), in Reply to Respondents Answer as to Ground One, was deemed "waived" and ignored. (*Id.* at 6, fn. 3). Bauer objected and requested *de novo* review for good cause. (Appx. E at 3-4.)

As to Ground Two, the Magistrate relied on the Arizona Court of Appeals decision which determined that — based on appearances — Bauer's images "clearly depict actual minors, not adults pretending to be minors," thus finding "sufficient" evidence to convict. (Appx. D at 10.) Bauer objected to the untenable court of appeals "no identity required" decision, contrary to state law. (Appx. E at 4-5.)

In the case of Ground Three, the Magistrate — while conceding that the jury instruction had been declared "unconstitutionally overbroad" by the Arizona Court of Appeals,

concluded that the additional language stating the jury was "free to accept or reject this inference as triers of fact" did not cure the constitutional defect, but helped reduce the risk of prejudice. (Appx D at 12.) Additionally, the Magistrate construed Bauer's Reply to Respondents as to "burden shifting" the "actual minor" element as waived. (Id. at 13, fn.9.) Bauer objected for good cause the Magistrate's failure to analyze this claim under Francis v. Franklin, 471 U.S. 307, 317 (1985). (Appx. E at 5-7.)

Finally, the Magistrate determined that Bauer's Ground Four was meritless based upon the analysis in Ground One. (Appx. D at 14-15.) Bauer objected for good cause. (Appx. E at 7.) Moreover, Bauer again sought an evidenciary hearing and a COA. (Id.)

On July 24, 2020, the district court ruled on Bauer's petition. The R&R was accepted and adopted in its entirety, including the denial of a "COA on all grounds for relief because [Bauer] has not made a substantial showing of the denial of a constitutional right." (Appx. B at 10.) Bauer timely filed his "Notice of Appeal: Request for COA and Leave to Proceed In Forma Pauperis." (Appx. C) The Ninth Circuit denied Bauer's request on February 9, 2021 (Appx. A.), parroting the district judge.

Pursuant to this Court's March 19, 2020 Order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, Bauer timely files the instant petition. And, as set forth in Hohn v. United States, 524 U.S. 236, 241-42 (1998), this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

Inasmuch As Bauer Has At Least Made A Showing Of The Denial Of A Constitutional Right, Jurists Of Reason Would (1) Find The District Court's Ruling On The Constitutional Claims Debatable, Or (2) Conclude That Bauer's Issues Are Adequate To Deserve Encouragement To Proceed Further. Miller-El v. Cockrell, 537 U.S. 322, 327, 340 (2003); 28 U.S.C. 2253(c)(2).

Law:

At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 580 U.S. ___, ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017)(slip op., at 13)(quoting Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). This "threshold" inquiry is more limited and forgiving than "'adjudication of the actual merits.'" Buck, *supra* (quoting Miller-El, 537 U.S., at 337); *see also id.*, at 336 (noting that "full consideration of the factual or legal bases adduced in support of the claim" is not appropriate in evaluating a request for a COA). At the habeas stage, however, when the state court does not reach the merits of the federal claim, federal habeas review is not subject to the deferential standard that applies under Antiterrorism and Effective Death Penalty Act; instead, claim is reviewed *de novo*. James v. Schriro, 659 F.3d 859 (CA9 Ariz. 2011).

Discussion:

Ground One

Here, Bauer's indictment ran afoul of his U.S. Const. Amend. 14 right to Due Process when it omitted the identities of any "actual minor" victims — under the age of 15 — against whom he allegedly committed a "Dangerous Crime Against

Children" ("DCAC"). In Russell v. United States, 369 U.S. 749, 763-64 (1962), this Court held that an indictment is only *sufficient* if it (1) contains all elements to the charged offense, (2) gives the defendant adequate notice of the nature and cause of the charges, and (3) protects the defendant against double jeopardy. (*Id.*) And, while the federal right to a grand jury indictment has never been found to be incorporated against the states, Hurtado v. California, 110 U.S. 516, 534-35 (1884), a state may create such a right through its constitution or statutes. Branzburg v. Hayes, 408 U.S. 665, 668, n. 25 (1972) and cases cited.

