No. 22–

IN THE
Supreme Court of the United States

DANIEL ALEXANDER RODRIGUEZ,

Petitioner,

v.

DAVID SHINN, *et al.*,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit incorrectly applied Arizona law in finding that multiple instances of prosecutorial misconduct, including falsely representing key evidence, commenting on the defendant's silence, vouching evidence not admitted at trial, and misstating the law, did not prejudice petitioner under *Strickland* v. *Washington*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Daniel Alexander Rodriguez. Respondent is the State of Arizona. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in Arizona state courts, the United States District Court for the District of Arizona, and the United States Court of Appeals for the Ninth Circuit:

State of Arizona v. *Daniel Alexander Rodriguez*, no. CR2014-107713-001 (Maricopa County Superior Court 2015, 2017 and 2019) (trial, and first and second post-conviction relief petitions)

State of Arizona v. *Daniel Alexander Rodriguez*, no. 1 CA-CR 15-0070 (Arizona Court of Appeals 2016) (direct appeal of conviction)

State of Arizona v. *Daniel Alexander Rodriguez*, no. CR-16-0110 (Arizona Supreme Court 2016) (denial of petition for review of direct appeal)

State of Arizona v. *Daniel Alexander Rodriguez*, no. 1 CA-CR 17-0162 (Arizona Court of Appeals 2018) (appeal of first post-conviction denial)

State of Arizona v. *Daniel Alexander Rodriguez*, no. CR-18-0116 (Arizona Supreme Court 2018) (petition for review of denial of appeal of post-conviction ruling)

Daniel Alexander Rodriguez v. *Stephen Morris*, no. 2:19-cv-04957 (United States District Court in the District of Arizona 2021) (petition for habeas corpus)

Daniel Alexander Rodriguez v. *David Shinn*, no. 21-16024 (United States Court of Appeals for the Ninth Circuit 2022) (appeal of denial of habeas corpus petition and denial of petition for panel rehearing)

There are no other related proceedings in state or federal trial or appeal courts, or in this Court, that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Alexander Rodriguez respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

On May 27, 2022, the United States Court of Appeals for the Ninth Circuit issued its memorandum decision affirming the district court's judgment. Pet. App. 1a–7a. The court subsequently denied a petition for rehearing for the panel on July 19, 2022. It issued a text entry in the docket rather than an order. Pet. App. 80a.

JURISDICTION

The Ninth Circuit entered final judgment on July 19, 2022, Pet. App. 80a, and this Court granted a 30-day extension of time to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Ninth Circuit's judgment below disregards applicable Arizona Supreme Court precedent that the Ninth Circuit was bound to apply. Under that precedent, Mr. Rodriguez only had to show that, absent the misconduct, the jury "*could have* reached" a different outcome. *State* v. *Escalante*, 425 P.3d 1078, 1087 (Ariz. 2018) (citation omitted, emphasis in original). The Ninth Circuit instead applied the more demanding "probably affected the outcome" standard from an Arizona case that had been superseded by *Escalante*. Pet. App. 5a–6a (quoting *State* v. *Bolton*, 896 P.2d 830, 847 (Ariz. 1995)).

This error violates a core federalism principle that Article III courts are "bound to accept the

interpretation of [state] law by the highest court of the state." *Hortonville Joint School Dist. No. 1* v. *Hortonville Educ. Ass'n, et al.*, 426 U.S. 482, 487 (1976) (citation omitted).

But for Mr. Rodriguez's counsel's ineffectiveness on direct appeal, the Arizona Court of Appeals could have reviewed the prosecutorial misconduct that permeated Mr. Rodriguez's trial. Had it done so, there is a reasonable probability that Mr. Rodriguez would have received a new trial. Yet his attorney disregarded his requests to present that argument and opted instead for what he regarded as a "long shot" Fourth Amendment claim that was certain to fail. This constitutionally ineffective assistance of appellate counsel prejudiced Mr. Rodriguez in a manner that excuses the procedural default of his legitimate prosecutorial misconduct claim.

The misconduct in the prosecution of Mr. Rodriguez, moreover, was egregious. The State's case against him was a house of cards of contradictory evidence built upon the wobbly foundation of an uncredible victim. Intent on securing a conviction, the prosecution stacked the deck and deprived Mr. Rodriguez of a fair trial by falsely representing its key testimony, commenting on Mr. Rodriguez's failure to testify, vouching evidence it had not admitted to the jury, misstating the law as well as witness testimony, and more.

The Ninth Circuit's decision finding no *Strickland* prejudice cannot be squared with federal law as seen in this Court's precedents, state law as seen in Arizona jurisprudence, or reality as seen in the record below. Its decision warrants review under this Court's supervisory authority, see Sup. Ct. R. 10(a), if not summary reversal.

