APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: August 19, 2022]

No. 17-15603

D.C. No. 2:14-cv-00409-NVW
District of Arizona, Phoenix

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
DAVID SHINN, Director; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellants.	)

ORDER

No. 17-15704

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellant,	)
	)

v.	)
	)
DAVID SHINN, Director; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellees.	)
	)

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

The panel has unanimously voted to deny appellee's petition for rehearing. Judge Ikuta and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Block so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

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

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 17-15603
17-15704

D.C. No. 2:14-cv-00409-NVW

[Filed: June 10, 2022]

STEPHEN EDWARD MAY,	)
Petitioner-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
DAVID SHINN, Director; MARK	)
BRNOVICH, Attorney General,	)
Respondents-Appellants/	)
Cross-Appellees.	)
	)

ORDER

Filed June 10, 2022

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

Order;
Concurrence by Judge Block

SUMMARY[**]

Habeas Corpus / Mandates

Denying Stephen Edward May's motion to recall a mandate, the panel wrote (1) motions that assert a judgment is void because of a jurisdictional defect generally must show that the court lacked even an arguable basis for jurisdiction, (2) May has not met that standard in arguing that the statutory "in-custody" requirement was satisfied, and (3) the additional details provided in the motion and accompanying exhibits do not demonstrate this Court's holding on mootness lacked an arguable basis.

Constrained by his oath of office to concur in his colleagues' decision rejecting May's last effort to escape lifetime incarceration, District Judge Block wrote separately to reinforce Judge Friedland's conclusion that "this case, an in particular May's sentence, reflects poorly on our legal system," *May v. Shinn*, 954 F.3d 1194, 1209 (9th Cir. 2020), *cert. denied* 141 S. Ct. 1740 (2021), and that justice compels that May's sentence be commuted by the State of Arizona.

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

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

COUNSEL

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

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

ORDER

May's motion to recall the mandate (Dkt. No. 135) is **DENIED**. "[M]otions that assert a judgment is void because of a jurisdictional defect generally" must show that "the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) (citations omitted). May has not met that standard in arguing that the statutory "in-custody" requirement was unsatisfied. *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) (per curiam); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Nor do the additional details provided in the motion and accompanying exhibits demonstrate that this Court's holding on mootness lacked an

arguable basis. *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017) (per curiam).

BLOCK, Senior District Judge, concurring:

This is another failed attempt by the defendant Stephen May to avoid spending the rest of his life in prison. Although I am constrained by my oath of office to concur in my colleagues' decision rejecting May's latest effort to escape lifetime incarceration, I write separately to reinforce Judge Friedland's conclusion that "this case, and in particular May's sentence, reflects poorly on our legal system," *May v. Shinn*, 954 F.3d 1194, 1209 (9th Cir. 2020), *cert. denied* 141 S.Ct. 1740 (2021), and that justice compels that May's sentence be commuted by the State of Arizona.

I

As shown by the past decisions of this panel, this is a bizarre case. May stands convicted by an Arizona jury of five of eight counts of child molestation of three children between the ages of six and eight. He was acquitted on two counts with respect to a nine-year-old child. *See May v. Ryan*, CIV 14-0409-PHX-NVW (MHB), 2015 WL 13188352, at *13 (D. Ariz. Sept. 15, 2015).[1]

The convictions occurred after the trial judge had declared a mistrial when the jury had announced that it could not reach a verdict. Although the judge had discharged the jury, the judge allowed the jury to

[1] For reasons unrelated to the merits, the final count was dismissed at the behest of the victim's parents. *Id.* at *14.

recommence its deliberations after the bailiff—as the lawyers were preparing to leave the courtroom—had advised the judge that the jurors wished to continue deliberating, and defense counsel consented. May's conviction was rendered following a weekend break after several more hours of deliberations. At the age of 37, May was sentenced to 75 years of incarceration without parole. Unless he lives to be 112, he will die in jail.

May had served ten years of his term of imprisonment as the case wended its way through the state and federal judicial systems before the district court granted his habeas petition and released him from incarceration. *See May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017). In a lengthy opinion Judge Wake ruled that May's trial counsel rendered ineffective assistance under *Strickland v. Washington,* 466 U.S. 668 (1984), because he did not object to the constitutionality of the Arizona law placing the burden of proving lack of intent on the defendant. *May*, 245 F. Supp. 3d at 1166.

On appeal, we unanimously disagreed, explaining:

> 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, which provided the background for the "prevailing professional practice at the time of trial," 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."

May v. Ryan, 766 F. App'x 505, 507 (9th Cir. 2019) (internal citations omitted).[2]

Nevertheless, Judge Friedland and I affirmed the district court's grant of habeas on other grounds: We first noted that "the State's case turned entirely on the jury's believing the testimony of several child victims who all had struggled to provide details of the alleged molestation on the stand, including failing to remember whether some of the incidents even took place." *Id.* at 507. We concluded that, in light of the particular circumstances, "when the trial judge asked if either party objected to the jury resuming deliberations after the court had already declared a mistrial and discharged the jury, competent counsel would have objected." *Id* at 508. Consequently, we ruled that "[t]he decision not to object was completely unsupportable on this record and, therefore, under the circumstances, could not have been considered a sound trial strategy." *Id.* (citations and internal quotation marks omitted).

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[2] Although we could not agree with Judge Wake that trial counsel was remiss in failing to object to the statute's constitutionality, Judge Wake's opinion makes a compelling case that the statute is indeed unconstitutional. Notably, the Supreme Court has yet to rule on the issue. In May's petition for certiorari, the issue of the statute's constitutionality was not presented. Three Questions Presented were advanced, each dealing with the application of *Strickland*. Petition for Certiorari at 2, *May v. Shinn*, 141 S.Ct. 1740 (2021) (No. 20-1080).

We also held that the prejudice prong of *Strickland* was satisfied.[3]

However, Judge Friedland changed her vote in response to the State's petition for rehearing, which pointed out that the panel had misunderstood an aspect of the case's procedural history. Writing for what was now a majority of the panel, she reasoned that since the State's case was so weak, "it was reasonable [for trial counsel] to think that the jury might acquit May if it continued deliberating." *May*, 954 F.3d at 1204. Accordingly, trial counsel could not be faulted for consenting to further deliberations. She explained that the alleged sexual molestation charges were predicated upon the brief touching of the children's genitals by May on the outside of either their clothing or bathing suits, and nothing more. *Id.* at 1197. As she elaborated:

> The fact that the jury was deadlocked meant that at least one juror wanted to acquit May. And both parties agree that the State's evidence against May was far from overwhelming. All four children testified that other people were nearby when May touched their genital areas. Luis and Danielle testified that May touched them when more than twenty people, including other adults, were in the vicinity—but none of those people claimed to see anything. Luis was

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[3] Judge Ikuta dissented. She believed that the majority's decision was based on "pure speculation" about "how a second trial would unfold," but that "pure speculation was insufficient to establish deficient performance" and that "we should reject such uninformed prognostications." *May*, 766 Fed. App'x at 509.

> also unable to identify May in court. Taylor and Danielle testified that they were unable to remember an incident in which May had touched them that they had previously disclosed to police. And Sheldon testified that he thought that May's touching was accidental until Taylor's mother told him otherwise. The State had not offered any expert testimony to try to explain away these discrepancies in the children's accounts. Based on these and other weaknesses in the State's case, it was reasonable to think that the jury might acquit May if it continued deliberating. Indeed, the jury ultimately did acquit May on the counts related to Sheldon.

Id. at 1204. I dissented, concluding that "[b]ecause I would find that May's counsel was objectively deficient in not objecting to resumed jury deliberations, and because there was a reasonable probability that an objection would have been sustained, I would affirm the grant of *habeas* relief." *May*, 954 F.3d at 1221.

In a brief concurring opinion, Judge Ikuta reasoned:

> It is our duty to impartially follow and apply the law. Here, as required to "reflect our enduring respect for the State's interest in the finality of convictions that have survived direct review withing the state court system," we adhered to the limited scope of federal habeas review. In doing so, we uphold the fundamental principles of our legal system.

Id. at 1208 (internal citations omitted). In a separate concurring opinion, Judge Friedland wrote "to express [her] dismay at the outcome of this case:"

> While I certainly recognize the seriousness of child molestation, the evidence that May was actually guilty of the five counts of molestation he was convicted on was very thin. May's conviction on those counts was based almost entirely on the testimony of the children who were the alleged victims. Yet, as described in the opinion, that testimony had many holes. The potential that May was wrongly convicted is especially concerning because he was sentenced to seventy-five years in prison—a term that all but ensures he will be incarcerated for the rest of his life.
>
> Given the significant constraints on the scope of our review, we are not in a position to do more than decide the narrow question whether the proceedings in this case were so egregiously unfair that they violated the Constitution. *But I agree with the dissent that this case, and in particular May's sentence, reflects poorly on our legal system*.

Id. at 1208–09 (emphasis added). After having been at liberty for more than four years May returned to prison.

II

I have profound respect for my two judicial colleagues who denied May's habeas petition. Judge Ikuta certainly cannot be faulted for her commitment

"to follow and apply the law." *Id.* at 1208. But, as Judge Friedland poignantly comments, we have reached a point in our judicial decision-making that "reflects poorly on our legal system." *Id.* at 1209.

Judge Friedland's clarion call about the current status of our legal system triggered my thoughts about a period of time over a half-century ago when the Supreme Court had issued a spate of ground-breaking decisions that spoke well of our judicial system. There was *Brown v. Board of Education* in 1954, *Mapp v. Ohio* in 1961, *Baker v. Carr* in 1962, *Gideon v. Wainright* in 1963, *Jackson v. Denno* in 1964, and *Miranda v. Arizona* in 1966. And I thought about the *Clayton* case.

In 1968 I was a young solo practitioner in Suffolk County, New York, when the New York State Court of Appeals assigned me to represent Robert Clayton. It was just a few years after the Supreme Court had held in *Jackson v. Denno* that those who had been convicted based on a confession had the right to a hearing to determine if it was voluntary.

Clayton had been indicted and convicted for murder as a result of a fight he had with a fellow migrant farm worker. Pursuant to *People v. Huntley*—the New York equivalent to *Jackson*—the trial court held a hearing to determine whether his confession was voluntary. *People v. Clayton*, 342 N.Y.S.2d 106, 108 (1973). I was assigned to handle this appeal. Ultimately, Clayton's conviction was ruled to be the product of "a pattern of police dominance and coercion." *Mancusi v. United States ex rel. Clayton*, 454 F.2d 454, 456 (2d Cir. 1972).

Clayton had spent about 20 years in jail when I gave him the good news: Rather than retry him, the Suffolk County District Attorney had agreed to allow him to plead to involuntary manslaughter. With credit for time served, Clayton would be a free man.

To my surprise, he rejected the offer. He told me that he had adjusted to a life in prison and wasn't sure he could adjust to a life out of prison as a convicted felon. I didn't know what to do, but the trial court, on its own motion, dismissed the indictment *in the interests of justice* pursuant to N.Y. Crim. Proc. Law § 210.40. *See People v. Clayton*, 350 N.Y.S.2d 495, 495 (Co. Ct. 1973). That statute re-codified an obscure provision of the Code of Criminal Procedure, dating back to 1881: "The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed." *People v. Campbell*, 48 Misc. 2d 798, 799 (N.Y. Misc. 1966) (citing Sec. 671 of the Code of Criminal Procedure); *see also* Practice Commentaries, N.Y. Crim. Proc. Law § 210.40.

The government appealed, arguing before the intermediate appellate court that never in the annals of the law had a murder indictment been dismissed on the court's own motion, and in the absence of the District Attorney's consent, in the so-called interests of justice.

In a precedent-making decision, Judge Hopkins, writing for a unanimous court, (1) affirmed the power of a court to dismiss *any* indictment, upon its own initiative, in the interests of justice; (b) established the substantive standards to be henceforth employed in

evaluating when principles of justice required dismissal, and (c) asserted that a hearing must be held to determine if dismissal was warranted. *See Clayton*, 342 N.Y.S.2d at 109–111. The court specified seven considerations that must be considered at such a hearing: "(a) the nature of the crime; (b) the available evidence of guilt; (c) the prior record of the defendant; (d) the punishment already suffered by the defendant; (e) the purpose and effect of further punishment; (f) any prejudice resulting to the defendant by the passage of time, and (g) the impact on the public interest of a dismissal of the indictment." *Id.* at 110. As the court wrote, the dismissal of an indictment "depended only on principles of justice, not on the legal or factual merits of the charge or even on the guilt or innocence of the defendant." *Id.* at 109.

On remand, I conducted the first "interest of justice" hearing in the state's history. The trial court granted the motion, and Clayton's murder indictment was dismissed. Thus, was born the *Clayton* hearing, which exists to this date.

Almost a half-century ago, I wrote an article for the New York State Bar Journal recounting my Clayton journey. *See* Frederic Block, *The Clayton Hearing*, N.Y. State B.J., Oct. 1973, 409. I was struck by the notion that because of New York's embrace of interest of justice hearings, "our legal system, though predicated upon the fundamental concept of due process, recognizes that the law must be possessed of an even more pervasive spirit; one that transcends common, codified or even constitutional law." *Id.* at 411. I commented that "it is, after all, the principle of 'justice'

which is the hallmark of our jurisprudence, and that the letter of the law is not the final word." *Id.* I concluded by stating that dismissal in the interests of justice may be appropriate—even for a murder indictment, such as in *Clayton*—"for reasons transcending the defendant's guilt or innocence." *Id.* at 412.

Although *Clayton* hearings abound to this day in New York State, there is no federal counterpart. The concept of justice tempering the strictures of the law is anathema to the federal justice system. Accordingly, as Judge Friedland laments, "*this case, and in particular May's sentence, reflects poorly on our legal system*."

III

There are two relevant injustices that have impacted May's lifetime sentence: (1) the strictures of habeas relief; (2) the emotional overlay that contributes to irrational sentencing when the nature of the crime entails sexual misconduct involving children.[4]

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[4] These are not the only injustices that reflect "poorly on our legal system:" We are the world leader in "mass incarceration." With a prison population of more than 2.3 million, we incarcerate our populace at more than twice the rate of Russia, four times that of China, and more than fourteen times that of Japan. *See* James Kilgore, *Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time* 11 (The New Press 2015). Congress—the first branch of government—has usurped much of the power of the judiciary by imposing mandatory minimums in over 25% of the sentences that judges must mete out, threatening to reduce the third branch of government to a twig. Our Sentencing Guidelines are often irrational and of little value. *See, e.g.*, *United States v, Parris,* 573 F.Supp.2d 744 (2008) (White Collar Crimes); *United States v. Dorvee*, 616 F.3d 174 (2d Cir.

It is my hope that by calling attention to these injustices this opinion will be of considerable value to those who will undoubtedly one day be deciding whether May's sentence should be commuted. I believe it is the responsibility of judges who have had the opportunity to identify injustices in the sentencing of a defendant to play an active role in sharing that information with those who will be passing final judgment on the life of a human being. I believe, therefore, that "there is no reason why judges could not play a more regular role in clemency." Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 72 N.Y.U. Ann. Surv. Am. L. 187, 382 (2018). This is in keeping with the moral responsibility of judges, who are "uniquely positioned to bring perceived injustices to other's attention and must." Jessica A. Roth, *Jack Weinstein: Reimagining the Role of the District Court Judge,* Federal Sentencing Reporter, Vol. 33, No. 3 163, 165 (Feb. 2021).

A. The Strictures of Habeas Relief

My first exposure to the writ of habeas corpus as a district judge was in 1995 during my first year on the bench. Winston Moseley, who had been convicted of killing Kitty Genovese in 1964, sought the writ decades after his conviction. The murder had caught national attention since it was one of the most infamous and brutal murders committed during that century and

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2010) (Child Pornography). And we make it difficult for ex-felons to re-enter society by imposing an inordinate number of restrictions as "collateral consequences." *See United States v. Nesbeth*, 188 F.Supp.3d 179 (E.D.N.Y. 2016).

"symbolized urban apathy [since] 38 people heard her screams but did nothing." 214 N.Y.L.J. 29 (July 25, 1995).

My initial reaction was that the inordinate passage of time had to preclude my asserting jurisdiction over the case. But to my surprise I learned that there was no statute of limitations for habeas petitions. I therefore conducted a hearing because Moseley's trial lawyer had testified in state court that he had previously represented Genovese and consequently "didn't try this case . . . objectively, calmly, just as a lawyer defending a client [should]." *Moseley v. Scully*, 908 F. Supp. 1120, 1125 (E.D.N.Y. 1995). This disclosure and admission compelled me to conduct the hearing to inquire into the nature, duration, breadth and bounds of this prior representation for the purpose of determining whether Genovese's lawyer labored under a constitutionally impermissible conflict of interest that adversely affected his representation. I denied Moseley's habeas petition on the merits, but only after determining that neither the passage of time nor other procedural grounds barred Moseley's claim.