Indeed, federal habeas courts have found that the Due Process rights enuciated in Russell are required not only in federal indictments but also in state criminal charges. *See* Valentine v. Konteh, 395 F.3d 626 (6 Cir. 2005) (state appeals court unreasonably applied clearly established principles of Due Process, which require that criminal charges be sufficiently specific to allow defendant to defend charges and protect against double jeopardy); also De Vonish v. Keane, 19 F.3d 107, 108 (2 Cir. 1994); Fawcett v. Bablitch, 962 F.2d 617, 618 (7 Cir. 1992); and Parks v. Hargett, 1999 WL 157431, at *3 (10 Cir. 1999) (same). In fact, a federal court will review a state indictment to determine if it is so fundamentally defective to have deprived the convicting court of jurisdiction to try the cause; or that under no circumstances could a valid conviction result from the facts provable under the indictment. Alexander v. McCotter, 775 F.2d 595, 598-99 (5 Cir. 1985); and Hamilton v. McCotter, 772 F.2d 171, 184 (5 Cir. 1985).

Bauer, throughout his Arizona direct appeal and post-conviction proceedings, as well as on federal habeas, complained of the fact that his indictment—contrary to established legal requirements of pleading the actual identity of the alleged victim of any offense "committed *against* another person"[2] to comport with Due Process—omitted this essential element and thus conferred no subject-matter jurisdiction to the trial court. He further asserted below that the "actual identity"

[2] State v. Olquin, 165 P.3d 228, 232-33 (Ariz. Ct. App. 2007)

as a "necessary" element to a "DCAC" was thus supported by this Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 495, 501 (2000), and as subsequently approved and adopted by the Arizona Supreme Court in State v. Schmidt, 208 P.3d 214, 216-17 (Ariz. 2008) (the thrust of the Apprendi line of cases is that any fact that "the law makes essential to the punishment" is the "functional equivalent of an element of a greater offense," and is to be treated accordingly) (citing Apprendi). Bauer's Ground One claim, which alleges a U.S. Const. Amend. 14 Due Process violation for the state's omission of the actual identities of the "actual minor" victims under 15 years of age that his "DCAC's" were committed *against* in his indictment — as flatly set forth by state precedent — unequivocally shows "the denial of a constitutional right." 28 U.S.C. §2253(c)(2). So, the first "prong" of the requirement for the issuance of a COA is met.

Importantly, no state or federal court has determined Bauer's Ground One in light of his reliance on this Court's caselaw as to indictments and elements. And, the Respondents never answered Bauer's *federal* argument either on direct appeal or PCR proceedings -- thus waiving a defense on habeas. Nonetheless, Respondents pled their waived defense on answering Bauer's habeas petition. Bauer filed a Traverse (Doc. 18.) and "Memorandum of Points and Law in Support of Traverse" (Doc. 19) to bring Respondents' waiver of their defense before the district court and to answer their "defense" raised *for the first time*. Notably, Respondents failed to address Bauer's citations to this Court's relevant caselaw and, instead, relied on unpublished state appeals court memorandum decisions which also failed to mention — let alone to analyze — federal caselaw in arriving at decisions against the proposition for which Bauer advanced. Bauer has, throughout his proceedings below, said they are "untenable."

Ignoring Respondents' waiver, the "R & R" determined — and the district judge adopted — the Respondents' *waived* defense in its entirety, and, without *de novo* review, accepted the unpublished appellate court determinations as "correctly stating

the law," and deferred to them. (Appx. B at 4,5.) Furthermore, the district court—finding that Bauer is the one who waived the Apprendi analysis when he simply replied to the *State's waived defense on Answer* — did no more than a "prima facie" analysis of this claim using the incomplete and untenable appellate decisions as its guide. (Id at 5, fn. 1.) However, since no Arizona court has ever determined Bauer's specific federal claim under relevant U.S. Supreme Court caselaw, the district court's "deferential" standard under the AEDPA was an error as a matter of law, as was its failure to conduct *de novo* review as sought by Bauer. (Appx. C at 2; and Appx. E at 1,2.) See James v. Schriro, 659 F.3d 859 (CA9 Ariz. 2011).

Accordingly, inasmuch as Bauer has made a substantial showing of the denial of a constitutional right, it cannot but be concluded that reasonable jurists (1) would find the district court's ruling on the 14th Amendment claim *debatable*, or (2) would conclude that this issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 327, 340 (2003). As such, the Ninth Circuit's COA denial should be reversed and a COA should issue as to Ground One.