A. Prosecutorial Misconduct

As relevant to the issues in his collateral attack, Mr. Rodriguez was convicted of various firearm, assault, and disorderly conduct charges and sentenced to 42.75 years in prison in early 2015. The charges arose from two shooting incidents on January 31 and February 14, 2014 in the Gewarges family's neighborhood of Youngtown, Arizona. Their juvenile daughter, AG, after ending a six-month relationship with Mr. Rodriguez, accused him of being the shooter in both incidents, also claiming he had threatened her and her family.

AG was the vital witness for prosecution success, but her "credibility was called into serious question by defense counsel." Pet. App. 77a. She had procured a fraudulent ID and had regularly deceived her parents, police, and others. 6ER-1308-10; 7ER-1658-60.[1] Testimony that she tried to break up with Mr. Rodriguez for months was contradicted by her continued romantic relations with him, 8ER-1790, and her claim that she blocked his cell number was disproved by her uninterrupted receipt of his calls. 6ER-1351-55. Her testimony was replete with "I don't know," and the prosecutor had to correct her factual errors more than once. 2ER-111-12. Eventually counsel was appointed, and she invoked the Fifth Amendment multiple times on the stand. 7ER-1644 & 1659-60. Her account was also at odds with that of other eyewitnesses. 2ER-113-23.

With AG as the only witness to identify Mr. Rodriguez as the perpetrator, the prosecutor pushed her account of events beyond fundamentally fair limits by: (1) soliciting highly misleading testimony and falsely representing that key evidence; (2) burden-shifting,

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[1] References to the record refer to pagination in appellant's appendix in the Ninth Circuit Court of Appeals.

including commenting on Mr. Rodriguez's silence and misstating the law; (3) misstating critical eyewitness testimony; and (4) vouching credibility, evidence that was not admitted at trial, and concocting an allegation that Mr. Rodriguez had confessed.

1. Falsely Representing the Source of Threatening Text Messages

With no one seeing the shooter, the prosecution heavily relied upon a series of threatening texts sent on the "HeyWire" app to AG's phone prior to the February shooting as its decisive evidence identifying the shooter. AG explained that she "just knew" that the texts, coming from a number she did not recognize, were from Mr. Rodriguez. 6ER-1353. However, law enforcement had analyzed his phone, going through deleted material as well as his call and text logs, and found "no forensic evidence to show that these HeyWire texts were sent from petitioner's phone." Pet. App. 67a; 6ER-1339.

But the prosecutor carefully orchestrated the detective's testimony, "repeatedly convey[ing] the impression that the HeyWire texts *were* found on Petitioner's phone." Pet. App. 67a (emphasis added); and see Pet. App. 81a–109a. Over defense counsel's continued objections, the trial court admitted the HeyWire texts into the record as decisive evidence of Mr. Rodriguez's guilt. Pet. App. 99a–100a.

The prosecutor achieved this deception by eliciting information about texts that had been found on both phones as if they included the HeyWire ones. He asked the detective multiple times to confirm—which he did—that "the data and everything," *including* "the text messages [the jury] saw on [AG's] phone, were those lining up to the same text messages on [Mr.

Rodriguez's] phone."[2] Pet. App. 107a. In testimony, the prosecutor solicited the detective's calculated misleading confirmation that "the text messages *we saw* on [AG's] phone"—note that the only texts the jury saw were the HeyWire ones – lined up with "the same text messages on Daniel's phone." *Id*.

The prosecutor doubled down in closing, insisting that the police had recovered the "entire conversation," that the phones "both matched up" in terms of calls and texts, and thus "what [AG] [told the jury] about . . . what's being said in these text messages are *all corroborated by independent sources*." Pet. App. 112a (emphasis added).[3] In closing argument, he assured jurors that the text messages on AG's phone were "also found and corroborated on defendant's phone." *Id.* at 111a. In his rebuttal closing, he brazenly told jurors that "The *same* text messages going to [AG's] phone are on his phone." *Id.* at 113a (emphasis added)

Even a cursory review of the record reveals that these repeated statements are unmistakably false.

2. Burden Shifting, Commenting on Silence, and Misstating the Law

The defense strategy was to undermine the prosecution's evidence through confrontation and arguing that the State had not met its burden. Resting after the prosecution's case in chief, the defense did not call any

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[2] The prosecutor's fraudulently misleading argument trying to preempt a hearing as to foundation is at Pet. App. 84a, and the hearing testimony that applies this subterfuge is at Pet. App. 88a–91a. The detective gave similarly misleading testimony to the jury. Pet. App. 103a–08a.