A year after my decision, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"). It created a one-year statute of limitations and "departed from earlier efforts to reform the federal postconviction process by implementing strict new procedural and substantive barriers to successful federal habeas corpus relief." David Goodwin, *An Appealing Choice: An Analysis of and a Proposal for Certificates Of Appealability in "Procedural" Habeas Appeals,* 68 N.Y.U. Ann. Surv. Am. L. 791, 792 (2013).

Under AEDPA a federal court "shall not" grant habeas relief "unless" the state court's decision was (1) "contrary to" or an "unreasonable application of" clearly established federal law, as determined by the decisions of the Supreme Court, or (2) based on an "unreasonable determination of the facts in light of the evidence presented" in the original proceeding. 28 U.S.C. § 2254(d)(1); (2).

The Supreme Court's recent decision in *Brown v. Davenport*, No. 20-826, 2022 WL 1177498 (Apr. 21, 2022), traces how AEDPA "represented a sea change in federal habeas law." *Id.* at *8. As Justice Gorsuch framed the issue:

> After a state court determines that an error at trial did not prejudice a criminal defendant, may a federal court grant habeas relief based solely on its independent assessment of the error's prejudicial effect under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Or must a federal court also evaluate the state court's decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?

Id. at *3.

Justice Gorsuch traced the reach of habeas relief during the country's history. He explained how by 1953 federal habeas practice had taken on a permissive scope. In that year the Supreme Court held that a state-court judgment was "'not *res judicata*' in federal habeas proceedings with respect to a petitioner's federal constitutional claims." *Id.* at *7 (citing *Brown v. Allen*, 344 U.S. 443, 458 (1953)). Thus, "[f]ull-blown

constitutional error correction became the order of the day." *Id.* Eventually, the Supreme Court "responded to the post-*Brown* [*v. Allen*] habeas boom by devising new rules aimed at separating the meritorious needles from the growing haystack." *Id.* at *8.

For example, in *Chapman v. California*, 386 U.S. 18 (1967), the Court had held that "when a defendant demonstrates on direct appeal that a constitutional error occurred at his trial, his conviction cannot stand unless the government proves the error's harmlessness 'beyond a reasonable doubt.'" *Brown v. Davenport*, 2022 WL 1177498, at *8 (quoting *Chapman*, 386 U.S. at 24). But in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), it "resolved that this same standard was inappropriate for use in federal habeas review of final state-court judgments." *Brown v. Davenport*, 2022 WL 1177498, at *8 (citing *Brecht*, 507 U.S. at 633–34). "Instead, the Court reasoned, a state prisoner should not receive federal 'habeas relief based on trial error unless' he can show the error had a 'substantial and injurious effect or influence' on the verdict." *Id.* (quoting *Brecht*, 507 U.S. at 637). In so doing, "the Court stressed that undoing a final state-court judgment is an 'extraordinary remedy,' reserved for only 'extreme malfunctions in the state criminal justice system' and different in kind from providing relief on direct appeal." *Id.* (quoting *Brecht*, 507 U.S. at 633–34).

Not satisfied with *Brecht's* restrictions, Congress doubled down by enacting its AEDPA "sea change," imposing new "demanding" obstacles in the path of habeas petitions. *Id.* Consequently, the majority held in *Brown v. Davenport* that in order to qualify for

habeas relief, a petitioner must satisfy both *Brecht* and AEDPA. It reasoned that "where AEDPA asks whether *every* fairminded jurist would agree that an error was prejudicial, *Brecht* asks only whether a federal habeas court *itself* harbors grave doubt about the petitioner's verdict." *Brown v. Davenport*, 2022 WL 1177498, at *9.

An empirical study conducted ten years after AEDPA disclosed that it had effectively neutered habeas relief. As it reported, compared to a 40% success rate prior to AEDPA, by 2007 out of a sample of 2,384 cases that year, only 7 writs were granted by the federal courts in non-capital cases. Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 174 (2021). Thus, the practical effect of AEDPA was "to halt the prior federal practice of employing habeas review to bring new conditions of fairness to the steamroller systems of justice found in too many states." Jed S. Rakoff, *The Magna Carta Betrayed?*, 94 N.C. L. Rev. 1423, 1429 (2016).

Now, with the Supreme Court's decision in *Brown v. Davenport*, superimposed on the difficulties in surmounting the strictures imposed under *Strickland* when seeking relief for ineffective counsel—as reflected by this case—habeas relief today is virtually a dead letter. *Brown v. Davenport*, therefore, realistically put the final nail in the habeas coffin.[5] *See also Shinn v. Martinez Ramirez*, No. 20-1009, slip op. at 15–17 (U.S.

[5] Indeed, Arizona's habeas regime includes many of the same procedural and substantive roadblocks found in the federal system. *See* Keith J. Hilzendeger, *Arizona State Post-Conviction Relief*, 7 Ariz. Summit L. Rev. 585 (2014).

May 23, 2022) (imposing further procedural requirements on federal habeas ineffective assistance of counsel claims).

B. Irrational Sentencing of Sexual Misconduct Crimes Involving Children

Nothing provokes more emotionality than sex crimes perpetrated on a child. The public widely regards child sex offenders as the "worst of the worst" and "better off dead." Colleen M. Berryessa & Chaz Lively, *When A Sex Offender Wins the Lottery: Social and Legal Punitiveness Toward Sex Offenders in an Instance of Perceived Injustice*, 25 Psychol. Pub. Pol'y & L. 181 (2019).

Congress has responded to this emotional outrage. For example, it has created Sentencing Guidelines for child pornographers that place all of them—be they mere possessors or inveterate distributors—at "a typical total offense level of 35." *United States v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010). As explained in *Dorvee*, "[a]n ordinary first-time offender is therefore likely to qualify for a sentence of at least 168 to 210 months." *Id.*

I cite *Dorvee* because it is an extraordinary circuit-court case that exemplifies how raw emotions can trigger irrational sentences when children are the victims of sexual misconduct. *See also United States v. Henderson*, 649 F.3d 955, 965–69 (9th Cir. 2011) (Berzon, J., concurring) (citing *Dorvee*, 616 F.3d at 186–88). Foremost, are the irrational Guidelines that Congress has created for convicted child pornographers. Thus, as *Dorvee* points out: "[T]he

Guidelines actually punish some forms of direct sexual contact with minors more *leniently* than possession or distribution of child pornography." *Id.* at 184.

The current status of the child pornography Guidelines dates to Congress' enactment of the PROTECT Act of 2003, Pub. L. 108-21, 117 Stat. 650. It was the culmination of the Sentencing Commission's multiple amendments to these Guidelines—at Congress' direction—since their introduction in 1987, each time calling for harsher penalties. *Dorvee*, 616 F.3d at 184. And "it was the first instance since the inception of the Guidelines where Congress directly amended the *Guidelines Manual*." *Id.*

But, as explained in *Dorvee*, these congressionally mandated Guidelines were "fundamentally different from most" and "unless applied with great care, c[ould] lead to unreasonable sentences." *Id.* The circuit court quoted from the comments by a former United States Attorney for the Eastern District of New York that the changes effected by the PROTECT Act evinced a "blatant disregard for the Commission" and were "the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress." *Id.* at 185 (internal quotation marks omitted). As he explained, Congress:

> (i) adopted sentencing reforms without consulting the Commission, (ii) ignored the statutorily-prescribed process for creating guideline amendments, (iii) amended the Guidelines directly through legislation, (iv) required that sentencing data be furnished

> directly to Congress rather than to the Commission, (v) directed the Commission to reduce the frequency of downward departures regardless of the Commission's view of the necessity of such a measure, and (vi) prohibited the Commission from promulgating any new downward departure guidelines for the next two years.

Id. (citation omitted).

The upshot of all of this congressional frenzy was that "sentencing enhancements cobbled together through this process routinely result[ed] in Guidelines projections near or exceeding the statutory maximums, even in run-of-the-mill cases." *Id.* at 186. Thus, Dorvee's sentencing range was calculated by the district court to be 262 to 327 months for having sexually explicit conversations with an undercover agent posing as a 14-year-old-boy, sending sexually explicit videos and images via the internet to the agent, and meeting another undercover agent, also posing as a 14-year-old boy, with a camera that he intended to use to photograph the "[the boy's] feet and penis." *Id.* at 176.

Dorvee illustrates the irrationality of the child pornography Guidelines with two examples: (1) "An adult who intentionally seeks out and contacts a twelve-year-old on the internet, convinces the child to meet and to cross state lines for the meeting, and then engages in repeated sex with the child, would qualify for a total offense level of 34, resulting in a Guidelines range of 151 to 188, with a criminal history category of 1." *Id.* at 187. Dorvee, meanwhile, had the same

criminal history category and had "never had any contact with an actual minor," yet "was sentenced by the district court to 233 months of incarceration," based, ironically, in part on the district judge's fear "that Dorvee *would* sexually assault a child in the future." *Id.* (2) A defendant convicted of possessing on his computer two nonviolent videos of seventeen-year-olds engaging in consensual conduct, with no criminal history, would result in a Guidelines range of 46 to 57 months. "This," the court noted, "is the same Guidelines sentence as that for an individual with prior criminal convictions placing him in a criminal history category of II, who has been convicted of an aggravated assault with a firearm that resulted in bodily injury." *Id.*

Thus, although the circuit court recognized that "enforcing federal prohibitions on child pornography is of the utmost importance," it held that "it would be manifestly unjust to let Dorvee's sentence stand." *Id.* at 188. Therefore, it remanded the case for resentencing, cautioning the district court that it was "dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results." *Id.*

The public's hatred of child pornographers is part of its emotional reaction to all sexual crimes involving children. Indeed, "[i]ndividuals living with pedophilic disorder are the most universally despised group in modern society." Margo Kaplan, *Taking Pedophilia Seriously* 72 Wash. & Lee L. Rev. 75, 128 (2015). Judges are not exempt from such emotional reactions. If anyone sexually assaulted one of my two adorable

little grandchildren, I would probably be indicted for murder. But I understand as a rational jurist that I cannot let my judgments be based on my emotions.

Realistically, the public's fear of pedophiles running loose and abusing children should be tempered by the knowledge that we judges impose enormous constraints on their freedom even when they are not incarcerated. The PROTECT Act authorizes life supervision by the Probation Department and, in some cases, requires it. The Adam Walsh Act requires those convicted of specified sex crimes to register as sex offenders and sets up a national database to coordinate state sex-offender registries.

Moreover, stringent special conditions are routinely imposed during supervised release. My list is fairly typical and includes mental health treatment, limitations on contact with children, limitations on computer access, and submission to random searches and other monitoring to ensure compliance.

Consequently, the data suggest that the recidivist rates for child sex offenders are low. For example, compared to a 67.8% re-offense rate for state prisoners in general over a three-year period ending in 2018, there was only a 3.5% re-offense rate for child sex offenders during that same time period. Maureen F. Larson & Robert F. Schopp, *Sexual Predator Laws: Clarifying the Relationship Between Mental Health Laws and Due Process Protections*, 97 Neb. L. Rev. 1167, 1169 (2019).

I have discussed the Second Circuit's decision in *Dorvee* at length because it is a clear exposition of how

Congress has responded to the public's emotional pedophilia hysteria by creating irrational child pornography Guidelines—which still exist. But this hysteria has obviously impacted the harsh sentences that the states have created for crimes entailing the sexual molestation of children, such as reflected in this case. Incredibly, May faces the rest of his life in prison for briefly fondling three children over their outer garments in broad public. Moreover, Judge Friedland correctly explains that the evidence against May "was very thin," and "had many holes." Thus, as she acknowledges, there was "[t]he potential that May was wrongly convicted." *May v. Shinn*, 954 F.3d 1194, 1208 (9th Cir. 2020).

But such are the harsh realities of life where thousands of innocent people are incarcerated and many are even on death row. Jay Robert Nash, *"I am Innocent!": A Comprehensive Encyclopedic History of the World's Wrongly Convicted Persons* (2008); Daniel H. Benson, *Executing the Innocent*, 3 Ala. C.R. & C.L.L. Rev. 1 (2013); *see also* Frederic Block, *Prosecutors aren't above the law: Gov. Cuomo must sign legislation creating an oversight commission*, The Daily News (Jul. 30, 2018).[6] Nonetheless, I doubt that even the most hardened believers that child molesters should be severely punished would objectively conclude that sentencing May to life was rational, and would agree with me and Judge Friedland that it "reflects poorly on our legal system."

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[6] Available at: https://www.nydailynews.com/opinion/ny-oped prosecutors-arent-above-the-law-20180726-story.html.

IV

May has now apparently run the gamut of any judicial recourse that might have been available. The only chance he has of not being incarcerated for the rest of his life would seem to be executive commutation. The Arizona Board of Executive Clemency ("Clemency Board"), comprising five members appointed by the Governor, may recommend the commutation of a sentence to the Governor "after finding by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is a substantial probability that when released the offender will conform the offender's conduct to the requirements of the law." Ariz. Rev. Stat. § 31-402.

Statistics provided by the Clemency Board show that between 2004 and 2016, it heard an annual average of 594.9 clemency hearings and recommended a yearly average of only 48.2 prisoners to the Governor who, in turn, granted an average of only 6.7 per year.

Given the nature of his offense, it is unlikely that the Clemency Board would recommend that the Governor commute May's sentence. But he would seem to be a perfect candidate for commutation. He had already served a decade of his sentence before being released by Judge Wake, and the record before me reflects that he was a law-abiding citizen during his more than four years of freedom before being returned to prison: He never attempted to abscond even though he knew that if Judge Wake's decision were reversed he would be spending the rest of his life in jail, and he

faithfully complied with his terms of supervised release.

Hopefully the Clemency Board will recognize the unusual nature of this case and recommend that the Governor commute May's sentence. And hopefully the Governor will agree that to do so in this particular case would be the humane thing to do *in the interests of justice*.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 17-15603
17-15704

D.C. No. 2:14-cv-00409-NVW

[Filed: March 27, 2020]

STEPHEN EDWARD MAY,	)
Petitioner-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH,	)
Attorney General,	)
Respondents-Appellants/	)
Cross-Appellees.	)
	)

OPINION

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

Argued and Submitted March 7, 2019
Phoenix, Arizona

App. 30

Filed March 27, 2020[*]

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

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

SUMMARY[***]

Habeas Corpus

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

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

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

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

After the close of evidence, the jury reported that it was deadlocked, and the judge declared a mistrial. Several minutes later, the jury requested permission to resume deliberations. May's defense lawyer did not object to such a resumption, which the judge then permitted, and the jury convicted May on most counts. May argued in his habeas petition that his lawyer's failure to object amounted to ineffective assistance of counsel. The district court accepted the magistrate judge's determination that the lawyer's failure to object was neither deficient performance nor prejudicial. The panel held that counsel's performance was not deficient because, on the facts of this case, it was a reasonable prediction that May had a better chance of a more favorable verdict from the existing jury on the existing trial record than he would from a retrial.

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

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

Dissenting, District Judge Block wrote that the majority ignores *Strickland v. Washington*'s constitutional underpinning that deference is due only "to counsel's *informed* decisions," and that the facts of

this case unequivocally show that counsel's decision was the antithesis of an informed decision.

COUNSEL

Robert A. Walsh (argued), Assistant Attorney General, Criminal Appeals Section; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellants/Cross-Appellees.

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

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

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

OPINION

FRIEDLAND, Circuit Judge:

Appellant Stephen May seeks habeas corpus relief, arguing that he was deprived of his Sixth Amendment right to counsel because the defense lawyer who represented him in his child molestation trial in Arizona state court was ineffective. After the close of evidence in that trial, the jury reported that it was deadlocked, and the judge declared a mistrial. Several minutes later, however, the jury requested permission

to resume deliberations. May's defense lawyer did not object to such a resumption, which the judge then permitted. The jury convicted May on most counts. May now argues that his lawyer's failure to object amounted to constitutionally deficient performance. We hold that May's counsel was not ineffective because, on the facts of this case, it was a reasonable prediction that May had a better chance of a more favorable verdict from the existing jury on the existing trial record than he would from a retrial.[1]

I.