Ground Two

It is difficult to imagine a more clear example of a 14th Amendment Due Process violation than Bauer's convictions without proof beyond a reasonable doubt of every fact necessary to constitute the crimes with which he was charged. The Due Process Clause protects defendants from conviction in any event when the state fails to meet its burden of proof as to each and every "necessary" element of the offense. See Fiore v. White, 531 U.S. 225, 228-29 (2001); and In re Winship, 397 U.S. 358, 363, 364 (1970). "The relevant question [on sufficiency of the evidence review] is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See Jackson v. Virginia, 433 U.S. 307, 319 (1979) (emphasis in original).

Relying on the R&R's approval of the Arizona Court of Appeals analysis of this claim on appeal, the district judge adopted the Magistrate's position and denied relief. (Appx. B at 5-6.) And, having foregone *de novo* review of the "victim's identity" element as to Ground One, the district judge held that "the state's failure to present evidence of a fact that is not an element of the charged offense could not have violated [Bauer's] due process rights." (*Id.* at 6.) However, assuming *arguendo* that the identity of an "actual minor" victim of a "DCAC" is an essential element in order to sustain that an *actual*, and not *fictitious* child under the age of 15 has been sexually exploited, the lower courts' reliance on the "appearances" determination[3] would be an error as a matter of law as to the sufficiency of the evidence -- one which jurists of reason would certainly find debatable. Moreover, Bauer has maintained -- since his state appeals court ruled on direct appeal -- that its "appearances" determination, based upon that court using the "inference" which it, itself, declared "unconstitutionally overbroad" in State v. Hazlett, 79 P.3d 1258, 1264 n.10 (Ariz.Ct.App.2003), was a Due Process violation in and of itself which rendered its ruling *untenable in law.*

Inasmuch as no direct evidence was adduced at trial which met the state's burden to prove the *identity* of the "actual minor" victim under the age of 15 "necessary element" of Bauer's alleged "Dangerous Crimes *Against* Children," see e.g., State v. Olquin, 165 P.3d 228, 232, 233 ¶¶ 21, 25 (Ariz.Ct.App.2007), the jury convicted Bauer without any evidence whatsoever that there were, indeed, "actual" victims of any crime(s). As such, the district court's determination that "the evidence presented at trial addressed each actual element of the offense and was sufficient to sustain a guilty verdict" (Appx. B at 6.) is debatable and deserves encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 327, 340 (2003).

Consequently, the Ninth Circuit's COA denial should be reversed and a COA should now issue as to Bauer's Ground Two claim.

3 (Appx. D at 10.)

Ground Three

Bauer here contends that the "Permissive Inference" instruction to the jury violated his Due Process guarantee against conviction for sexual exploitation of a minor where no "actual child" was shown to be a participant in the depiction. This instruction, as set forth in ARS §13-3556,[4] was declared "unconstitutionally overbroad" by the Arizona Court of Appeals in State v. Hazlett, 79 P.3d 1258, 1264 n. 10 (Ariz. Ct.App. 2003), eleven years prior to Bauer's trial. The Hazlett court, in light of this Court's determinations in Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389, 1405-6 (2002); and New York v. Ferber, 102 S.Ct. 3348 (1982), found Arizona's "permissive inference" instruction to run afoul of clearly established principles of Due Process "[b]y permitting the trier of fact to infer 'that a participant is a minor if the visual depiction or live act through its title, text, or visual representation depicts the participant as a minor.'" Hazlett, 73 P.3d at 1264 n. 10. Again, assuming *arguendo* that evidence of the "actual" identity of any victim of an offense committed *against* a person is a "necessary" element to convict in this case, *see e.g.*, State v. Olquin, 165 P.3d 228, 232, 233, ¶¶ 21 25 (Ariz. Ct. App. 2007), it is clear that this instruction — along with the absence of proof authenticating any "actual" minor depicted — would be prejudicial, reversible error for undermining the jury's responsibility to find the "actual identity" element beyond a reasonable doubt, contrary to Francis v. Franklin, 471 U.S. 307, 317 (1985).