[3] The prosecutor's patently false representations in closing arguments that the texts were found on Mr. Rodriguez's phone are at Pet. App. 111a, 112a.

witnesses. The prosecutor thus asserted three times that his evidence was "undisputed." Pet. App. 116a, 118a. Though two objections were sustained, the judge overruled a third one, erroneously conveying to the jury that that burden-shifting was proper. *Id.* at 119a–120a. The prosecutor expounded: "[n]o one took the stand and said anything different than what [AG] told you," and Mr. Rodriguez "takes issue with accepting responsibility." *Id.* at 116a, 118a. But the only person who could "dispute" AG's identification of the shooter or explain why he was contesting the charges was Mr. Rodriguez who had exercised his constitutional right not to testify.

The prosecutor went on to use his "undisputed" argument as a springboard to misstate the law. Mocking the defense strategy, the prosecutor explained to jurors, "That was his argument, which is *not what you're supposed to do*," mis-instructing them that they cannot rely on any impeachment of the State's case when the defense did not put on a case. Pet. App. 122a (emphasis added). Jurors would naturally understand that as an instruction of law stated by a representative of the State This undermined the entire trial defense.

3. Misstating Witness Testimony

Because the prosecution's success depended upon AG, the prosecutor repeatedly argued that eyewitness accounts contradicting hers nonetheless "all corroborate each other showing [Mr. Rodriguez] [wa]s the man . . . pulling the trigger." Pet. App. 133a. The prosecutor falsely asserted that several witnesses—none of whom identified Mr. Rodriguez, and several of whom never *saw* anything—were "all eyewitnesses to *his* car and *him* driving away." 8ER-1969 (emphasis added). The prosecutor stated that the victim's account had been "corroborated" by Ms. Bensink and other witnesses at least nineteen times. Pet. App. 62a n.9. In

reality, not one independent witness identified Mr. Rodriguez as the shooter nor identified his car.

For example, Ms. Bensink recounted that the car in the January incident was an "almost black" two-door "Mustang coupe," 5ER-967, whereas Mr. Rodriguez had a burgundy four-door Mercury sedan. 6ER-1313; 8ER-1845. Her description of the shooting varied significantly from AG's, and she could not see the shooter who remained in the driver's seat. 5ER-976 & 986. The prosecutor misrepresented to the jury not only that Ms. Bensink "corroborated" AG's testimony, but that the two "sa[id] *exactly the same thing*." 8ER-1968-69 (emphasis added). Other January witnesses heard but never saw any of the event, nevertheless the prosecutor argued that they all corroborated AG's accusation that Mr. Rodriguez was the shooter. *Id.*

4. Conjuring and Vouching

The prosecutor also resorted to: (1) concocting, without evidence, a fable that Mr. Rodriguez had confessed his guilt to others, and (2) arguing that evidence never presented to the jury also corroborated AG's story, and (3) vouching undeservedly AG's truthfulness.

The police could not find Mr. Rodriguez's gun. Canvassing potential buyers, the detective acknowledged that his investigation produced nothing. 8ER-1847. But the prosecutor insinuated that Mr. Rodriguez not only sold the gun, but the buyer denied it because Mr. Rodriguez had confessed to him that it had been used in the two shootings. "[Mr. Rodriguez] probably went and told them what he did with it. They know the gun's hot. They know that it's got something on it." Pet. App. 126a.

The prosecutor further vouched having evidence and witnesses supporting its case that had not been admitted to the jury. That included argument that three

members of the Tindall family also corroborated AG's story of the January shooting, and a video of Mr. Rodriguez buying ammunition – all also never introduced to the jury. See Pet. C.A. Op. Br. at 22–25, 39–40. Finally, in an unlawful attempt to brush aside AG's "serious" credibility issues, Pet. App. 77a, the prosecutor stated—*twice*—that while AG may be "interesting" or "not the greatest high school female," "*she isn't a liar*." Pet. App. 28a, 129a–130a, 132a (emphasis added).

B. Direct Appeal in State Courts

Mr. Rodriguez specifically implored his appellate attorney to challenge the prosecutorial misconduct that permeated the trial. 3ER-414. Counsel denied this request, raising only a Fourth Amendment challenge regarding the search of Mr. Rodriguez's vehicle. 3ER-415-25. After filing the brief, appellate counsel told Mr. Rodriguez he did not raise prosecutorial misconduct because he "didn't want to weaken [the] best argument with weak points." 3ER-414. Yet he admitted that "the suppression issue" he presented was "a long shot." *Id.*

As counsel anticipated, the Court of Appeals affirmed Mr. Rodriguez's convictions. 3ER-365. The Arizona Supreme Court denied review. 3ER-353.

C. State Post-Conviction Relief

Mr. Rodriguez filed a post-conviction relief petition in the Arizona trial court. As relevant here, the petition raised claims of prosecutorial misconduct based on a cumulative pattern of misconduct, and ineffective assistance of appellate counsel (IAAC) for failure to raise that misconduct on appeal. 3ER-328.