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

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

[2] This rule provides in full: "A defendant is entitled to a severance of offenses joined solely under Rule 13.3(a)(1) [allowing for joinder

The trial court granted the motion in part by severing the count related to Nicholas. Ruling from the bench, the judge made reference to the fact that the count related to Nicholas alleged that he had been molested at a daycare center where May worked in 2001, while the counts related to the other children involved allegations of molestation occurring between 2003 and 2005. Because the timing and other "circumstances" of the count related to Nicholas were "different," and there had also "been a loss of evidence" with respect to that count, the judge determined that the evidence concerning the other children would be "more prejudicial than probative on that count."

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

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of offenses that are of the same or similar character], unless evidence of the other offense or offenses would be admissible if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

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

Luis testified first. Luis attended an elementary school where May was employed for several months. May worked with first graders with special needs who would be integrated into Luis's class for certain activities, including computer lab. Luis testified that one day in computer lab May came over to help him. While May's right hand was holding the computer mouse, May's left hand touched Luis's "private part" over his pants. Luis testified that May did not move the hand that was touching his genital area.[3] Luis testified that two adults other than May and about twenty children were present when this happened.

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

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

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

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

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

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

"didn't think he meant it." Taylor also testified that another adult was present when this happened.

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

Like Taylor, Danielle had told police about multiple incidents.[5] At trial, Danielle testified that May touched her genital area over her bathing suit at her eighth birthday party. About forty people, including twenty adults, were present at the pool during the party. Danielle testified that she and May were in the jacuzzi. May "put [her] on his lap," and he touched her "private parts" on top of her bathing suit. The prosecutor asked Danielle if she also remembered "another time earlier in the summer that you had a barbecue and [May] touched you[.]" Danielle replied, "No." The prosecutor further asked Danielle if she remembered telling police

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[5] Danielle's father testified at trial that, when he spoke to Danielle prior to her interview with police, she recalled only one incident. Danielle stated in the police interview that May touched her every time they were both at the pool. At trial, when asked if she "remember[ed] telling police that this touching happened every time [she] went to the pool," Danielle responded, "[n]o, it didn't happen every time I went to the pool."

about a "barbecue at the beginning of the summer" where May "touched you again with his hand." Danielle responded that she did remember telling police, but indicated that she did not remember the touching.

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

Sheldon testified that he initially thought May touched him by accident, but that he changed his mind after talking to his mother and Taylor's mother. Taylor's mother later testified that, soon after Taylor gave a statement to police, Sheldon "came up to [her] and told [her] what had happened to him." Sheldon's

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

stepfather also testified that he and Sheldon's mother approached Sheldon about May and that Sheldon was initially reluctant to talk but eventually said that May had touched his genital area.

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

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

The prosecutor's cross-examination focused in part on statements May had made in an interview with a detective. During that interview, the detective had listed the names of several children, and May had responded by stating that he did not even know a half

dozen children. But May testified at trial that he knew many children from his work teaching children. He testified that he did not remember what he meant when he told the detective otherwise.

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

In all, the jury heard evidence for five days.

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

Defense counsel Thompson emphasized that the children had given inconsistent statements and sometimes could not recall what had happened. He also pointed out that adults were present on many of the occasions when May allegedly touched a child, yet none

of those adults ever saw anything. Thompson argued that the children's stories about May touching them were the product of the children's talking to each other or of an adult's suggesting that they had been inappropriately touched.

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

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

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

The court responded with the following instruction:

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

The instruction tracked Arizona Rule of Evidence 404(b), which provides that "evidence of other crimes, wrongs, or acts . . . may . . . be admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b).[8] The instruction also made clear that the jury could not consider the evidence for the purpose described in Rule 404(c): "to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c).[9]

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

[9] The prosecutor did not object to the instruction. Nor did the prosecutor attempt to argue during trial that evidence of other acts

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

No more than several minutes later, the judge announced that "[t]he bailiff has received a communication from the jury that they do not wish to have a hung jury and wish to continue deliberating and communicate that to the counsel." The judge then asked the prosecutor and defense counsel Thompson if either had any objection. Thompson consulted with May for about twenty to thirty seconds. Both Thompson and the prosecutor then said they had no objection. In an interview occurring two years after May's trial, one juror stated that all the jurors used

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could be used to show May's propensity to molest children. In fact, any reference to character evidence at trial or in the instruction may have been foreclosed once the trial began, given that the procedures for admitting evidence under Rule 404(c) had apparently not been followed. *See* Ariz. R. Evid. 404(c)(1)(D), (c)(3) (requiring the court to make certain findings and requiring the prosecutor to make disclosures).

their cell phones after being excused, but this fact was apparently not known to Thompson, the prosecutor, or the judge at the time.

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

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

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

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

two ten-year terms running concurrently for the counts related to Danielle, and ten years for the count related to Luis—that is, an aggregate minimum sentence of thirty years.

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

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

May sought post-conviction relief in Arizona court. Among other claims, May contended that his trial counsel Thompson was ineffective because he had failed to object to the resumption of jury deliberations after the trial court declared a mistrial. May retained a defense strategy expert, who testified at an evidentiary hearing that he believed Thompson was ineffective. May also submitted a declaration from Thompson, in which Thompson stated that, before responding that the defense had no objection to the jury's resuming deliberations, he had a "very brief conversation" with May about the alternative

strategies of continuing with the jury or risking a retrial. Thompson further stated that he was "[c]aught in the moment by a circumstance [he] had never before encountered in almost 300 previous felony jury trial [sic]."

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

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

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

on another ground that May had raised: that the Arizona child molestation statute under which May was convicted was unconstitutional.[11]

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

II.

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

For the reasons explained below, we hold that May's lawyer did not render deficient performance under the standard outlined in *Strickland* by failing to object to the resumption of jury deliberations after the trial

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[11] This is among the issues we discuss in a concurrently filed memorandum disposition. *See supra* note 1. We hold there that because the challenge to the constitutionality of the statute was procedurally defaulted and May cannot show cause and prejudice to overcome that default, the district court erred in granting habeas relief.

court declared a mistrial. Because we would reach this conclusion regardless of whether we reviewed the performance question de novo (as the dissent does, Dissent at 40–41) or with deference under the Antiterrorism and Effective Death Penalty Act, *see* 28 U.S.C. § 2254(d), we need not decide which standard of review applies here. *See Berghuis v. Thompkins*, 560 U.S. 370, 389–90 (2010). We also need not decide whether May has satisfied the prejudice prong of *Strickland* because his claim fails on the performance prong.

A.

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

The Supreme Court has made clear that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Thus, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Put differently, the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quotation marks omitted).

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

B.

There were good reasons to think that sticking with the current trial record and jury would better serve May's interests than would a new trial. When a jury indicates that it is deadlocked, a rational defendant deciding between a mistrial or staying the course with the current jury "would compare the likely consequences of allowing the jury to deliberate longer with the likely consequences of obtaining a mistrial." *Brewster v. Hetzel*, 913 F.3d 1042, 1058 (11th Cir. 2019) (quoting *Lane v. Lord*, 815 F.2d 876, 879 (2d Cir. 1987)); *see also United States v. Beckerman*, 516 F.2d 905, 909 (2d Cir. 1975) (noting that the "report of a jury in deadlock *could* be welcome news to an accused who

is fearful of his fate" and therefore welcomes a mistrial, but also contemplating the possibility that the defendant might "ha[ve] an interest in having guilt determined by this particular jury" (emphasis added)). Here, it was objectively reasonable to think that acquittal on some or all counts was a real possibility if May continued with the current jury, while a mistrial likely would have led to a retrial that could well have resulted in conviction on all counts. Because Thompson's failure to object to the resumption of deliberations "falls within the range of reasonable representation," we "need not determine the actual explanation for [his] failure to object." *Morris v. California*, 966 F.2d 448, 456 (9th Cir. 1991).[12]

The fact that the jury was deadlocked meant that at least one juror wanted to acquit May.[13] And both parties agree that the State's evidence against May was far from overwhelming. All four children testified that other people were nearby when May touched their genital areas. Luis and Danielle testified that May touched them when more than twenty people, including other adults, were in the vicinity—but none of those people claimed to see anything. Luis was also unable to

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

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

identify May in court. Taylor and Danielle testified that they were unable to remember an incident in which May had touched them that they had previously disclosed to police. And Sheldon testified that he thought that May's touching was accidental until Taylor's mother told him otherwise. The State had not offered any expert testimony to try to explain away these discrepancies in the children's accounts. Based on these and other weaknesses in the State's case, it was reasonable to think that the jury might acquit May if it continued deliberating. Indeed, the jury ultimately did acquit May on the counts related to Sheldon.[14]

There was further reason to think the current trial record was more favorable to May than the record that might result from a retrial. In particular, the trial court gave the jury an instruction that was relatively favorable to May. That instruction permitted the jury

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

to consider "[e]vidence of other acts" to "establish the defendant's motive, opportunity, intent, plan, absence of mistake or accident" in accordance with Arizona Rule of Evidence 404(b). *See* Ariz. R. Evid. 404(b). But, significantly, the instruction expressly forbade the jury from considering "[e]vidence of other acts" in accordance with Rule 404(c), which permits "evidence of other . . . acts . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." *See* Ariz. R. Evid. 404(c). The instruction admonished the jury: "You must not consider [evidence of other acts] to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense." In other words, the jury could consider evidence that May had molested one child as, for example, evidence that May had not mistakenly or accidentally touched the other children. But the jury could not consider evidence that May had molested one child as evidence of sexual propensity to molest children generally.

It was a reasonable strategy to move forward with a jury that had specifically been prohibited from considering "evidence of other . . . acts" as proof of May's "aberrant sexual propensity." *See* Ariz. R. Evid. 404(c). At a retrial, the jury might have been allowed to consider other acts as evidence of May's character—which could have increased the risk that jurors would punish May for perceived bad character regardless of whether they were persuaded by the evidence that he had committed all of the alleged

crimes. *See, e.g.*, 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5382 (criticizing Federal Rules of Evidence 413 to 415, which are similar to Arizona Rule of Evidence 404(c), because those provisions "[a]llow[] the jury to easily cast the defendant into the category of 'The Other,' as a 'lustful rapist' or a 'depraved child molester'"); *cf. State v. Garcia*, 28 P.3d 327, 334 (Ariz. Ct. App. 2001) (noting that "the potential for unfairness [was] particularly high" in a case where "many very young victims . . . each testif[ied] to multiple uncharged molestations," and where the trial judge admitted the uncharged acts as proof of the defendant's character). The difference between allowing in other acts to prove only May's intent, versus allowing in other acts to prove both May's intent and his character, could reasonably be viewed as a meaningful one by counsel in Thompson's shoes. *See generally State v. Scott*, 403 P.3d 595, 600 n.3 (Ariz. Ct. App. 2017) (observing that the appropriate "consideration and use by the jury of evidence of a prior crime differs significantly depending upon whether it is admitted . . . under Rule 404(b), or 'to show that the defendant had a character trait giving rise to an aberrant sexual propensity . . .' under Rule 404(c)").

In the trial that happened, the prosecutor had not pursued the admission of character evidence under Rule 404(c) and had never asked the jurors to infer from a finding that May had engaged in any of the charged acts that he had a propensity for aberrant sexual acts. But once the prosecution knew that Thompson's primary strategy at trial had been to argue that May had never inappropriately touched the

children at all—a defense that could be particularly undermined by propensity evidence if the jury did not believe that defense as to at least one child—the prosecution would be especially inclined to seek an instruction about propensity evidence at a retrial. And there was reason to think that if the prosecutor had requested use of Rule 404(c) evidence at a retrial, the court would have granted it. At the pretrial hearing on the motion to sever the counts against May, the trial court had expressly contemplated that the evidence with respect to each child could be admissible with respect to the other children under both Arizona Rule of Evidence 404(b) and Rule 404(c). In light of these considerations, it was a reasonable strategic choice for Thompson to allow the existing jury to continue deliberating with the more favorable instruction.

More generally, Thompson could reasonably have concluded that it would be risky to give the State a second bite at the apple because the State would be able to refine in other ways the case it presented at the first trial. *See generally, e.g.*, *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) ("[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."); *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (noting that the prosecution may "learn from its mistakes and put [on] a more persuasive case the second time around" (quoting *United States v. Moran*, 393 F.3d 1, 10 (1st Cir. 2004))). For example, the State argues that the prosecution could have "revis[ed] its cross-examination of May and other defense witnesses," "call[ed] new witnesses," and

sought to reconsolidate the count related to Nicholas with the counts related to the other children. The State also could have sought to address inconsistencies and gaps in the children's testimony by retaining an expert witness who might testify that "children's memories tend to be more simplistic and less rich in detail" and that "children do not tend to recall time[lines] and dates." *See Kurtz v. Commonwealth*, 172 S.W.3d 409, 413 (Ky. 2005). May's own defense strategy expert admitted that the State would benefit at any retrial from having a record of the first trial.

Of course, May would also profit from having that record at a retrial. But it was reasonable to think the State would profit more. Due to asymmetries in disclosure obligations, defense counsel was probably able to learn more about the prosecution's case before trial began than the other way around. *Compare* Ariz. R. Crim. P. 15.1 (listing the State's relatively broader disclosure obligations), *with* Ariz. R. Crim. P. 15.2 (listing the defendant's relatively narrower disclosure obligations); *see also generally State v. Helmick*, 540 P.2d 638, 640 (Ariz. 1975) (observing that "discovery in a criminal case is not really a two-way street" because "[t]he constitutional protections of the Fifth and Fourteenth Amendments deny to the prosecution full disclosure of information from the defense" (quoting *Wright v. Superior Court*, 517 P.2d 1261, 1264 (Ariz. 1974))). At a retrial, any informational advantage the defense had prior to the first trial would be diminished. *See* Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 506 (1977) ("The government may be aided upon retrial merely by having observed defense counsel's tactics on cross-examination or by

having learned the nature of any substantive defense. These possibilities are particularly important because . . . the prosecution generally lacks the opportunity to learn much prior to trial.").

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

The dissent's argument that Thompson should have attempted to ascertain the facts about "what may have occurred after the jury was discharged" fares no better.

Dissent at 50. Investigation of the facts would have required questioning jurors in open court, in front of the judge and the prosecutor. The jurors presumably would have described using their cell phones after being excused. Even in the absence of evidence that jurors' use of their cell phones had prejudiced them—and we take this opportunity to note that the record before us is devoid of any such evidence—this could have prompted the judge to disallow further deliberations. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016) (explaining that "courts should . . . ask to what extent just-dismissed jurors accessed their smartphones or the internet" when deciding whether to reempanel a jury); *State v. Crumley*, 625 P.2d 891, 895 (Ariz. 1981) ("It is simply too dangerous a practice to discharge the individual jurors . . . , send them back into the community . . . , and then recall those same jurors.").[15]

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

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

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

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

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

[17] May argues in his briefing that "[t]here is a difference between deciding whether to seek a mistrial and taking the radical, and

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

III.

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

IKUTA, Circuit Judge, concurring:

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

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highly unusual, step of reconstituting the jury to allow previously discharged jurors to begin their deliberations anew." We agree that the particular situation counsel faced was unusual. But May does not explain how that would or should alter defense counsel's calculus in weighing the risks of a retrial after mistrial against proceeding with the current jury.

FRIEDLAND, Circuit Judge, concurring:

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

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

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

BLOCK, Senior District Judge, Dissenting:

The majority holds that "we cannot say that [May's lawyer's] decision to continue with the current jury rather than risking a retrial—which he reached after

briefly consulting with May about the choice—fell outside 'the wide range of reasonable professional assistance'" under the constraints of *Strickland v. Washington*, 466 U.S. 668 (1984).

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

I.

A.

I start with the unimpeachable official trial transcript. It tells us that at 2:58 p.m. on Friday, July 12, 2007, the jury rendered a note, after deliberating for two days, reporting that "we are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." The court then gave the jury the Arizona-

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

equivalent of an *Allen* charge and recessed from 3:00 until 3:26 p.m., when it received a second note, filed at 3:30 p.m., of the same import, but adding: "We do not have significant dispute over the facts or the elements of law, or how to apply the law to the facts. We feel we need some guidance to 'proof beyond reasonable doubt.'"

The following then transpired:

THE COURT: Let's bring in the jury.

(Jury enters the courtroom.)

THE COURT: Please be seated. The record will show the presence of the jury, counsel and the defendant.

Ladies and gentlemen, I have received your most recent note and based upon the information contained in that note after discussing it with the attorneys, I'm going to declare a mistrial. I know you are disappointed not to be able to reach a verdict, but sometimes that happens. Some cases are more difficult to resolve than others.

On behalf of the members of the participants in this trial, I want to thank you for your service to the community. You have gone above and beyond what we typically ask jurors to do and most grateful for your time and attention. The attorneys indicated that they may wish to speak with you. You are certainly under no obligation to do so. If you are willing to speak with the

> lawyers, I would ask that you wait back in the jury room and they will be in shortly.
>
> Again, thank you very much for your time and attention. You are excused. Have a good weekend.