Yet, notwithstanding Bauer's complaint of this unequivocal Due Process violation, the district court found that the instruction *was not* prejudicial, reversible error because (1) a forensic pediatrician testified as to the ages the participants — whom she never examined personally — *appeared* to be; (2) Bauer, himself, thought the participants *appeared* to be children; and (3) the Arizona Court of Appeals noted — based on *appearances* — that the "images themselves clearly depict actual minors, not adults pretending to be minors." (Appx. B at 7-8.) So, *appearances*, *appearances*, and more *appearances* simply trump

[4] Appx. B at 7, hereby incorporated herein by reference hereto.

the Arizona Court of Appeals determination that to convict for possession of child porn based upon *appearances* (which the trier of fact "infers" to prove an actual child) runs afoul of clearly established 14th Amendment protections? Apparently so in Bauer's case.

The Arizona Court of Appeals determination on which the R&R and district court relied has untenably ignored the import of Hazlett, *supra*, and its controlling rule of law as to Bauer's "unconstitutionally overbroad" jury instruction. This constitutes an indefensible departure from the basic norms of constitutional adjudication compelled by the Due Process clause of the 14th Amendment in federal habeas oversight of state proceedings, and jurists of reason could find the district court's deference to unpublished cases — rather than to published opinion based on this Court's precedent — debatable or wrong.

As such, this issue deserves encouragement to proceed further, and the Ninth Circuit's denial of a COA should be reversed. A COA as to Bauer's Ground Three should issue. Miller-El v. Cockrell, 537 U.S. 322, 327, 337 (2003).

Ground Four

The final Ground raised in Bauer's habeas petition was the denial of his 14th Amendment Right to Effective Assistance of Counsel. He claimed that his trial counsel — in light of state and federal guarantees — (1) failed to advocate on his behalf as to the constitutionally insufficient indictment, and (2) allowed trial to proceed without subject-matter jurisdiction -- resulting in convictions, sentences, and incarceration outside of Due Process protections. Under Strickland v. Washington, 466 U.S. 668, 691-92 (1984), if indeed Bauer's trial counsel performed deficiently, *i.e.* below objectively reasonable standards, and said deficient performance prejudiced him — resulting in an unreliable or fundamentally unfair outcome in the proceeding — Bauer would have received ineffective assistance. (*Id.*)

As set forth above, indictments in Arizona fail to confer jurisdiction if an "essential" element is omitted. (*supra* at 8.) Simply put, Bauer's trial counsel ignored his

constitutionally deficient indictment--structural error was ignored. See U.S. v. Gonzalez-Lopez, 548 U.S. 140 (2006); and Neder v. U.S., 527 U.S. 1, 30 (1999)(Scalia, J. concurring in-part and dissenting in-part). Had counsel been diligent and moved for a remand to the grand jury for cause, the State would have had to provide the "actual" minor victims' identities as an essential element under Olquin, supra, and the insufficient indictment would have been cured. And, if the State could not allege the victims' identities -- Bauer's case would have been dismissed with prejudice. Here, counsel's ignorance of relevant state and federal caselaw prevented an effective advocacy of any such pre-trial challenge, and a fundamentally unfair—jurisdictionally void— outcome, prejudicial to Bauer's Due Process guarantees, resulted.

The district court found—based on its deference to unpublished memorandum decisions— that "[g]iven that [Bauer's] claims in grounds one and two are without merit, his claim in ground four must fail as well." (Appx. B at 6.) And, that "because counsel cannot be held ineffective for failing to raise meritless claims, [Bauer] has not shown that counsel's representation fell below an objective standard of reasonableness." (Id.)(citing the R & R [Appx. D.] at 14-15.) Relief on Ground Four was denied. (Id.)

What is *not* debatable, is that it was not the role of the district court to pronounce what constitutes "State law" as to an essential element of Bauer's particular "Dangerous Crimes Against Children" based on unpublished memorandum decisions which failed to mention, let alone analyze, the relevant application of this Court's precedent to the *federal* claim. Because the district judge failed to conduct a *de novo* review where deference was *not* appropriate, James v. Schriro, 659 F.3d 859 (CA9 Ariz. 2011), jurists of reason would find debatable or wrong the lower court's resolution of Bauer's constitutional ineffective assistance of counsel claim; or they could conclude the issue presented is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 327, 337 (2003). Thus, a COA should issue as to Ground Four.

CONCLUSION

Inasmuch as Bauer has at least made a "substantial showing of the denial of a constitutional right" in each of his four grounds on habeas, a COA should issue. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott Charles Bauer

Scott Charles Bauer, Petitioner Pro-se.

Date: 6/25/2021