The trial court denied relief. It allotted a single sentence to prosecutorial misconduct, noting only that "defendant failed to raise [t]his claim[] . . . in his direct

appeal," and provided no comment on the IAAC claim. 2ER-298. The court ended its cursory ruling by incorporating "other reasons stated in the State's response." *Id.*; 2ER-315, 323-24.

Mr. Rodriguez timely appealed, and the court of appeals affirmed, holding merely that "petitioner has not established an abuse of discretion." 2ER-277. The Arizona Supreme Court summarily denied review. 2ER-263.

D. Federal Habeas Petition

Mr. Rodriguez filed a petition for a writ of habeas corpus per 28 U.S.C. § 2254 in the U.S. District Court, again raising IAAC and prosecutorial misconduct. 2ER-248 & 252.

The magistrate judge recommended granting the petition. Recognizing that the prosecutorial misconduct claim was procedurally defaulted, she nonetheless "determined that Petitioner's claim of ineffective assistance of appellate counsel in his habeas petition is meritorious." Pet. App. 78a. The magistrate judge further found it "inconceivable that counsel pursued a 'long shot' suppression issue over Petitioner's prosecutorial misconduct issue," as "[t]he facts supported a substantive claim of prosecutorial misconduct that would have, in fact, been the most promising issue on appeal." *Id.* at 77a–78a.

The district court nevertheless rejected that recommendation. It disagreed that the false representations about the HeyWire text messages rose to the level of prosecutorial misconduct. In fact, it only found misconduct regarding misstatements of Ms. Bensink's testimony, vouching (just based on "not a liar"), and burden-shifting (disregarding commenting on silence), but concluded that those did not constitute reversible error either independently or cumulatively. Importantly,

the district court failed to apply Arizona law in analyzing the misconduct and whether it prejudiced Mr. Rodriguez's right to a fair trial. Pet. App. 8a–39a. It issued a certificate of appealability "only to Petitioner's claim that ineffective assistance of appellate counsel violates a clearly established federal law and establishes cause for procedural default." *Id.* at 39a.

Mr. Rodriguez appealed to the Ninth Circuit. It reviewed the "IAAC claim in the cause-and-prejudice context de novo," and affirmed. Pet. App. 3a. The Ninth Circuit found no "reasonable probability that an Arizona court would have ordered a new trial based on the prosecutor's conduct" had it been raised in the criminal appeal. *Id.* at 4a–5a.

The Ninth Circuit summarily denied Mr. Rodriguez's petition for rehearing that sought to correct the Court's reliance on invalidated caselaw. Pet. App. 80a; C.A. Pet'n Reh'g at 3–8.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT ERRED BY FAILING TO APPLY THE CORRECT STATE LAW IN DETERMINING THAT MR. RODRIGUEZ SUFFERED NO PREJUDICE FROM THIS ABUNDANCE OF MISCONDUCT.

Although obligated to conduct its prejudice analysis "under Arizona law," the Ninth Circuit failed to properly do so. Pet. App. 5a. By applying an overruled and stricter standard to decide prejudice, it did not merely "second-guess the Arizona Supreme Court's characterization of state law"—it ignored it. *McKinney* v. *Arizona*, 140 S. Ct. 702, 708 (2020). Left uncorrected, this error will infect other habeas petitions in federal courts in Arizona, misleading federal judges to apply a construction of Arizona law "different from the

one rendered by the highest court of the State." *Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997).

A. The Ninth Circuit Misapplied Arizona Law.

States are free to provide a broader range of constitutional remedies than are available under federal standards. *Danforth* v. *Minnesota*, 552 U.S. 264, 275–77 (2008). The Arizona Supreme Court did that by holding that its courts must apply a more generous standard to determine prejudice than some former Arizona caselaw had required. Consequently, a federal court cannot determine whether there is a "reasonable probability" of a different outcome in Arizona courts if it does not apply the correct Arizona prejudice standard. Because the Ninth Circuit applied the wrong (more demanding) standard of superseded Arizona law, its *Strickland* prejudice analysis was fundamentally flawed.

The Ninth Circuit stated that, "to warrant reversal for prosecutorial misconduct under Arizona law, 'the conduct must have been so pronounced and persistent that it permeated the entire trial and *probably* affected the outcome'" Pet. App. 5a (quoting *Bolton*, 896 P.2d at 847) (emphasis added). The misconduct must have been "reasonably *likely* to have affected the jury's verdict." *Id.* (quoting *Bolton*, 896 P.2d at 847) (emphasis added). That "probably" and "likely" language is more exacting than the "could have" language rendered precedential in *Escalante*. *Escalante*, 425 P.3d at 1087 (rejecting a "would have" resulted in a different outcome test, opting for the more generous "could have" resulted in a different result one). *Escalante* also referenced *State* v. *Henderson*, 115 P.3d 601 (Ariz. 2005), reasoning that "*Henderson*'s 'could have' standard is well-accepted and complements the state's burden in harmless-error review to prove 'beyond a reasonable

doubt that the error did not contribute to or affect the verdict or sentence.'" *Id.* *Escalante's* holding is also consistent with *United States* v. *Agurs*, 427 U.S. 97, 103, 104, 106 (1976) (applying the "could have affected the judgment of the jury" standard). [4]