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

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

> THE COURT: Well, we're back on the record. The bailiff has received a communication from the jury that they do not wish to have a hung jury and wish to continue deliberating and communicate that to the counsel.
>
> Any objection from the State?
>
> MR. BEATTY: Not from the State.
>
> THE COURT: Any objection [from May's counsel], Mr. Thompson?
>
> MR. THOMPSON: No, your Honor.
>
> THE COURT: All right. I'm going to then advise the bailiff to communicate with the jury that they may continue deliberating and to let us know.

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

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

What is known, however, is that the court used the bailiff as its surrogate to give instructions to the jury rather than to call the jurors back into the courtroom and that, tellingly, May's counsel's response when asked if he had any objection to continued deliberations was instantaneous. What is perfectly clear from the trial record, therefore, is that Thompson never asked the court to give him any time to think about this most critical decision or even to speak to his client.[2]

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

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

From all of that, the majority acknowledges simply that "May hired a defense strategy expert, who testified . . . that he believed Thompson was ineffective," and reports only the following snippet from the PCR record—taken from Thompson's Declaration: "[B]efore responding that the defense had no objection to the jury's resuming deliberation, he had 'a very brief conversation' with May about the alternative strategies of continuing with the jury or risking a retrial," and "further stated that he was 'caught in the moment by a circumstance [he] had never before encountered in almost 300 previous felony jury trial [sic].'"[3]

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

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

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

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

3. Thompson's Declaration states that "[a]t the moment Judge Stephens informed the courtroom of the jury's desire to continue deliberating, [he] was standing at counsel table, where Mr. May was sitting." Apparently, this is when Thompson had that "brief" conversation with May, although the official trial transcript makes no mention of what had then transpired aside from Thompson's instantaneous response that he had no objection to the continued deliberations.

4. Although the majority accurately reports that Thompson was "[c]aught in the moment," it fails to mention that Thompson then acknowledged that he "did not consider what had caused the jury to change their minds, whether we should inquire as to what had happened, or whether the jury—having been discharged and released from their oath and admonitions—could even be reconstituted." In other words, Thompson was the veritable "deer in the headlights" and, other than his awareness that the trial transcript would obviously be available at a retrial, he gave no thought whatsoever to the wisdom of allowing the jury to engage in further deliberations after it had been discharged.

5. May's Affidavit stated:

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

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

> [W]hen you get a mistrial . . . you close up your file and get out of the courtroom as fast as you can. . . . [B]y all defense standards, you have

> won not with an acquittal, but you leave with your client . . . to live and fight another day.

The expert then testified that:

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

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

> Well, what reasonable objective standards would require is that, one, first you gather whatever information is available about what just went on, either through the bailiff advising on the record, the Court advising on the record so you have the information—whatever information is available you have. It might even require a voir dire of certain members of the jury, and then after you gather the information, you take whatever time is necessary and you ask the

> Court's indulgence . . . to explain to your client what just happened, here are the pros, here are the cons, here's my recommendation to you, here's the risks, here's the rewards, and then you and the client come to a collective decision.[4]

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

> Ruggiero: Last question. When you guys were back in the jury room between the time the mistrial was declared and the time you came back, did anyone make any phone calls, get on their cell phones?
>
> Proeber: Absolutely every one of us.
>
> Ruggiero: Did you call out?
>
> Proeber: I'm sure I did.
>
> Ruggiero: Who did you call?

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

Proeber: I don't remember.

Ruggiero: Did you talk about the trial?

Proeber: My friend, something, saying oh my God it's over.

Ruggiero: Did you–

Proeber: Thank God I'm coming back to work now. I mean, I'm sure.

Ruggiero: Did others make calls?

Proeber: Every one of us was on our cell phones walking out.

B.

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

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

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

C.

The majority has devoted its entire opinion to a detailed analysis of the trial testimony and evidence, yet that is beside the point unless we were to hold that

counsel's mindless acquiescence to resumed deliberations was an irrelevancy.

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

He also had an obligation "to consult with the defendant on important decisions." *Strickland*, 466 U.S. at 688. Certainly, this was an important decision.[5] At best, the record reflects a 20- to 30-second conversation between counsel and client where apparently all that was mentioned was the obvious—that the trial transcript would be available at a retrial. This is hardly a meaningful consultation. *See, e.g.*, *U.S. ex rel. Washington v. Maroney*, 428 F.2d 10, 12–13 (3rd Cir. 1970) (commenting on an ineffective conference between counsel and defendant that lasted between one to ten minutes: "This brief encounter between Washington and counsel took place in open court . . . . It was in no respect a private discussion, but was a

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

hurried, whispered meeting in an atmosphere where a genuine opportunity for disclosure of information or a discussion of defense was impossible."). Nor could it be a meaningful conversation if Thompson had not acquired basic facts and had not taken a modicum of time to explore the law. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his *failure to perform basic research* on that point is a quintessential example of unreasonable performance under *Strickland*." (emphasis added)).

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

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

1. The Law & Prevailing Professional Norm

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

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

Authorities teaching that defendants benefit when hung juries result in mistrials are legion. Such authorities vary in time and format and abound in criminal defense manuals, reported cases, and legislative debates from across the country. *See, e.g.*, Blue's Guide to Jury Selection § 28:5; Criminal Trial Techniques § 66:11 ("Even where the case is perceived to be progressing well for the defense, the potential

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

waiver of an applicable issue by the failure to seek a mistrial almost always warrants the motion."); Massachusetts Superior Court Criminal Practice Manual, ch. 18, CRIMP MA-CLE 18-1 ("Defense counsel who oppose mistrial [when a jury is deadlocked] should have very strong reasons to hope for acquittal; the wiser course usually is to seek the mistrial and return to fight another day.").[7]

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

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

defense attorney would generally be well-advised to take it.

Apart from that, a mistrial means more time for negotiations, potential witness unavailability, new evidence, and so forth. *See, e.g.*, *United States v. Diggs*, 522 F.2d 1310, 1321 n.24 (D.C. Cir. 1975) ("[A] mistrial need not 'require' a retrial. Witnesses disappear; other considerations often affect the prosecutor's discretion."); *see also* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 Cardozo L. Rev. 1417, 1417 n.2 (1997) (explaining that trials ending in hung juries are beneficial for criminal defendants in part because not every hung jury results in a retrial). In May's case, a mistrial also meant guaranteed time out of jail, since he was out on bond.

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

Moreover, in addition to being cognizant of the prevailing professional norm, some simple research would have informed Thompson that there was caselaw applying the then-prevailing common law rule that once a jury has been discharged it could not be reconstituted. *See, e.g.*, *Blevins v. Indiana.* 591 N.E.2d 562, 563 (Ind. App. 1992) ("Any action of the jury after its discharge is null and void."); *Michigan v. Rushin*, 194 N.W.2d 718, 721–22 (Mich. App. 1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green*, 995

S.W.2d 591, 614 (Tenn. 1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia*, 111 S.E. 291, 294 (Va. 1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court").[8]

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

> Even without full sequestration, the common-law rule remains sensible and administrable. After discharge, the court has no power to impose restrictions on jurors, and jurors are no longer under oath to obey them. Jurors may access their cellphones and get public information about the case. They may talk to counsel or the parties. They may overhear comments in the hallway as they leave the courtroom. And they may reflect on the case—away from the pressure of the jury room—in a way that could induce them to change their minds. The resulting prejudice can be hard to detect. And a litigant who suddenly finds himself on the losing end of a materially different verdict may be left to wonder what may have happened in the interval between the jury's

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[8] Generally, these criminal cases have involved juries that were discharged after rendering a verdict. However, *Blevins* considered the specific factual circumstance of a jury discharged after the declaration of a mistrial, as in May's trial. 591 N.E.2d at 563.

> discharge and its new verdict. Granting a new trial may be inconvenient, but at least litigants and the public will be more confident that the verdict was not contaminated by improper influence after the trial has ended. And under this bright-line rule, district courts would take greater care in discharging the jury.

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

2. The Facts

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

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

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

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

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

Tellingly, the Court then concluded:

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

Id. at 1895 (emphases added).

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

D.

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

Indeed, a number of questions jump off the pages: (1) What were the precise communications between the bailiff and the jurors both before and after the judge discharged the jurors? In particular, what instructions did the bailiff give the jurors as the judge's surrogate? (2) Was there any communication in the hallway between some of the jurors—let alone with the bailiff—

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

before they all returned to the jury room? (3) Were there individual pressures applied by some of the jurors to others outside the jury room to continue deliberations? (4) Since the record contains the unchallenged report from one juror that "everyone was on our cellphones walking out," to whom were the jurors talking, and what was said?

I have profound respect for the candor expressed by my colleague in her concurring opinion, and for her humanity in recognizing that "[t]he potential that May was wrongly convicted is especially concerning because he was sentenced to seventy-five years in prison—a term that all but ensures he will be incarcerated for the rest of his life,"[10] and that his sentence "reflects poorly on our legal system."[11] But I cannot agree with her that

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

[11] Judge Friedland might also have noted that it also reflects "poorly on our legal system" that Arizona is the only state that places the burden of proving lack of intent on the defendant, and that it may well be that if the issue ever reached the Supreme

there were "significant constraints on the scope of our review." The majority simply limited its review to an extensive analysis of those parts of the record that apparently played a large part in the jurors' inability to reach a verdict before the mistrial was declared. But May's counsel never indicated that he had reflected for one moment about the weaknesses of the prosecution's case—let alone discussed them with his client.

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

II.

A.

Although not critical to the dispositive conclusion that Thompson's performance was objectively deficient because of his failure to make an informed decision—which also prevented him from effectively consulting with his client—I also take issue with the majority's conclusion that "[t]here were good reasons to think that sticking with the current trial record and jury would

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Court, it would agree with Judge Wake that it is unconstitutional. *See May v. Ryan*, 245 F. Supp. 3d 1145, 1149 (D. Ariz. 2017) ("Arizona stands alone among all United States jurisdictions in allocating the burden of proof this way."); *Schad v. Arizona*, 501 U.S. 624, 640 (1991) ("[A] freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions" may signal constitutional infirmity.). However, as explained in our Memorandum, Thompson could not be faulted for failing to object on that ground.

better serve May's interests than would a new trial." While the majority has finely combed the record in its effort to support its conclusion, its principal rationales are that May's counsel could have reasonably wanted to avoid a second trial because (1) "the State would be able to refine in other ways the case it presented at the first trial," and (2) a less favorable jury instruction might have been given at a second trial. Against the available evidence, these conclusions are subjective, speculative, and unsupportable.

The first rationale simply makes no sense. It would render nugatory the entire body of law extolling the virtues of a mistrial since the record of any prior trial would always be available to the government at a retrial. In any event, I see nothing in the record explaining what the State could have meaningfully done better if it got a second bite at the apple. The State makes several arguments, which the majority presumably credits. For example, at oral argument the State argued that May's demonstrably false statements that he did not know one of the victims, or even "half a dozen children," were particularly damaging to his defense and would have been used against him in a second trial. Yet those statements were made in a pretrial police interview and had been admitted in the first trial. They would not be more damaging in some future proceeding. In addition, May had vigorously proclaimed his innocence at trial, and it is unclear what benefit the State could have derived from having a copy of that testimony. In short, the majority's

conclusory argument that the State could have refined its case at a second trial rings hollow.[12]

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

B.

To allow all this speculation by two of the three judges on this particular panel to trump the body of law supporting a retrial, especially in light of the prevailing professional norm and the unimpeached expert testimony, would be a miscarriage of justice.

Notably, the majority ignores that prevailing professional norms are valuable guides to determining what is reasonable; and since *Strickland* "calls for an inquiry into the objective reasonableness of counsel's

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

performance, not counsel's subjective state of mind," a reviewing court must identify the prevailing professional norm *before* it decides whether a potential justification for counsel's performance is objectively reasonable. *Harrington v. Richter*, 562 U.S. 86, 105, 110 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms.'"). Otherwise, there is no anchor to guard against decisions pegged on the predilections of judges.

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

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

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

III.

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

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

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

Asking whether it constitutes fundamental error to "allow[] the jury to reconvene" (as the Court of Appeals did on direct review) is different than asking whether there was a "reasonable probability" that the trial judge would have sustained an objection to resumed deliberations *if* one had been made (which was the question posed to the Court of Appeals in the PCR proceeding). *Cf. United States v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984) (assessing prejudice based

upon "[w]hether the trial court would have sustained the objection"). When the PCR court relied on the direct-review decision to hold that May had not shown prejudice, it committed a non sequitur: That May had not shown prejudice under a "fundamental error" standard did not mean that he failed to show prejudice under *Strickland*.[13]

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

Moreover, under a correct application of *Strickland*, there can be no doubt that Thompson's deficient performance prejudiced May. *Cf. Williams*, 529 U.S. at 396 (plurality opinion of Stevens, J., joined by

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

O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.) (applying *Strickland* to ineffective-assistance claim after holding state-court decision was "contrary to" clearly established law). By the time the jury resumed deliberations, the trial judge had declared a mistrial, discharged the jury, and set a new trial date. The trial also was of relatively short duration. Given those considerations, there was "a reasonable probability" that if trial counsel had objected to reconstituting the jury, the trial judge would have sustained the objection and maintained the mistrial. *Strickland*, 466 U.S. at 694. Indeed, the trial judge might well have granted such an objection simply to prevent the possibility or perception of juror contamination, or out of a concern that a decision to allow resumed deliberations would be erroneous (even if such error did not rise to the heights of a "fundamental error"). Under *Strickland*, no more is needed to show prejudice.

CONCLUSION

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

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

severe strictures of Arizona's sentencing regime.[15] May has already served ten years based on his counsel's ineffectiveness, and has been at liberty since March 2017, without incident, ever since Judge Wake granted his *habeas* petition based on a statute of dubious constitutionality.[16]

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[15] Although May has raised a claim that the Eighth Amendment rendered his harsh sentence unconstitutional, I concurred with the majority in our Memorandum that the claim was procedurally barred. In any event, the Supreme Court has foreclosed that argument. *See Ewing v. California*, 538 U.S. 11, 30–31 (2003). While I am mindful of that precedent and the seriousness of May's offenses, I cannot help but agree with the dissenters in that case, two of whom are still sitting Justices. A common-sense proportionality review, which would weigh May's criminal conduct against his otherwise clean record and all-but-life sentence, would doubtless suggest that the punishment is cruel and unusual, especially taking into account sentencing patterns in other jurisdictions. *See id*. at 35 (Breyer, J., dissenting).

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

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: March 27, 2020]

No. 17-15603

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellants.	)
	)

MEMORANDUM[*]

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

No. 17-15704

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellees.	)
	)

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

Argued and Submitted March 7, 2019
Phoenix, Arizona

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

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

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

[1] A concurrently filed majority opinion resolves May's claim that his lawyer rendered ineffective assistance of counsel by failing to

1. As the State properly conceded at oral argument, we review de novo under *Strickland v. Washington*, 466 U.S. 668 (1984), whether counsel's ineffectiveness constitutes cause and prejudice to excuse procedural default of a claim, even where the state court considered the same allegations of deficient performance. *See Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2017). Reviewing de novo, we conclude that May's trial counsel was not ineffective for failing to object to the constitutionality of the child molestation statute. Given the long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, *see State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995), which provided the background for the "prevailing professional practice at the time of the trial," *see Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam),[2] we cannot conclude that trial counsel's failure to object to the constitutionality of the statute's placing the burden of proving lack of intent on the defendant "fell below an objective standard of reasonableness," *see Strickland*, 466 U.S. at 688. The district court erred in holding otherwise. Because we do not reach the constitutionality of the Arizona child

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object to the resumption of jury deliberations. Judge Block dissents from that decision.

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

molestation statute, we vacate the district court's judgment in that respect. *See C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 988-89 (9th Cir. 2011); *see also Camreta v. Greene*, 563 U.S. 692, 713-14 (2011).[3]

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

May contends that his lawyer objectively and unreasonably erred by failing to further confer with May when the jury requested to resume deliberations after the trial judge declared a mistrial. In May's view, the decision whether to accept a mistrial fundamentally belongs to the defendant. But the record shows that May's lawyer briefly conveyed the options to him before deciding not to object to the jury continuing with deliberations, and May has not produced an affidavit or testified during postconviction proceedings that he would have asked for his lawyer to object if he had been consulted more extensively. The Arizona Court of Appeals therefore did not unreasonably conclude that any failure to further confer did not result in prejudice.

May argues that his lawyer was ineffective for failing to call any experts to discuss May's neurological

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

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

May asserts that his lawyer also was ineffective by failing to consult with or call an expert about the malleability of children as witnesses. The Arizona Court of Appeals' ruling on postconviction review, which incorporates the trial court's ruling, is the last reasoned decision on this claim. We conclude that the court reasonably applied *Strickland* in evaluating May's counsel's decision to raise issues with the children's testimony through his own cross-examination rather than through an expert witness.

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

Even assuming that an actual innocence claim is cognizable in a federal habeas proceeding in the non-capital context, May has not made a sufficient showing

to meet that "extraordinarily high" bar. *See Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997)).

The remainder of May's claims were procedurally defaulted because of his failure to properly raise them in state court. To be an adequate bar to federal habeas review, a state procedural rule must be "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984) (stating the rule must be "firmly established and regularly followed"). "Arizona's waiver rules are independent and adequate bases for denying relief." *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014) (citing *Stewart v. Smith*, 536 U.S. 856, 859-60 (2002) (per curiam)); *see* Ariz. R. Crim. P. 32.2.

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

The Arizona Court of Appeals on direct appeal and collateral review also held that five other claims were procedurally barred: that (1) the jury lacked jurisdiction to return a verdict after the mistrial was declared; (2) the jury inappropriately considered

extrinsic evidence; (3) the prosecutor vindictively obtained a new indictment after May successfully moved for a remand; (4) the prosecutor improperly coached one of the witnesses during a recess in his trial testimony; and (5) May's sentence constituted cruel and unusual punishment under the Eighth Amendment. The state court's determinations that the arguments were procedurally barred constitute an adequate and independent bar to our review, *see Stewart*, 536 U.S. at 860-61, and May has not demonstrated cause and prejudice to excuse the defaults.

REVERSED.[4]

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

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: March 27, 2020]

No. 17-15603

D.C. No. 2:14-cv-00409-NVW
District of Arizona, Phoenix

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellants.	)

ORDER

No. 17-15704

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellant,	)
	)

v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellees.	)
	)

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

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

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

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

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

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: March 26, 2019]

No. 17-15603

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellants.	)
	)

MEMORANDUM[*]

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

No. 17-15704

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
CHARLES L. RYAN; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellees.	)
	)

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

Argued and Submitted March 7, 2019
Phoenix, Arizona

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

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

1. As the State properly conceded at oral argument, we review de novo under *Strickland v. Washington*, 466 U.S. 668 (1984), whether counsel's ineffectiveness

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

constitutes cause and prejudice to excuse procedural default of a claim, even where the state court considered the same allegations of deficient performance. *See Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016). But, even reviewing de novo, we reach the same conclusion as did the state court with respect to May's claim that trial counsel was ineffective for failing to object to the constitutionality of the child molestation statute. Given the long-standing status of the law in Arizona that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, *see State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995), which provided the background for the "prevailing professional practice at the time of the trial," *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam),[1] we cannot conclude that trial counsel's failure to object to the constitutionality of the statute placing the burden of proving lack of intent on the defendant fell "below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688. The district court erred in holding otherwise. Because we do not reach the constitutionality of the Arizona child molestation statute, we vacate the district court's judgment in that respect. *See C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 988-89

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

(9th Cir. 2011); *see also Camreta v. Greene*, 563 U.S. 692, 713-14 (2011).

2. To evaluate May's claim that trial counsel was ineffective for failing to object to reconstituting the jury after a mistrial was declared, the Antiterrorism and Effective Death Penalty Act instructs us to "look to the last reasoned state-court decision" analyzing that claim. *Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). We will accord deference to that state court decision unless it "(1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). But, where the state court has not ruled on the merits of the claim, we review the claim de novo. *See Stanley v. Cullen*, 633 F.3d 852, 859-60 (9th Cir. 2011). In the ineffective assistance of counsel context, if the state court resolved the claim on one prong of *Strickland* without reaching the other, we assess the merits of the unaddressed prong de novo. *See Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) (discussing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), and *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam)).

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

whether May's counsel was objectively deficient for failing to object to the continued deliberations.

Given the trial record of this particular case, counsel's failure to object to permitting the jury to resume its deliberations after the trial judge declared a mistrial and discharged the jury constituted objectively deficient performance. It was not "sound trial strategy," *see Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)), for May's lawyer not even to attempt to preserve the mistrial based on a hung jury, because a mistrial here would have been a clearly advantageous result for May. The State's case turned entirely on the jury's believing the testimony of several child victims who all had struggled to provide details of the alleged molestation on the stand, including failing to remember whether some of the incidents even took place. The transcripts memorializing the witnesses' failure to remember during the first trial would have been available to May in any second trial. May's counsel also had good reason to believe that, if the case had to be reset for a new trial, the victims might decide not to testify again. One of the counts had already been dismissed prior to the first trial because the victim's parents preferred that the victim receive counseling rather than testify, and the father of one of the other victims made statements at the pre-trial motions conference reflecting frustration with the length of proceedings and thereby suggesting a possibility that more victims might refuse to participate in a second trial. There was therefore a reasonable chance that, if the mistrial had remained in place, the State would not have pursued a second trial

at all, or that the State would have pursued fewer charges if it did re-try May.

When pressed at argument about how May would have been worse off in a second trial, the State could only posit that May's counsel did not want the State to have an opportunity to prepare for a second trial with a copy of May's testimony from the first trial at hand. But May had vigorously proclaimed his innocence at trial, so it is unclear what benefit the State could have derived from having a copy of that testimony. The State contended at oral argument that May's demonstrably false statements that he did not know one of the victims or even "half a dozen children" were particularly damaging to his case and would have been used against him in a second trial. But those statements were made in a pre-trial police interview and had already been admitted in the first trial—they would not be more damaging in some future proceeding, so the way they were introduced and responded to in the first trial did not make a second trial riskier for May.[2]

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[2] Despite these facts, the dissent agrees with the State that the prosecution's possession of the transcript would have disadvantaged May in a second trial because "the prosecutor would be able to refine his case and improve the chances of obtaining a conviction if he got a second bite at the apple." That may be true in some cases, but there is no evidence it is true on this record. We further note that the only expert to opine on May's counsel's decision concluded that failing to pursue the mistrial fell far short of reasonable professional judgment. The expert testified in the postconviction evidentiary hearing that, in his view, taking the mistrial would be the best defense strategy in all cases, but was especially so in this one because of a trial record that only advantaged May. Consequently, we do not believe that May's

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

3. We also review de novo the prejudice prong of May's claim that trial counsel was ineffective for failing to object to reconstituting the jury after a mistrial was declared, because the Arizona Court of Appeals' explanation of why there was no reasonable probability that an objection would have resulted in a different outcome was either contrary to or an unreasonable application of *Strickland*. In addressing whether May was prejudiced by his counsel's failure to object to the resumed deliberations, the Court of Appeals concluded that "May [could not] show prejudice because [the court] rejected the underlying claim of error on appeal." *State v. May*, 2012 WL 3877855, at *4. On direct review, however, the Court of Appeals had analyzed whether the jury was improperly reconstituted solely for *fundamental error*, *State v. May*, No. 1 CA-CR

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counsel's refusal to object to the resumption of deliberations was a "reasonable on-the-spot calculation," even under the strong deference of *Strickland*. The dissent accuses us of improperly engaging in hindsight, but every fact we have pointed to was available to May's counsel at the time the trial judge asked whether either side objected to the jury resuming deliberations.

07c0144, 2008 WL 2917111, at *2-3 (Ariz. Ct. App. July 24, 2008), which asks the court to analyze whether (1) there was error, (2) the error was fundamental, and (3) the error prejudiced the defendant. *State v. Henderson*, 115 P.3d 601, 608 (Ariz. 2005). Arizona courts define "fundamental error" as "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at 607 (quoting *State v. Hunter*, 688 P.2d 980, 982 (1984)). Asking whether the trial judge's failure to sua sponte maintain the mistrial amounted to fundamental error is different than asking whether the trial judge would have sustained an objection to the jury resuming deliberations if one had been made—the judge might have granted such an objection to prevent even the possibility of juror contamination, or to avoid a ruling that would have been erroneous but that would not rise to the level of fundamental error.

The dissent reads the Court of Appeals' opinion differently, interpreting the decision as holding that there was no prejudice from the lack of objection because there was no error whatsoever in reconvening the jury, let alone fundamental error. Even under a charitable reading, the Court of Appeals did not hold that there was no error in how the jury reconvened here. As the dissent notes, the court instead held there was no per se rule that the jury could not be reconvened after discharge, so there was no "structural error requiring reversal." The use of the phrase "structural error requiring reversal" connotes that the court was concluding any error was not fundamental,

not that there was no error in the first place.[3] The Court of Appeals' complete reliance on its prior analysis was therefore misplaced and either did not apply *Strickland* whatsoever or applied it in an unreasonable manner.

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

4. Accordingly, because we can grant relief on alternative grounds, *see Buckley v. Terhune*, 441 F.3d

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

688, 694 (9th Cir. 2006) (en banc), the judgment of the district court is **AFFIRMED**. We need not reach May's other arguments for affirmance.[4]

IKUTA, Circuit Judge, dissenting:

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

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

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

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

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

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

therefore we must defer to the state court's decision. *See id.* at 24–25. The majority's decision to the contrary fails to give the state court's decision the deference which is due.[1]

Second, even if we reviewed the deficiency prong de novo, the majority errs in holding that May's counsel was deficient. Under *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. We are precluded from "second-guess[ing] counsel's assistance," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In other words, "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted).

Here, May's lawyer explained that his decision not to object was a tactical one. He was motivated by a reasonable concern that if the case were retried, the

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

prosecution would have "a complete transcript of [May's] testimony from the mistried case." Further, May's counsel could have reasonably thought that the jury would return acquittals, given that the jury had previously deadlocked and received an impasse instruction. "Reconstruct[ing] the circumstances of counsel's challenged conduct" and "evaluat[ing] the conduct from counsel's perspective at the time," *Strickland*, 466 U.S. at 689, May's counsel made a reasonable on-the-spot calculation that it would better serve his client to go forward with the current jury. There is no basis for concluding that this decision violated prevailing professional norms; a reasonable attorney could conclude that a jury as divided as this one might acquit his client while, on the other hand, the prosecutor would be able to refine his case and improve the chances of obtaining a conviction if he got a second bite at the apple. Exercising the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, we must affirm the Arizona Court of Appeals's determination that there was no deficiency here.

The majority's decision to the contrary makes all the errors *Strickland* warned us against. Relying on "the distorting effects of hindsight," *id.* at 689, the majority speculates that "mistrial here would have been a clearly advantageous result for May." Indulging in armchair quarterbacking, the majority surveys the nature of the State's case, speculates that the victims might have dropped out if there was a second trial, and supposes that should victims drop out, the State would become discouraged and choose not to try May again. In response to May's counsel's reasonable assessment

that the prosecutor would have an advantage if offered a mulligan, the majority presents as legal analysis a series of detailed conjectures and predictions about how a second trial would unfold.[2] But pure speculation is insufficient to establish deficient performance, and we should reject such uninformed prognostications. *See Gonzalez v. Knowles*, 515 F.3d 1006, 1014–16 (9th Cir. 2008); *Bragg v. Galaza*, 242 F.3d 1082, 1088–89 (9th Cir. 2001), as amended on denial of reh'g, 253 F.3d 1150 (9th Cir. 2001).

Because AEDPA requires us to defer to the decision of the Arizona Court of Appeals, I would reject May's claim of ineffective assistance of counsel for failing to object to the resumption of jury deliberations. The majority's conclusion is contrary to AEDPA and binding Supreme Court precedent. Therefore, I dissent.

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

APPENDIX G

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. CV-14-00409-PHX-NVW

[Filed: March 28, 2017]

Stephen Edward May,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

[*Table of Contents Has Been Omitted for Printing Purposes*]

INTRODUCTION

Petitioner Stephen May was convicted under Arizona's child molestation law, which does not require the state to prove the defendant acted with sexual intent. Rather, once the state proves the defendant knowingly touched the private parts of a child under

the age of fifteen, to be acquitted the defendant must prove his *lack* of sexual intent by a preponderance of the evidence. Arizona stands alone among all United States jurisdictions in allocating the burden of proof this way. Arizona is the only jurisdiction ever to uphold the constitutionality of putting the burden of disproving sexual intent on the accused.

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

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

The Court has considered all the briefing and reviewed the R&R de novo. *See* Fed. R Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made). May raised numerous claims in his petition, and for the most part the Court agrees with the Magistrate Judge's determinations, accepts the recommended decision within the meaning of Rule 72(b), and overrules May's objections. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge"). May also raised concern that the R&R appeared to copy large volumes of text "virtually verbatim" from the State's briefing, including several background facts that were incorrect. (Doc. 38 at 13.) While this is concerning, none of the affected portions, including factual errors, make a material difference.

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

The state courts on collateral review also disavowed making any ruling on the merits of May's constitutional claim. Because no state court

adjudicated the merits of May's constitutional claim, the question must be considered de novo here. But even if measured under the deferential standard of 28 U.S.C. § 2254(d)(1), an adjudication against May would be contrary to, or involve an unreasonable application of, clearly established Federal law, as decided by the Supreme Court of the United States.

The State deprived May of his constitutional right to due process of law and proof of guilt beyond a reasonable doubt. By crafting its child molestation law as it did, Arizona spared itself from proving sexual intent and instead burdened May with disproving it. Absent sexual intent, however, all the conduct within the sweep of the statute is benign, and much of it is constitutionally protected. Nothing in the revised elements of the crime distinguishes wrongful from benign from constitutionally protected conduct. One must look to the defendant's burden of proof to see what this statute is really about, which is the same thing it has always been about: the defendant's sexual intent. This shifting to the accused of the burden of disproving everything wrongful (here the only thing wrongful) about the prohibited conduct cannot stand unless there are no constitutional boundaries on a state's ability to define elements, transubstantiate denials into affirmative defenses, and be master of all burdens of proof. The State argues precisely that in defense of May's conviction, that element-defining and burden-shifting are no longer part of justiciable constitutional law. But there are boundaries, some well-settled boundaries, and this statute crosses them at a brisk sprint.

BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

After several days of trial, the jury deliberated for two days but could not reach a verdict. (Doc. 35 at 21-22.) They gave the judge several notes indicating they were deadlocked, and the judge accordingly declared a mistrial and dismissed them. But just minutes after the proceedings were adjourned, the bailiff delivered a note stating that the jurors, who were still in the jury room gathering their things, wished to resume deliberations. (Doc. 35 at 22.) Neither side objected, and the jury reconvened. After nearly a full day of additional deliberation, the jury convicted May on five counts and acquitted him on two. (Doc. 35 at 23.) (An eighth count was previously severed and eventually dismissed.) May's attorney moved for new trial,

arguing that the final jury instructions misstated Arizona law by requiring May to prove a lack of sexual intent (Doc. 35 at 23.) Once again, Thompson did not assert the law or the jury instructions were unconstitutional. The judge denied the motion and later sentenced May to 75 years in prison, 15 years for each count. (Doc. 35 at 24.)

After an unsuccessful direct appeal, May sought post-conviction relief in Arizona superior court. This collateral review proceeding was his first chance under Arizona procedure to raise a claim of ineffective assistance of counsel. *See State v. Spreitz,* 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002) (holding that ineffective assistance of counsel may not be presented until post-conviction review). May argued that Thompson provided ineffective assistance at trial by not challenging the constitutionality of placing the burden on him to disprove sexual intent. The superior court denied relief because of procedural default without deciding the merits of the constitutional claim (Docs. 1-11; 1-13), and the state appellate court affirmed on the decision below (Doc. 1-17). The Arizona Supreme Court summarily denied review. (Doc. 1-20.)