By applying *Bolton's* more demanding "reasonably likely" standard, the Ninth Circuit unjustly doomed Mr. Rodriguez's claim from the start. Under the *correct* binding authority, there is a reasonable probability that an Arizona court of appeals would have ordered a new trial, because it is clear that a reasonable jury *could have* "plausibly and intelligently" returned a different verdict absent the misconduct below. Given that, it was unreasonable—in fact ineffective—for appellate counsel to have ignored the viable and compelling prosecutorial misconduct issue.

B. The Ninth Circuit's Misapplication of State Law Raises Genuine Federalism Concerns.

The Ninth Circuit's fundamental misunderstanding of Arizona law warrants the exercise of this Court's supervisory power. See Sup. Ct. R. 10(a). This is particularly necessary given the frequency with which the Ninth Circuit, and the circuit courts in general, are asked to apply state law in habeas cases.

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[4] See also *Strickler* v. *Greene*, 527 U.S. 263, 297–99 (1999) (Souter and Kennedy, JJ., concurring in part) (citation omitted). The concurrence criticized "the unfortunate phrasing of the shorthand version" of the federal standard to establish prejudice: a "reasonable probability" of a different outcome. These justices warned that that appellation "raises an unjustifiable risk of misleading courts into treating it akin to the more demanding standard, 'more likely than not.'" They recommended instead a "significant possibility" standard, which aligns well with *Escalante's* "could have" standard.

When federal courts adjudicate using state law, it is imperative that they strictly observe federalism principles, *i.e.*, with full deference to how the State views its own laws. Our federal system cannot function as intended if Article III courts do not "appreciat[e] the respect due state courts as the final arbiters of state law." *United States* v. *Taylor*, 142 S. Ct. 2015, 2025 (2022). This is why "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state [law] different from the one rendered by the highest court of the State." See *Fankell*, 520 U.S. at 916. Indeed, this Court has time and again emphasized that federal courts are "bound by [state courts'] interpretation of state law." *Johnson* v. *United States*, 559 U.S. 133, 138 (2010); see also *McKinney*, 140 S. Ct. at 708 ("[W]e may not second-guess the Arizona Supreme Court's characterization of state law."); *Hortonville*, 426 U.S. at 488 ("We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the state."); *Baker* v. *General Motors Corp.*, 522 U.S. 222, 249 (1998) (Kennedy, J., concurring in the judgment) ("In construing state law, we must determine how the highest court of the State would decide an issue.").

Although this Court does not generally sit to correct error, it has granted certiorari in the past in resolving conflicts between circuit courts and state supreme courts so as to protect these longstanding federal principles. See, *e.g.*, *Seling* v. *Young*, 531 U.S. 250, 260 (2001) ("This Court granted the petition for a writ of certiorari to resolve the conflict between the Ninth Circuit Court of Appeals and the Washington Supreme Court.") In *Seling*, the Ninth Circuit and the Washington Supreme Court had arrived at different conclusions by applying the same rules and standards. In

this case, the Ninth Circuit failed to apply the correct rules and standards in the first place.

Given the frequency with which federal circuit courts are called upon to apply state law in the context of habeas relief, it is all but certain that this situation, or a similar one, will arise again. If the decision below is allowed to stand, there is nothing to stop the Ninth Circuit, or any other circuit, from trampling bedrock federalism principles by continuing to incorrectly apply outdated precedent to reach conclusions which are *not* in accord with state courts' binding authority.

II. THE PROSECUTORIAL MISCONDUCT WAS EGREGIOUS.

A. Cumulative Instances of the Variety of Grave Misconduct was Reversible Error.

A review of the record below demonstrates the gravity of the prosecutorial misconduct that tainted Mr. Rodriguez's trial. That his appellate counsel failed to raise the issue speaks to counsel's unconstitutional ineffectiveness. *Smith* v. *Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.")). That the Ninth Circuit diminished the impact of the misconduct, under incorrect state law no less, speaks to the need for decisive reversal.

A prosecutor's improper comments violate the constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State* v. *Hughes*, 969 P.2d 1184, 1191 (Ariz. 1998) (citing *Donnelly* v. *Christoforo*, 416 U.S. 637, 643 (1974)). Under Arizona law, reversal based on misconduct requires that it was "so pronounced and persistent that it permeates the entire atmosphere of the

trial." *State* v. *Atwood*, 832 P.2d 593, 628 (Ariz. 1992) (citing *United States* v. *Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985)) (cleaned up). To make that determination, the court "necessarily has to recognize the cumulative effect of the misconduct," including matters not objected to nor properly preserved. *Hughes*, 969 P.2d at 1191. The Arizona Supreme Court pointed to a number of prosecutorial misconduct cumulative error reversals where prosecutors committed just a few instances of material misconduct that constitute a pattern. *Id.* But few of the cases cited had as many instances, and as egregious forms of misconduct, as this case presents.

In the present case, the cumulative effect of the misconduct had a substantial and injurious effect on his defense. It therefore effected an unconstitutional deprivation of his right to a fair trial.

1. The federal magistrate judge who issued the initial report and recommendation found abundant evidence that "[i]n front of the jury, the prosecutor repeatedly conveyed the impression that the [threatening] HeyWire texts were found on [Mr. Rodriguez's] phone." Pet. App. 67a. In fact, "they were not recovered from [his] phone" and "there was no forensic evidence to show that these HeyWire texts were sent from [his] phone." *Id.* The prosecutor solicited highly misleading testimony from the detective implying that those texts were on Mr. Rodriguez's phone, Pet App. 81a–108a, but never tried to correct it. Instead, the prosecutor vigorously argued over and over again that those texts were *in fact* on his phone, cementing that as a certainty in jurors' minds.

"[C]onsistent and repeated misrepresentation" of evidence can constitute reversible error. See *Miller* v. *Pate*, 386 U.S. 1, 6 (1967). In *Miller* v. *Pate*, this Court did not hesitate to provide habeas relief when "[t]he

prosecution deliberately misrepresented the truth." *Id.* In that case, "[t]here were no eyewitnesses to the brutal crime which the petitioner was charged with perpetrating," but the prosecution submitted what he characterized as a pair of "bloody shorts" as its primary inculpatory evidence. *Id.* at 3. Witnesses, forensic analysts, and the prosecutor emphasized that the shorts were "a garment heavily stained with blood." *Id.* at 6. Yet it was not blood, but paint, and "[t]he prosecution's whole theory with respect to the exhibit depended upon that misrepresentation." *Id.* This Court reaffirmed that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence," in granting relief. *Id.* at 7.

The parallels between the present case and *Miller* are striking.[5] Just as it was true that the shorts in *Miller* were stained with *something*, it is true that *some* text messages on Mr. Rodriguez's phone matched those on the victim's phone (consequent to months of dating AG). But the *essential*, would-be inculpatory HeyWire text messages, that were critical to the prosecution's success, were clearly *not* found on Mr. Rodriguez's phone. The State's repeated testimony and argument that *all* the texts on the victim's phone, thereby including the threatening HeyWire texts, had been found on Mr. Rodriguez's phone, is akin to the repeated suggestion in *Miller* that what was merely paint was actually blood. The prosecution in *Miller* "had known at the time of the trial that the shorts were

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[5] Similar parallels are drawn to the *Minnitt* case, where the Arizona Supreme Court reversed a capital conviction with prejudice due to the prosecutor knowingly arguing the detective's false testimony to the jury. See *State* v. *Minnitt*, 55 P.3d 774, 778 (Ariz. 2002).

stained with paint," *Miller*, 386 U.S. at 6, and the prosecutor in this case knew just as well that even the forensic examination failed to connect the threatening texts to Mr. Rodriguez's phone. As in *Miller*, the prosecution in this case "deliberately misrepresented the truth" to both the judge and the jury. *Id.* Had this been raised on direct appeal, a new trial *could have* very well been ordered on this basis alone per *Miller*—but the pervasive misconduct did not end there.

2. The defense strategy had been to rely on cross-examining State witnesses and arguing the constitutional law rather than putting on a case. The prosecutor therefore improperly argued, three times despite a pair of sustained objections, that State's evidence was "undisputed." Pet. App. 116a–17a, 119a–20a. "The State improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element" of a charge. *State* v. *Johnson*, 447 P.3d 783, 820 (Ariz. 2019). Those arguments did not merely imply, but expressly pointed out, that Mr. Rodriguez failed to call witnesses: "All the evidence that came from that stand . . . is undisputed. No one took the stand and said anything different than what [AG] told you." Pet. App. 116a. A third objection was overruled, informing jurors that they could properly hold that constitutionally legitimate defense strategy against Mr. Rodriguez in deciding his fate.