LEGAL STANDARDS ON FEDERAL HABEAS REVIEW

A federal habeas court cannot review a state court's denial of relief based on adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). Thus, a defendant defaults on any claim not presented to state courts in accordance with the state's procedural rules, generally barring federal habeas review. *Id.* at 731-32. Exceptions apply where

the defendant shows cause and prejudice for the default or a miscarriage of justice would result from upholding the default. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). One way a petitioner can establish cause is by showing the default resulted from ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

May did not challenge the constitutionality of Arizona's child molestation statute at trial, raising it for the first time in collateral proceedings. Since Arizona law required him to raise it at trial, May cannot raise the claim here absent a showing of cause and prejudice for his default.[1] *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding post-conviction review of any claim that could have been raised at trial or on direct appeal). However, May contends his trial attorney was ineffective in not challenging the constitutionality of Arizona's child molestation law.[2]

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal habeas will not lie on

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

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

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

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

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

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

This Court must therefore assess at the threshold whether the Arizona state courts committed either of the errors enumerated in section 2254 in rejecting May's contention of ineffectiveness of counsel to excuse his procedural default on his constitutional claim. Ineffective assistance of counsel is measured by the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel must have performed deficiently, and this performance must have prejudiced the defendant. *Id.*

ANALYSIS

I. History of Arizona's Child Molestation Law

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

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

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

Rev. Stat. of Ariz. (Penal Code) § 282 (1913).[3] That law had dropped out of the code by 1928, and not until 1965 did the state legislature pass a new law prohibiting sexual conduct with children in particular.[4] That year

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

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

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

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

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

the legislature enacted section 13-653 of the Arizona Revised Statutes, providing:

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

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

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

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

Arizona Supreme Court took it to be implied, reasoning:

> [F]rom both the word "molest" itself and the general intent of the Legislature as may be grasped from a reading of the statute as a whole, a scienter requirement is apparent. As we have said before, where a penal statute fails to expressly state a necessary element of intent or scienter, it may be implied. . . . [T]herefore, it is certainly possible for a doctor or parent to touch the private parts of a child without "molesting" him by doing so, in which case the statute has not been violated.

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

Over the next twenty years, the legislature tweaked section 13-1410 in various ways, but "[Arizona] courts continued to treat sexual interest as an 'essential element' of the offense." *State v. Holle (Holle I)*, 238 Ariz. 218, 223-24, 358 P.3d 639, 644-45 (Ariz. Ct. App. 2015), *vacated by State v. Holle (Holle II)*, 240 Ariz. 300, 379 P.3d 197 (2016). *See, e.g.*, *State v. Brooks*, 120 Ariz. 458, 460, 586 P.2d 1270, 1272 (1978); *State v. Madsen*, 137 Ariz. 16, 18, 667 P.2d 1342, 1344 (Ariz. Ct. App. 1983); *State v. Anderson*, 128 Ariz. 91, 92, 623 P.2d 1247, 1248 (Ariz. Ct. App. 1980). In 1983, the legislature enacted section 13-1407(E) of the Arizona Revised Statutes, making lack of sexual interest an affirmative defense to child molestation. *See* 1983 Ariz. Sess. Laws, ch. 202 § 10. But at that time, Arizona law on proving affirmative defenses generally was that

upon the defendant raising an affirmative defense, the burden shifted to the state to refute it beyond a reasonable doubt. *See, e.g.*, *State v. Duarte*, 165 Ariz. 230, 231, 798 P.2d 368, 369 (1990) ("[O]nce evidence of self-defense is presented, the burden is on the state to prove beyond a reasonable doubt that the conduct was unjustified."). Thus in practice, prosecutors had to prove sexual intent beyond a reasonable doubt. *See Holle I*, 238 Ariz. at 224, 358 P.3d at 645 (collecting authorities and noting, "For practical purposes . . . the enactment of § 13-407(E) did not significantly change the way courts treated sexual interest.").

Not until 1993 did the legislature amend sections 13-1410 and 13-1407(E) to their current forms. *See Holle I*, 238 Ariz. at 225, 358 P.3d at 646. Before then, the text of section 13-1410 began with the words "[a] person who knowingly molests a child . . ." before reciting the precise actions that were prohibited. *See* 1965 Ariz. Sess. Laws, ch. 20, § 3. The 1993 update revised the language to read:

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

1993 Ariz. Sess. Laws, ch. 255 § 29. The Arizona court of appeals held that the new language, which omitted the verb "molests," eliminated sexual intent as an element of the crime. *State v. Sanderson*, 182 Ariz. 534, 542, 898 P.2d 483, 491 (Ariz. Ct. App. 1995). But the court of appeals upheld the statute on the understanding that it shifted only the burden of

production to the defendant—not the burden of proof or persuasion. While it was the defendant's burden to assert lack of sexual intent as an affirmative defense, the state then bore the burden of proving sexual intent beyond a reasonable doubt. *See id.*; *Holle I*, 238 Ariz. at 225, 358 P.3d at 646. Thus, even under the *Sanderson* court's quibble on changing a verb ("molests") to a noun ("molestation"), whether a fact was treated as an element or the absence thereof as an affirmative defense had no practical consequence. Either way the state had the burden of proof beyond a reasonable doubt.

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

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

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

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

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

Though no case had so held when May stood trial, as of today, ten years later, prosecutors bear the burden of proving beyond a reasonable doubt that the defendant "intentionally or knowingly" engaged in

sexual contact with a child under fifteen, defined as any direct or indirect touching, fondling or manipulating of any part of the genitals or anus by any part of the body or by any object or causing a person to engage in such contact. *See* Ariz. Rev. Stat. §§ 13-1401(3), 13-1410(A). The defendant then bears the burden of proving by a preponderance of the evidence that such touching was without a sexual interest. The question arises here, as it no doubt will in other cases concerning essential denials relabeled as defenses to be proved, whether it is constitutional to put the burden of disproof on the defendant instead of the burden of proof on the state.

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

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

From the passage of section 13-205 until the conclusion of May's state court proceedings, no Arizona court—including those that reviewed May's conviction—addressed whether it is constitutional to require a child molestation defendant to disprove his sexual interest. In *Holle I* in 2015, the Arizona court of appeals avoided the question by distinguishing a

"defense" from an "affirmative defense," and thereby held under state law that the prosecution must still prove sexual intent beyond a reasonable doubt. *Holle I*, 238 Ariz. at 226, 358 P.3d at 647. In its 3-2 decision vacating *Holle I,* the Arizona Supreme Court held that state law makes lack of sexual intent an affirmative defense to be proved by the defendant. *Holle II*, 240 Ariz. at 311, 379 P.3d at 208. The *Holle II* court also held, for the first time anywhere in the country, that putting such a burden on a child molestation defendant does not violate federal due process of law. *Id.* That federal law ruling, handed down by the state supreme court nine years after May's conviction and three years after his state court proceedings ended, is not entitled to deference from this Court. None of the state courts in May's case decided the federal constitutional question, so this habeas court must decide it as *res nova* if it reaches the question.

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

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

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

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

That said, the Supreme Court has repeatedly cautioned legislatures against skirting *Winship* by simply extracting essential elements from offenses and putting the burden on defendants to disprove them.

The Court first addressed this in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), in which it overturned a murder conviction where the jury was instructed it could infer "malice aforethought," an element of murder under Maine law, from a mere finding that the defendant committed an intentional killing. *Id.* at 703. While the defendant could downgrade the offense to manslaughter by raising heat of passion as an affirmative defense, he carried the burden of proving heat of passion by a preponderance of the evidence. *Id.* at 686. The Court concluded that this "affirmatively shifted the burden of proof to the defendant" to disprove malice, an essential element of murder, even though the Maine supreme court had upheld the burden shifting scheme as an integral part of the state's law. *Id.* at 701.

Two years later a similar issue arose in *Patterson,* where the Supreme Court upheld a second-degree murder conviction under a New York statute that criminalized the intentional killing of another person without proof of malice. 432 U.S. at 198. The statute permitted a defendant to reduce the charge by proving by a preponderance of the evidence that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.* Malice need not be proved and lack of malice was not a permitted defense or rebuttal. The defendant nonetheless contended the charge-reduction scheme impermissibly shifted the burden of proof by effectively requiring him to disprove malice. *Id.* at 201. The *Patterson* Court disagreed, distinguishing *Mullaney* on the grounds that since the New York statute did not expressly recite malice as an element of

murder, the heat of passion defense did not negate an essential element. *Id.* at 208-09. Significantly, neither party in *Patterson* disputed that "the State may constitutionally criminalize and punish" the intentional killing of another person without more. *Id.* at 209. But the Court emphasized that while its decision "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes[,] . . . there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210 (citation and internal quotation marks omitted).

Defying the plain language of *Patterson,* at oral argument the State defended May's conviction on the basis that legislatures have complete and unfettered authority to decide both the elements of and "affirmative" defenses to any crime. According to the State, the constitutional limit is entirely a matter of form: lawmakers can force the accused to prove or disprove any fact as long as the legislature is careful to call the arrangement an "affirmative defense." Or, as in this case, a legislature can take what was for decades an element of the crime (sexual intent) and relabel the denial of it as an affirmative defense, thereby freeing the state from having to prove it and making the accused disprove it instead. At oral argument the State was candidly absolutist in maintaining that legislatures have unbounded capacity to shift to defendants the burden of disproving anything, subject only to the specific examples listed in *Patterson*: a legislature "cannot declare an individual guilty or presumptively guilty of a crime"; nor may it "validly

command that the filing of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." *Patterson*, 432 U.S. at 210. The State declined any more specific constitutional justification for allowing a state to make an accused disprove sexual intent for child molestation.[5]

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

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

reallocate traditional burdens of proof . . . ."); *Schad v. Arizona*, 501 U.S. 624, 639 (1991) (citing *Patterson* for the proposition that "there are obviously constitutional limits beyond which the States may not go" in defining offenses). The State's stance is antithetical to the very requirement of proof beyond a reasonable doubt. It is directly contrary to Supreme Court case law on the very level of generality at which the State poses it.

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

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

At a high level and as has been noted, deference to the legislature's discretion ends when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201-02. In confirming how traditions and conscience weigh in specific challenges, courts "have often found it useful to refer both to history and to the current practice of other States in determining whether a State has exceeded its discretion in defining offenses." *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (plurality opinion). A state may not "shift[] the burden of proof as to what is an inherent element of the offense," on which long history and widespread use shed light. *Id.* Of particular importance to this case, "a freakish definition of the elements of a crime that finds no analogue in history or

in the criminal law of other jurisdictions" signals possible constitutional infirmity. *Id.* At the very least, the remaining elements of the stripped-down crime must define something wrongful. *See Morrison v. California*, 291 U.S. 82, 90 (1934) ("For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . ."). Additionally, "the shifting of the burden [must] be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Id.* at 89.

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

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

Examination of both history and practice compels or at least forcefully suggests the conclusion that sexual intent is essential to child molestation. While sexual crimes against children have long been punished in America, specific laws against sexual contact with children are of more recent vintage. Both the British common law and early American jurisdictions typically treated sexual offenses against children under broader categories, such as assault with intent to commit rape, or even rape itself. *See* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason,* 22 Seton Hall Legis. J. 1, 11-15 (1997). Where such offenses did not involve sexual penetration, a handful of states created separate statutes criminalizing the offense of "taking indecent liberties" with children, though these laws often did not

enumerate specific elements. *Id.* at 17. Arizona's own 1913 molestation law, discussed above, likewise required that the prohibited acts be carried out "with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or of such child." Ariz. Rev. Stat. (Penal Code) § 282 (1913). Other states used the same language before and after Arizona did. *See, e.g.*, *People v. Curtis,* 1 Cal. App. 1, 1-2, 81 P. 674 (Cal. Ct. App. 1905); *Milne v. People,* 224 Ill. 125, 126, 79 N.E. 631, 631-32 (1906); *State v. Kernan,* 154 Iowa 672, 673, 135 N.W. 362, 363 (1912); *State v. Kocher,* 112 Mont. 511, 119 P.2d 35, 37 (1941)

Statutes of this sort became the norm across jurisdictions and persisted over time. The Model Penal Code, first published by the American Law Institute in 1962, compiled a single advisory corpus of preferred formulations of criminal statutes. *See* Markus D. Dubber, *Criminal Law: Model Penal Code* 7-11 (2002). The Model Penal Code included sexual crimes against children within a broader section on sexual assault, which provided for criminalizing certain kinds of "sexual conduct," defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire." ALI, Model Penal Code § 213.4 (1962). That language endures to the present. *See* ALI, Model Penal Code § 213.4 (2015). Today the statutes or case law of 48 out of 50 states, the District of Columbia, three U.S. territories, and the federal government require some sexual purpose for the crime of child molestation.[6]

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[6] Currently, the vast majority of jurisdictions define the "sexual contact" requisite for child molestation as intentional touching of

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

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

948.01(5) (2015) (Wisconsin); Wy. Stat. Ann. § 6-2-301(a)(vi) (2010) (Wyoming).

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

Child molestation statutes in Florida, Massachusetts, and New Mexico do not specify intent requirements or enumerate exceptions for, e.g., hygienic touching. *See* Fla. Stat. § 800.04(5)(a) (2014) (prohibiting certain intentional touching of anyone under 16 years of age "in a lewd or lascivious manner"); Mass. Gen. Laws ch. 265, § 13B (2008) (criminalizing "indecent assault and battery on a child under the age of 14"); N.M. Stat. Ann. § 30-9-13(A) (2003) (criminalizing "the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one's intimate parts"). However, courts in all three states have gleaned requirements of something more than mere touching from the language of their respective statutes. *See Andrews v. State*, 130 So.3d 788, 789-90 (Fla. App. 2014) ("[T]he Legislature has not defined the terms 'lewd' and 'lascivious.' But generally speaking, these words . . . usually have the same meaning, that is, an unlawful indulgence in lust, eager for sexual indulgence" (alterations and internal quotation marks omitted)); *Commonwealth v. Lavigne*, 42 Mass. App. Ct. 313, 314-15, 676 N.E. 2d 1170, 1172 (1997) (defining "indecent" touching as "fundamentally offensive to contemporary moral values...and which the common sense of society would regard as immodest, immoral, and improper" (internal quotation marks omitted)); *State v. Pierce*, 110 N.M. 76, 83, 792 P.2d 408, 415 (1990) (holding that lawful parenting behaviors are foreclosed from prosecution under § 30-9-13 because only "unlawful" touching is prohibited).

Hawaii may be the only jurisdiction other than Arizona that does not require sexual intent for a child molestation offense. The state's penal code outlaws "knowingly subject[ing] to sexual contact another person who is less than fourteen years old or

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

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

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

Indeed, the "affirmative defense" here is not an explanation, avoidance, or justification. Nor is it a

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caus[ing] such a person to have sexual contact with the [offender]." Haw. Rev. Stat. § 707-732(1)(b) (2009). The Hawaii legislature in 1986 rewrote its definition of "sexual contact" specifically to cut out sexual gratification as a requirement. *See* Haw. Rev. Stat. § 707-700 (2016); *State v. Kalani*, 108 Hawai'i 279, 285, 118 P.3d 1222, 1228 (2005) (rejecting a constitutional vagueness challenge). No court has addressed whether some sexual intent requirement is implied, which party would have to prove or disprove it, or whether it would be unconstitutional for a defendant to have to disprove it.

diminishment of culpability, offense level, or punishment. The defense is proof of a negative. It is refutation of the entire wrongfulness that may be lurking in any of the extensive prohibited conduct. When a law as written criminalizes entirely benign intentional conduct and has no mental state requirement to separate the bad from the good, making disproof of a state of mind a complete "defense" retains state of mind as central to the crime.

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

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

Patterson, 432 U.S. at 224 n.8 (Powell, J., dissenting) (emphasis added). But even the dissenters thought their hypothetical statute so "egregious" that they had "no doubt that the Court would find some way to strike [it] down . . . ." *Id.* at 225 n.9. The *casus terribilis* the

dissenters posed—no mental state requirement for widely criminalizing benign conduct with the defendant charged to disprove bad mental state—has arrived. It is in Arizona and people are in prison for it, May for the rest of his natural life.

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

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

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

The fact that a previously required element has been formally transferred to the defense does not automatically defeat the law. A legislature could initially require elements that go beyond any

constitutional or common sense minimum of wrongfulness and later opt to remove them. *See Patterson*, 432 U.S. at 209. But in child molestation, sexual intent is not lagniappe. It is essential to separate wrongful conduct from everyday child touching in parenting, hygiene, medical care, athletics, and other non-culpable acts within the stated elements of the Arizona crime.

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

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

In its recent decision on this same question, the Arizona Supreme Court excused this burden-shifting on the ground that other criminal statutes occasionally sweep innocent conduct within their general language. *Holle II*, 240 Ariz. at 309, 379 P.3d at 206.[7] From the

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

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

Shifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish. *See Patterson*, 432 U.S. at 209. Here, however, section 13-1410 criminalizes diapering and bathing infants and much other innocent conduct. *See Holle II*, 240 Ariz. at 308-09, 379 P.3d at 205-06. More than just innocent, some such conduct is constitutionally protected. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("The Due Process Clause of the Fourteenth Amendment protects the fundamental right

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

of parents to make decisions concerning the care, custody, and control of their children."). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). As May's attorney pointed out at oral argument, the statute even criminalizes circumcision of babies, a ritual practiced in several religious faiths. *See generally* Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis,* 9 Va J. Soc. Pol'y & L. 497 (2002).