However, when the prosecutor specifically referenced the lack of defense *witnesses*, he crossed the line into reversible misconduct because it drew jurors' attention to Mr. Rodriguez's decision not to take the stand. It is well-established that the privilege against self-incrimination prohibits a prosecutor from commenting on a defendant's failure to testify. See *Griffin* v. *California*, 380 U.S. 609, 613–14 (1965); *State* v. *Sorrell*, 645 P.2d 1242, 1244 (Ariz. 1982). Improper

comment on silence is so prejudicial to the defendant that reversal is mandated "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal." *Anderson* v. *Nelson*, 390 U.S. 523, 524 (1968). This rule applies equally when the prosecutor infers that the defendant was exercising his when only the defendant could dispute it. *State* v. *Vild*, 746 P.2d 1304, 1308 (Ariz. Ct. App. 1987); *Lincoln* v. *Sunn,* 807 F.2d 805, 810 (9th Cir. 1987). Argument that "[n]o one, no one, no one got up on this stand and testified to you contrary," was fundamental error under Arizona law, reversible despite no objection. *State* v. *DeCello*, 550 P.2d 633, 636 (Ariz. 1976). That is remarkably similar to argument here: "No one took the stand and said anything different than what [AG] told you." Pet. App. 116a.

That severe misconduct was exacerbated when the prosecutor misstated the law, instructing jurors that when the defense introduced no witnesses to dispute State witnesses, jurors "are not supposed to" consider any cross-examination challenging their testimony. Pet. App. 122a. Because that undermined the entire lawful defense strategy, it constitutes fundamental error per *Escalante*, 425 P.3d at 1085. As a representative of the State, jurors would take the prosecutor's instructions to heart and could convict by ignoring all confrontation because the defense put on no witnesses.

As a result, improper burden-shifting and the grievous comment on Mr. Rodriguez's silence and misstatement of the law therefore substantially adds to the calculus of cumulative misconduct.

3. The prosecutor also distorted evidence by using a relatively innocuous text from Mr. Rodriguez,

interpreted as related to the sale of a gun, to "conjur[e] up a damning scenario." Pet. App. 69a. The State told the jury that detectives could not locate the gun because Mr. Rodriguez probably confessed to the buyer that he had used it in the charged shootings, resulting in the buyer denying its possession to investigating law enforcement. Pet. App. 126a. There was no evidence whatsoever to support that fabrication. See *State* v. *Rosco*e, 910 P.2d 635, 648 (Ariz. 1996) (arguing matters with no evidentiary support introduced error into the trial). More troubling, this fiction "could appear to the jury as based upon evidence, or based upon the prosecutor's special knowledge"—much akin to vouching—and it "inflamed the passions of the jury by inviting it to consider the scenario of [Mr. Rodriguez] selling the gun illegally to other criminals." Pet. App. 69a.

Since there was no confession in evidence, injecting one into the case substantially impacted the likelihood of conviction. Confession is "the most probative and damaging evidence that can be admitted against [a defendant]." *Arizona* v. *Fulminate*, 499 U.S. 279, 296 (1991). This fiction was not fairly derived from the evidence and necessarily affected the jury's ability to judge the evidence fairly.

There was additional serious vouching committed. When the prosecutor misrepresented that the entire Tindall family corroborated AG's account of the January shooting, Pet. App. 112a, 133a, but only three of the six family members had testified, he vouched having evidence supporting his case that had not been presented at trial. Likewise, when he stated that the State had video surveillance showing Mr. Rodriguez purchasing ammunition, *id.* at 131a—never introduced at trial—the prosecutor further vouched evidence outside the record to establish his case. Under Arizona law,

argument may not be based upon "extraneous matters that were not or could not be received in evidence." *State* v. *Dumaine*, 783 P.2d 1184, 1194 (Ariz. 1989); *State* v. *Leon*, 945 P.2d 1290, 1293 (Ariz. 1997) (quoting *Dumaine*, 783 P.2d at 1194).

He furthermore vouched for the credibility of AG, twice asserting that she is "not a liar." Pet. App. 129a–30a, 132a. Characterizing witnesses as "liars" or "not liars," even in a single instance, constitutes improper vouching.[6] See *United States* v. *Garcia-Guizar*, 160 F.3d 511, 521 (9th Cir. 1998). Even under the Ninth Circuit's own precedent (not cited by the panel here), a prosecutor's statements that a witness "is not a liar" or "is a lot of things but he is not a liar" constitute improper vouching. *Carriger* v. *Stewart*, 132 F.3d 463, 482 (9th Cir. 1997). Because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence," *Napue* v. *People of the State of Ill.*, 360 U.S. 264, 269 (1959) it is improper for "a prosecutor to place the imprimatur of the state on the testimony of a witness." Pet. App. 70a (citing *Carriger*, 132 F.3d at 482). Where there is a pattern of vouching, and/or it is coupled with other misconduct, Arizona courts have not hesitated to reverse. *E.g., Leon*, 945 P.2d at 1294; *State* v. *Bailey,* 647 P.2d 170, 176–77 (Ariz. 1982).