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

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

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

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

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

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

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

III. Cause and Prejudice: Ineffective Assistance of Counsel

That said, May defaulted on the constitutional claim by not raising it at trial. He contends he has shown cause and prejudice because his trial attorney was ineffective for failing to challenge the constitutionality of Arizona's statute and the jury instructions given

pursuant to it. May raised his claim of ineffective assistance of counsel at the proper time in his post-conviction proceeding and exhausted it in the state courts.

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

A. Prejudice

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

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

1. The State Courts Unreasonably Applied Federal Law

On habeas review, a federal court must "determine what arguments or theories supported, or could have supported, the state-court decision . . . ." *Harrington,* 562 U.S. at 88. The best indication of this is the

reasoning of the state courts. And where such reasoning is summarily affirmed (or review denied) by a higher state court, "silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Kernan v. Hinojosa,* — U.S. —, 136 S. Ct. 1603, 1605-06 (2016) (quoting *Ylst v. Nunnemaker,* 501 U.S. 797, 804 (1991)) (internal quotation marks omitted).

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

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

> Defendant claims ineffective assistance of trial and appellate counsel in failing to challenge the constitutionality of the child molestation statute. His expert did not opine on whether such a challenge would have been successful. (R.T. of Sept. 7, 2011, at 122-125).

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

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

The superior court found May suffered no prejudice without deciding whether May's trial counsel performed deficiently. "It is past question that the rule set forth in *Strickland* qualifies as clearly established

Federal law, as determined by the Supreme Court of the United States." *Williams,* 529 U.S. at 391 (internal quotation marks omitted). "That the *Strickland* test of necessity requires a case-by-case examination of the evidence . . . obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the Supreme] Court." *Id.* (citation and internal quotation marks omitted).

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

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

Third, the superior court said the Arizona statute "is not significantly different than" the statute in Patterson so there was no prejudice from not

challenging it But that is both incorrect and unreasonable. While missing a traditional element of murder, the statute in *Patterson* required the government to prove beyond a reasonable doubt something the state could make a stand-alone crime: intentional killing. *Patterson,* 432 U.S. at 209. The *Patterson* Court yielded two holdings: that that burden-shifting scheme did not deprive the defendant of due process, *id.* at 205-06, and more broadly, that within "constitutional limits," prosecutors need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused," *id.* at 210. But just as the Constitution does not require prosecutors to disprove every affirmative defense, *Patterson* is equally clear that the Constitution does not free prosecutors from ever having to prove anything labeled as an affirmative defense.

One struggles to reconstruct the omitted reasoning behind the bare assertion that the statute in *Patterson* and the one at issue here are "not significantly different." The likeliest candidate is that they share a common form: each omits one element traditionally part of the relevant offense and relabels it an affirmative defense a defendant must prove. These similarities of form do exist. But it is both incorrect and unreasonable to ignore substance altogether. *Patterson* itself said that while the state need not disprove every affirmative defense, "there are obviously constitutional limits beyond which the States may not go in this regard." 432 U.S. at 210. To conclude that a statutory scheme relabeling anything as an affirmative defense is constitutional *per se* does violence to that holding.

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

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

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

The superior court's application of *Strickland* was unreasonable for another reason: the conclusion that May suffered no prejudice is refuted on this record. The *Strickland* measure for prejudice is a "reasonable

probability" of a different outcome but for the default *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The R&R concludes that even if relieved of the burden of proving himself innocent, May still would have been convicted unanimously given the volume of evidence against him. (Doc. 35 at 56-57.) That is a remarkable conclusion in light of the actual history of this trial. None of the state courts so found. This Court rejects that conclusion.

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

Had the trial judge instructed the jury that the state must prove sexual intent beyond a reasonable

doubt, it is reasonably probable that May would not have been convicted. There is certainly "a probability sufficient to undermine confidence in the outcome." *See Strickland,* 466 U.S. at 694. Given how close it was under the prejudicial instruction actually given and the two deadlocks on reasonable doubt, the *Strickland* test for prejudice is readily shown here. In particular, there is a reasonable probability the jury would have remained deadlocked, even if only a single juror harbored reasonable doubt. *See Buck v. Davis,* — U.S. —, 137 S. Ct. 759, 776 (2017) (formulating district court's prejudice inquiry as whether habeas petitioner had demonstrated a reasonable probability that in sentencing phase, "at least one juror would have harbored a reasonable doubt" as to defendant's future dangerousness); *Cone v. Bell,* 556 U.S. 449, 452 (2009) (remanding petitioner's habeas claim for district court to determine whether there was a reasonable probability withheld *Brady* evidence "would have altered at least one juror's assessment of the appropriate penalty for [petitioner's] crimes"); *Wiggins v. Smith,* 539 U.S. 510, 537 (2003) (finding that, where jury did not hear mitigating evidence before sentencing defendant to death, "there is a reasonable probability that at least one juror would have struck a different balance" had mitigating evidence been presented).

The State argues the jury still would have convicted May because they found he touched the victims "intentionally or knowingly." The State contends such findings can only be explained as the jury inferring sexual intent beyond a reasonable doubt (Doc. 22 at 189-90.) This is a bold contention. It means that intentional and knowing necessarily subsumes sexual

intent, which then can never be disproven. Any instruction on sexual intent becomes a redundancy and might as well be omitted. It is enough to reject this that it is in defiance of the statute as written.

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

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

Ct. 815 (2016) (reviewing prejudice based on "whether [the defendant] had a reasonable likelihood of securing a new trial if the attorney had properly preserved" the relevant issue for subsequent review); *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1315 (11th Cir. 2003) ("[T]he prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently: even when it is *trial* counsel who represents a client ineffectively in the *trial court,* the relevant focus in assessing prejudice may be the client's appeal."). It is a question of law, not of psychology, how an appeal should and would have turned out if preserved and taken.

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

B. Deficient Performance

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

Under *Strickland*, an attorney's performance is deficient if it "fell below an objective standard of

reasonableness." *Strickland,* 466 U.S. at 688. The Supreme Court has declined to articulate more specific guidelines, stating, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins,* 539 U.S. at 521 (quoting *Strickland,* 466 U.S. at 688). A habeas court must make "every effort . . . to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. The defendant must "overcome the strong presumption that counsel's performance was within the wide range of reasonable professional assistance and might be considered sound trial strategy." *Carrera v. Ayers,* 670 F.3d 938, 943 (9th Cir. 2011) (internal quotation marks omitted). But that. presumption is based on the need to choose among alternative and sometimes incompatible trial strategies—or at least not to forfeit one's credibility before the jury with weak strategies that detract from stronger ones.

At the hearing on his state post-conviction relief petition in 2011, May called as an expert Michael Piccarreta, a seasoned criminal defense attorney with extensive professional credentials, including previous expert testimony on ineffective assistance of counsel. (Doc. 23-9 at 137-38.) Piccarreta testified that the National Legal Aid and Defenders Association considers it standard criminal defense practice to "review [the statute charged] for constitutional issues." (Doc. 23-9 at 143.) He said the burden-shifting scheme of Arizona's child molestation law "jumps out at you that it's a problem" and that a standard course of action would have been to file a motion to dismiss the

charges so that, at the very least, "you have preserved the issue for higher courts." (Doc. 23-9 at 145.) Piccarreta said that "particularly with the circumstances of this case, that failure to raise the constitutionality of the statute and the switching the burden was ineffective assistance of counsel." (Doc. 23-9 at 123-25.) On cross-examination, when asked whether attorneys who failed to raise constitutional challenges in other child molestation cases were ineffective, Piccarreta stated that in his opinion

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

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

This Court fully agrees with Piccarretta's opinion based also on the Court's own knowledge and experience. The Court also concludes Thompson performed deficiently even without relying on expert testimony. It should have been obvious that the burden-shifting scheme presented a serious constitutional question that could have been dispositive

for May. At the time, there was no appellate case assessing the constitutionality of Arizona's 1997 statutory amendment. Even if there had been a case on point, the constitutional question was a matter of federal law amenable to vindication in later federal court review. Thompson performed deficiently by failing to recognize and act on this. *See Hinton v. Alabama,* — U.S. —, 134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."). Minimal competence required preserving the obvious federal issue. *See Vanterpool,* 767 F.3d at 834 (remanding on performance prong of *Strickland* where counsel's failure to raise constitutional challenge raised factual question of whether it was "attributable to an ignorance of the law").

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

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 8 (2003). That usual presumption, however, cannot stand on this record. When questioned about why he did not challenge the constitutionality of the burden-shifting

scheme, Thompson had no explanation. He did not articulate any reason, strategic or otherwise, for having foregone a constitutional challenge. It is clear beyond question that there was no strategic or other benefit to May in not preserving the constitutional challenge. It would have cost no material time or resources and could not have undercut any other strategy or course of action. There is no reason, tactical or other, for failing to preserve the federal constitutional claim. Piccarreta's opinion reflected as much. But the undersigned need only rely on 30 years at the trial and appellate bars, occasional expert testimony on standard of care for trial and appellate lawyers, and thirteen years as a judge of this Court presiding over more than 3,000 criminal cases. It is plain that May's trial counsel fell well below an objective standard of reasonableness under prevailing professional norms. Trial counsel's performance was constitutionally deficient. The performance and prejudice prongs of *Strickland* have both been met, and any contrary conclusion would be unreasonable. The ineffective assistance establishes cause and prejudice for May's default on his constitutional challenge.

IV. Constitutional Challenge

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

If the state court had decided the constitutional question on the merits, this Court would be limited to assessing whether the state court's decision "was contrary to, or involved an unreasonable application of"

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

More likely, this Court is charged with de novo review because the state court's assessment of the constitutional question was not on the merits. The superior court specifically declined to review the merits of May's constitutional claim since he had defaulted on it by failing to raise it at trial. (Doc. 1-11 at 3.) The court of appeals did the same. (Doc. 1-17 at 6.) The state courts did not "decide[] the petitioner's right to post conviction relief on the basis of the substance of the constitutional claim advanced," but rather "den[ied] the claim on the basis of a procedural or other rule precluding state court review of the merits." *Lambert v. Blodgett,* 393 F.3d 943, 969 (9th Cir. 2004). Since no state court addressed the merits, this Court must decide the constitutional question de novo. *See Chaker v. Crogan,* 428 F.3d 1215, 1221 (9th Cir. 2005).

Whether under de novo review or deferential review, the burden-shifting scheme of sections 13-1410 and 13-1407(E) of the Arizona Revised Statutes as applied in this case violates the Constitution's

guarantee of due process of law—specifically, May's right to be convicted of a crime only if the state proves each element beyond a reasonable doubt and to have the jury so instructed. *See* Section II, *supra.*

V. Harmless Error

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

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

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

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

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment in favor of Petitioner Stephen

Edward May against Respondent Charles L. Ryan that Respondent release Petitioner from custody forthwith.

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

The Clerk shall terminate this case.

Dated: March 28, 2017.

/s/ Neil V. Wake
Neil V. Wake
Senior United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 14-0409-PHX-NVW (MHB)

[Filed: September 15, 2015]

Stephen Edward May,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

REPORT AND RECOMMENDATION

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

Petitioner Stephen Edward May, who is represented by counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and Memorandum of Law in Support of Petition (Doc. 2). Following a jury trial, Petitioner was convicted in Maricopa County Superior Court, case #CR2006-030290-001, of five counts of molestation and was sentenced to a 75-year term of imprisonment. In his Petition and supporting 162-page Memorandum,

Petitioner names Charles L. Ryan as Respondent and the Arizona Attorney General as an additional Respondent. Petitioner raises 14 grounds for relief – most of which have multiple components. In total, Petitioner has alleged over 35 constitutional violations. Respondents filed their 463-page Answer on September 22, 2014, and Petitioner filed his Reply three months later. (Docs. 22, 29.)

BACKGROUND[1]

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

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

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

Thompson also argued that he was entitled to severance of counts, pursuant to Arizona Rule of Criminal Procedure 13.4, because the charged offenses were consolidated for trial solely by virtue of their similar nature, were committed at different places and times, and had no eyewitnesses in common. (Exh. A: P.I., Item 29, at 2-3; Exh. C: R.T. 11/13/06, at 3-5,10-12.) On November 13, 2006, the trial court partially granted this motion by severing Count 8 from Counts 1 through 7. (Exh. A: P.I., Item 32, at 1-2; Exh. B: M.E., Item 43, at 2.) However, Judge Stephens also ruled that the seven remaining charges were properly consolidated because evidence of the charged offenses against Taylor, Danielle, Sheldon, and Luis would be cross-admissible at separate trials, pursuant to Arizona Rule of Evidence 404(b), to prove motive opportunity, intent, preparation, plan, identity, and absence of mistake or accident, and pursuant to Arizona Rule of

Evidence 404(c), to demonstrate that Petitioner had an aberrant sexual propensity to commit the charged offenses. (Exh. B: M.E., Item 43, at 2; Exh. C: R.T. 11/13/06, at 5-10.)

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

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

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

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

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

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

a. Luis A. (Count 7)

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

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

"private part," the part which Luis goes to the bathroom "to pee" or do a "number one." (Exh. E: R.T. 1/3/07, at 26-29, 33, 36, 41.)

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

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

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

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

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

When asked about Luis during his post-arrest interview with Mesa Police Detective Manuel Verdugo on November 9, 2005, Petitioner responded that "he wished he could tell [Verdugo] more than he could tell [Verdugo], but left it at that." (Exh. G: R.T. 1/8/07, at

86, 93.) At trial, Petitioner testified that he vaguely remembered Luis as a student in computer class at Tavan Elementary, but claimed that he had no recollection of any one-on-one time with Luis. (Exh. I: R.T. 1/10/07, at 47-49.)

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

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

During the summer months of 2005, Petitioner molested both girls at least twice by touching their vaginas over their bathing suits while they sat on his lap inside Gentry Walk's community swimming pool. (Exh. E: R.T. 1/3/07, at 70-77, 83-84, 105-06, 118-25, 135-36; Exh. G: R.T. 1/8/07, at 83-85; Exh. H: R.T. 1/9/07, at 44-49; Exh. XX: DVD of Taylor's forensic interview [Trial Exh. 25]; Exh. YY: DVD of Danielle's forensic interview [Trial Exh. 26].) Petitioner molested both girls at Danielle's birthday pool party on the afternoon of September 10, 2005. (Exh. E: R.T. 1/3/07, at 70-74, 83-84, 116-21.) Danielle's father, Dan, invited Petitioner among 40 other guests to attend the party. (Id. at 116-118; Exh. F: 18 R.T. 1/4/07, at 91-93, 114.)

Upon seeing Petitioner at the shallow end of the pool, Taylor swam over to Petitioner and sat on his lap.

(Exh. E: R.T. 1/3/07, at 72-73.) While Taylor was sitting on his lap, Petitioner placed his right hand "on top" of her "private" (her vagina). (Id. at 73-74, 81, 84; R.T. 1/8/07, at 49; Exh. I: R.T. 1/10/07, at 9; Exh. XX: DVD of Taylor's forensic interview [Trial Exh. 25].) Taylor testified that: (1) she and Petitioner were neither tickling nor playing with each other at the time of the touching; (2) Petitioner said nothing to her while his hand was on her vagina; and (3) Petitioner neither apologized for touching her vagina, nor ever claimed that the contact was accidental in nature. (Exh. E: R.T. 1/3/07, at 77, 100, 105.) At the time of this first incident, Taylor did not realize that Petitioner's touching was "bad at all," but instead thought that Petitioner "didn't mean it," and even attributed the contact to Petitioner "just being clumsy" and "playful"—even despite the fact Petitioner "would hold [Taylor] by [her] private" whenever he threw her into the water. (Id. at 74, 77, 105.)

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

During her birthday party, Danielle saw Petitioner in the Jacuzzi, decided to join him, and sat in a corner

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

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

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

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

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

him to stop; and (4) Petitioner manually touched Danielle's "private parts" (vagina) over her bathing suit. (Exh. F: R.T. 1/4/07, at 97, 102, 108-10, 114, 116.)

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

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

On November 9, 2005, Detective Verdugo arrested Petitioner, who waived his rights and agreed to answer questions during a videotaped post-arrest interview. (Exh. G: R.T. 1/8/07, at 86-88, 112-13; Exh. ZZ: DVD of Petitioner's Interview [Trial Exh. 27].) Verdugo later testified that Petitioner "had trouble maintaining eye contact" with him during the post-arrest interview. (Exh. G: R.T. 1/8/07, at 118-19.) Verdugo found Petitioner's demeanor "atypical" in that Petitioner seemed "not concerned" throughout the entire interview, remained silent whenever Verdugo ceased asking questions, never became angry or emotional when Verdugo revealed the nature of the allegations and accused Petitioner of falsely denying them, and even asked Verdugo questions about which children were involved in the investigation. (Id. at 88-92, 114.) Petitioner claimed that he did not know why he was being accused, stated that he had no reason to be remorseful, and denied any recollection of such episodes. (Id. at 94, 99, 103-05, 109-111.)