4. Furthermore, the prosecution misstated the testimony of multiple witnesses enabling him to argue that their accounts corroborated AG's, whereas they were at odds with her claims. See 2ER-113-23. Misstating the evidence is a "particularly prejudicial form of misconduct, because it distorts the information the jury is to rely on in reaching a verdict." *United States* v.

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[6] "Not a liar" also misstated the expanse of evidence that she was untruthful.

Mageno, 762 F.3d 933, 945 (9th Cir. 2014) (citing *Darden* v. *Wainwright*, 477 U.S. 168, 181–82 (1986)). When a prosecutor repeatedly misrepresents witnesses' statements to his advantage, it constitutes misconduct under Arizona law. *State* v. *King,* 514 P.2d 1032, 1039 (Ariz. 1973).

5. The cumulative effect of these instances of misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (citing *Donnelly*, 416 U.S. at 643). There is a reasonable probability that an Arizona court of appeals, even without finding that any particular instance of misconduct warranted reversal standing alone, *Hughes*, 969 P.2d at 1191, would have found the cumulative effect of the misconduct "so prolonged or pronounced that it affected the fairness of trial." *State* v. *Hulsey*, 408 P.3d 408, 429–30 (Ariz. 2018). Consequently, a reasonable jury hearing this case without the myriad misconduct *could have* very well reached a different outcome. And the Arizona Court of Appeals deciding prosecutorial misconduct (had it been properly appealed) *could have*—in fact likely would have—reversed the case pursuant to this Court's and Arizona's binding authority.

The impact of the prosecutorial misconduct on Mr. Rodriguez was especially injurious given abundant weaknesses in the prosecution's evidence. However, the Ninth Circuit justified overlooking the most egregious text messages misconduct by construing it as "cumulative of other properly presented evidence." Pet. App. 6a. Although the State presented some evidence that remained untainted by the prosecution's pervasive misconduct, its import was ambiguous and weak in comparison. Though AG twice addressed the texts' sender as "Daniel," she reminded the person texting her that they had been dating for ten months

(whereas she had only even met Mr. Rodriguez six months earlier), and she accepted the sender's confrontation of having multiple other contemporaneous relations—potentially meaning Mr. Rodriguez. Additionally, though the ballistics technician "identified" two shell casings found in the street in January and one found buried deep in the Montego's trunk in February as fired from the same gun, he could not tell which of nineteen makes of gun fired them. Moreover, one of those casings had been crushed, potentially deforming markings. Another unfired cartridge and a casing found in the Mercury Montego did not match any of them. Mr. Rodriguez's semi-automatic pistol ejects shell casings, but no casings were found ejected into his car interior or the scene of the drive-by.

Given the ambiguity and weakness inherent in that "other evidence" which the Ninth Circuit relied on, a jury that was free from the superabundance of misconduct *could* very well *have* found that the "other evidence" did not rise to the level to prove beyond a reasonable doubt that Mr. Rodriguez was the shooter. *Agurs*, 427 U.S. at 103; *Escalante*, 425 P.3d at 1087.

B. The Egregious and Reversible Misconduct Makes this Case a Compelling Vehicle to Decide this Legal Issue.

The aggravated nature of prosecutorial dishonesty in such cases as *Mooney* v. *Holohan*, 294 U.S. 103 (1935), *Napue*, 360 U.S. 264, and *Miller*, 386 U.S. 1, is mirrored in the facts of this case. It is that naked affront to the truth-seeking mission of the justice system that was the impetus behind those decisions and which factually colors this one. The profusion of other misconduct that Mr. Rodriguez suffered at trial compounds the unfairness. Subsequent failure of his appellate counsel to recognize the strength of that issue on appeal—defaulting any hope to raise it later—

exacerbates the injustice. As a result, this case offers a most compelling vehicle for this Court to explore the legal question before it.

III. BECAUSE MR. RODRIGUEZ SUFFERED ACTUAL PREJUDICE, THIS COURT SHOULD GRANT REVIEW OR GRANT, VACATE, AND REMAND.

Given the serious and pervasive prosecutorial misconduct at trial, it is reasonably likely that an Arizona court properly applying *Escalante* would find that a reasonable jury *could have* returned a different verdict if not for the cumulative misconduct. Mr. Rodriguez therefore suffered actual prejudice under *Strickland*, and the Ninth Circuit should have conducted a complete analysis as to whether IAAC excused the procedural default of his prosecutorial misconduct claim.

As such, this case warrants review or summary reversal, and should be remanded to the Ninth Circuit with instructions to consider whether appellate counsel's failure to raise prosecutorial misconduct on direct appeal constitutes deficient performance.

CONCLUSION

For the foregoing reasons, the Court should grant this petition or, in the alternative, summarily vacate the Ninth Circuit's opinion, and remand for a proper IAAC analysis using applicable Arizona law.

Respectfully submitted,

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