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

also told Verdugo during the interview that he did not know Sheldon. (Id. at 67; Exh. ZZ: DVD of Petitioner's Interview [Trial Exh. 27].)

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

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

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

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

general areas of their genitals," albeit not intentionally, knowingly, or with any sexual motivation. (Exh. I: R.T. 1/10/07, at 39-41, 56.)

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

c. Sheldon H. (Counts 5-6)

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

Almost always at Sheldon's request, Petitioner picked Sheldon up and threw him into the water several times. (Exh. F: R.T. 1/4/07, at 51, 69, 73.) Sheldon alleged that Petitioner had manual contact with his penis on two separate occasions—first in mid-August 2004, and second shortly after July 4, 2005. (Id. at 46-56, 60, 72.) While using the water pitcher kept near the witness stand as a prop to illustrate his

testimony, Sheldon testified that: (1) Petitioner picked him up with the left hand on the middle of Sheldon's back and the right hand resting on his "front private spot," the body part that Sheldon used to "pee" and called his "dick"; and (2) during the "second" time during which he was airborne and about to be thrown into the water, Sheldon shifted Petitioner's right hand to his stomach area, but Petitioner then replaced his hand over Sheldon's genitals. (Id. at 46-50, 67-69, 72; Exh. G: R.T. 1/8/07, at 33.) Sheldon additionally claimed that Petitioner caused Sheldon to rub his penis against Petitioner's buttocks on several non-charged occasions by placing Sheldon against his back and suddenly shifting positions to make Sheldon slide down his back. (Exh. F: R.T. 1/4/07, at 63-64, 67-68, 70-71, 80.)

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

Sheldon's mother, Tisha, did not learn that Petitioner had touched Sheldon inappropriately until she had a conversation with a neighbor sometime after the police arrested Petitioner on November 9, 2005. (Exh. G: R.T. 1/8/07, at 32, 38, 85-87.) Because Sheldon became upset and refused to talk when Tisha broached

this topic, she had her husband and Sheldon's stepfather, Fernando, question Sheldon about Petitioner. (Id. at 32.) Sheldon told Fernando that: (1) he estimated that Petitioner had touched his "privates" four times while they were in the swimming pool; (2) Sheldon did not initially believe that Petitioner touched his penis intentionally, but changed his mind because whenever Sheldon pushed Petitioner's hand away from his genitals, Petitioner returned his hand to Sheldon's penis; and (3) he did not tell anyone sooner because he was frightened. (Id. at 32-33, 38.)

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

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

Attorney Thompson presented Petitioner's defense by cross-examining every prosecution witness, except Officer Marquez (Exh. F: R.T. 1/4/07, at 85-87), and presenting the testimony of three witnesses—Desiree Wells, Detective Quihuiz, and Petitioner. (Exh. E: R.T. 1/3/07, at 36-44 [Luis A.]; id. at 57-62 [Sandra

Martinez]; id. at 80-103 [Taylor S.]; id. at 126-33, 138 [Danielle A.]; Exh. F: R.T. 1/4/07, at 11-25 [Detective Shores]; id. at 57-71, 82-83 [Sheldon H.]; id. at 100-08, 117 [Dan A.]; Exh. G: R.T. 1/8/07, at 10-23, 28-30 [Linda Cano]; id. at 34-36 [Fernando Lopez]; id. at 55-67, 76-77 [Denise S.]; id. at 93-108 [Detective Verdugo]; Exh. H: R.T. 1/9/07, at 5-19, 28-31 [Desiree Wells]; id. at 50-56, 63 [Detective Johnson]; Exh. I: R.T. 1/10/07, at 5-13, 18-19 [Detective Quihuiz] 25-56, 74-76, 97 [Petitioner].)

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

Although Thompson subsequently testified at Petitioner's PCR proceeding that he told Petitioner's parents that he could not "bring in witnesses to testify that [Petitioner] had 15 other opportunities to molest children and didn't" (Exh. CC: R.T. 9/7/11, at 19), Thompson nonetheless presented trial testimony that informed the jurors that other people had observed Petitioner interacting with children, but had not observed Petitioner initiating sexual contact with any minor. On cross-examination, Thompson elicited Linda Cano's testimony that: (1) she had hired Petitioner to

work in the Special Olympics program, wherein approximately 80% of the athletes were under 18 years of age; (2) Petitioner worked for Linda from October 2004 to December 2005; (3) Petitioner not only helped coach athletes in swimming, speed skating, golf, and ice skating, but also attended basketball games and practices; and (4) Linda never received any complaints about Petitioner from any of the athletes, their parents, or other staff members who attended or participated in these events. (Exh. F: R.T. 1/4/07, at 6, 10-13, 18-22.) During closing argument, Thompson reminded the jurors that Linda had received no complaints about Petitioner during his employment at her program. (Exh. I: R.T. 1/10/07, at 144.)

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

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

(1) Petitioner neither told the charged victims not to tell anyone that he had touched their genitals, nor threatened them with adverse consequences should they disclose such contact; instead, Petitioner said nothing at all during and immediately after the incident. (Exh. E: R.T. 1/3/07, at 42 [Luis]; id. at 100-01 [Taylor]; id. at 131 [Danielle]; Exh. F: R.T. 1/4/07, at 18-19 [Luis]; id. at 67-69 [Sheldon]; Exh. G: R.T. 1/8/07, at 99-100 [Sheldon]; Exh. I: R.T. 1/10/07, at 146, 153 [closing argument].)

(2) Petitioner never rubbed, penetrated, or pinched the victims' genitalia. Instead, Petitioner placed his open hand over the crotch area of their pants or bathing suit, where it remained stationary for a brief period of time. (Exh. E: R.T. 1/3/07, at 41, 60, 62 [Luis]; id. at 87 [Taylor]; id. at 130 [Danielle]; Exh. F: R.T. 1/4/07, at 17-18 [Luis]; id. at 102 [Danielle]; Exh. G: R.T. 1/8/07, at 102 [Sheldon]; Exh. H: R.T. 1/9/07, at 55 [Danielle]; Exh. I: R.T. 1/10/07, at 9, 12 [Taylor]; id. at 153 [closing argument].)

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

1/10/07, at 8, 11 [Taylor]; id. at 152 [closing argument].)

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

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

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

• Luis had given inconsistent statements about whether Petitioner had squeezed his penis or merely rested his open hand over his genitals.

(Exh. E: R.T. 1/3/07, at 15, 33, 41, 44, 51-52, 58-60; Exh. I: R.T. 1/10/07, at 135.)

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

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

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

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

• Luis did not recall speaking with Detective Shores at school. (Exh. E: R.T. 1/3/07, at 43-44.) Shores testified that he did not even submit Luis' case to the county attorney for charging because Luis could not recall peripheral details, and there was no corroborating evidence. (Exh. F: R.T. 1/4/07, at 10, 15-16; Exh. I: R.T. 1/10/07, at 137.)

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

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

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

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

• Taylor initially believed that Petitioner had accidentally touched her, but attributed her change of mind to growing older and maturing. (Exh. E:

R.T. 1/3/07, at 80, 84-85, 87, Exh. I. R.T. 1/10/07, at 11, 138-39.)

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

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

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

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

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

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

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

> (1) Detective Verdugo withheld necessary details about the allegations and choosing instead to ask Petitioner very general questions, such as, "Why do you think you are here?" "What's going on at the pool?" and "Tell me about Taylor?" (Exh. G: R.T. 1/8/07, at 94, 99, 103-04 [cross-examination of Detective Verdugo]; Exh. I: R.T. 1/10/07, at 34-35, 97 [Petitioner's testimony explaining that he answered, "I don't know," because Verdugo did not provide sufficient information to answer his questions, not because Petitioner was trying to be evasive]); id. at 149-50 [closing remarks criticizing Verdugo's opened-ended questioning techniques].)
>
> (2) Petitioner had no reason to recall specifics about his frequent interaction with children in the swimming pool. (Exh. E: R.T. 1/3/07, at 16 [opening statement reporting that Petitioner could not provide Detective Verdugo with any detailed information regarding the charged victims because

> there was "nothing memorable" about playing with children in the pool "months" before the interview].)

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

As to the jury instructions, Petitioner asked Judge Stephens to charge the jury that the State had the burden of proving, beyond a reasonable doubt, that Petitioner intentionally or knowingly, and with the motivation of a sexual interest, directly or indirectly touched the genitals of a child under 15 years of age. (Exh. H: R.T. 1/9/07, at 71-73.) In support of his position that "the State [was] obligated to prove a motivation of sexual interest as an element of the offense" (id. at 71-72), Petitioner relied exclusively upon Arizona Senate Bill 1145's amendments to the statutory definition of "affirmative defense" set forth in A.R.S. § 13-103(B):

> My reference is to the amended Senate Bill 1145, effective date April 24, '06, which, in effect, abolishes common law and affirmative defenses. In pertinent part, the amended Arizona Revised Statutes 13-103B states [that an] affirmative defense does not include any justification defense or [a] defense that either

> denies an element of the offense charged or denies responsibility, including misidentification or lack of intent.
>
> My view is that that establishes that there is no necessity remaining as there was under the previous circumstance where lack of intent would be an affirmative defense for the defendant to prove by a preponderance of the evidence that allegation. I believe that with the amendment to the statute, the State is obliged to prove beyond a reasonable doubt that the defendant was motivated by sexual interest. I think that is part of the offense that's charged.

(Id. at 72-73.)

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

Judge Stephens sustained the State's objection to Petitioner's proposed instruction. (Id. at 100-01.)

Because Petitioner intended to argue his lack of sexual motivation to the jury, Judge Stephens gave the following jury instructions, over his objection:

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

(Id. at 107-08.)

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

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

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

(Id. at 107.)

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

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

(Id. at 106-07.)

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

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

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

In response, Judge Stephens provided the following supplemental instruction:

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

> trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense.

(Id.)

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

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

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

Less than 30 minutes later, the foreman sent another note that Judge Stephens construed as a report of continued deadlock. (Id.; Exh. A: P.I., Item 219; Exh. B: M.E., Item 220.) After reassembling the jurors in the courtroom, Judge Stephens made the following statements:

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

> Again, thank you very much for your time and attention. You are excused. Have a good weekend.

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

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

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

On January 16, 2007, the jury resumed its deliberations, recessed for lunch at 12:11 p.m., resumed deliberating at 1:37 p.m., and reconvened in the courtroom at 3:16 p.m. to announce its verdicts on all seven counts. (Exh. B: M.E., Item 233.) The jurors found Petitioner guilty as charged on the charges

involving Taylor S. (Counts 1 and 2), Danielle A. (Counts 3 and 4), and Luis A. (Count 7), but acquitted him of the two counts involving Sheldon H. (Counts 5 and 6). (Exh. A: P.I., Items 224-30; Exh. B: M.E., Item 233; Exh. L: R.T. 1/16/07, at 3-6.) Judge Stephens polled the jurors individually to verify that each juror personally assented to these verdicts. (Exh. B: M.E., Item 233; Exh. L: R.T. 1/16/07, at 5-6.) After thanking the jurors for their service, Judge Stephens told them, "If you wish to speak with the attorneys, you can wait back in the jury room, and they will be in shortly. You are certainly under no obligation to do so, and you are free to leave." (Exh. L: R.T. 1/16/07, at 8.)

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

On January 26, 2007, Petitioner filed a motion for new trial, pursuant to Arizona Rule of Criminal Procedure 24.1, arguing: (1) the verdicts were contrary to the weight of the evidence; (2) Judge Stephens erroneously denied Petitioner's motion for direct verdicts of acquittal; (3) Count 7 involving Luis should have been severed from Counts 1 through 6; and (4) the final jury instructions violated Arizona law by mischaracterizing the defense of lack of sexual motivation as an affirmative defense. (Exh. A: P.I., Item 241.) Judge Stephens found these arguments

groundless and accordingly denied this motion. (Exh. M: R.T. 2/16/07, at 6-7.)

On February 8, 2007, Thompson submitted for Judge Stephens' consideration a mitigation package, including letters from more than 40 friends and relatives and photocopies of seven medical records that Petitioner's pediatrician, Dr. Arnold Gold, authored between April 15, 1974, and December 9, 1983. (Exh. A: P.I., Item 244; Exh. M: R.T. 2/16/07, at 4-6.) On February 16, 2007, Thompson filed a sentencing memorandum that recommended the imposition of mitigated 10-year prison terms per count, with Petitioner receiving concurrent prison terms for each set of "paired counts relating to Taylor and Danielle," so that Petitioner would receive the mandatory minimum aggregate sentence of 30 calendar years' imprisonment. (Exh. A: P.I., Item 246, at 4.)

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

On February 16, 2007, Petitioner filed a timely notice of appeal from the judgments and sentences. (Exh. A: P.I., Item 251.) Petitioner retained Tracey

Westerhausen to represent him on appeal. (Exh. CC: R.T. 9/7/11, at 50.)

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

> 1. "The jury instructions [regarding child molestation] unconstitutionally placed the burden of proof on the defendant." (Doc. 1-2: Opening Brief, 1 CA-CR 07-0144, at 13.) Petitioner argued that Arizona's child-molestation statute required the State to prove, beyond a reasonable doubt, the specific-intent element "that the touching was motivated by sexual interest," and that the trial court's instructions requiring Petitioner to prove by a preponderance of the evidence that he lacked sexual motivation improperly shifted the burden of proof of an element of the crime from the prosecution to the defense. (Id. at 12-16.)
>
> 2. "Having declared a mistrial and discharged the jurors, the trial court violated [Petitioner's] constitutional rights by permitting the jurors to reconvene and deliberate further." (Id. at 16.) Petitioner identified the state and federal constitutional rights at issue as "the right to an impartial jury, the right to due process, and the guarantee against double jeopardy," with the thrust of his argument being that the jurors might have been exposed to improper outside influences during the interval between the trial court's declaration of mistrial and the subsequent resumption of deliberations. (Id. at 16-20.)

> (3) "The trial court abused its discretion in imposing only 'slightly mitigated' sentences, ignoring the fact that [Petitioner's] conduct was milder than the usual child molest case." (Id. at 20-22.)
>
> (4) "The individual sentence for each count and their and cumulative effect of 75 years violated the protection against cruel and unusual punishment." (Id. at 23-32.)

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

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

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

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

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

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

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

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

On March 24, 2009, Petitioner moved the Arizona Supreme Court to reconsider this ruling. (Exh. P: Motion for Reconsideration of Denial of Review, CR-08-0281-PR.) For the first time on direct review, Petitioner challenged the constitutionality of the child-molestation statute:

> The child molestation statute violates due process because it relieves the state from proving every element of the charged crime beyond a reasonable doubt. First, the statute does this by making too many every day and innocent acts fall within its definition of child molestation. Second, although the Legislature has broad authority to define the elements of a

> crime, it may not lower the state's burden of proof by calling an "element" something else. The Legislature has unconstitutionally done that here.

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

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

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

In its court-ordered brief in opposition, the State argued that certiorari should be denied because: (1) Petitioner had never presented this constitutional challenge to A.R.S. §§ 13-1410(A) and 13-1407(E) to the Arizona judiciary—an omission that would effectively transform the Supreme Court from a court of final review to one of first review; (2) "the conflict that Petitioner claims to exist among lower courts is illusory and inapposite to A.R.S. § 13-1410(A)"; and (3) "Petitioner's reliance on *Apprendi* and its progeny is misplaced." (Exh. R: PCR's Exh. ["Tab"] 109: Brief in

Opposition, Supreme Court No.08-1393, at 17, 30, 32; Exh. CC: R.T. 9/7/11, at 125, 142-43.)

On October 5, 2009, the Supreme Court denied certiorari. See May v. Arizona, 558 25 U.S. 819 (2009).

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

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

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

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

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

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

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

• PCR Ground VI: "The numerous and serious interferences with the impartiality of the jury

cumulatively violated [Petitioner's] right to a jury trial." (Id. at 42.)

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

• PCR Ground VIII: "No reasonable fact finder could have found [Petitioner] guilty of child molestation beyond a reasonable doubt because the child molestation statute unconstitutionally relieves the State of its burden to prove the core element of sexual motivation." (Id. at 48.)

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

• PCR Ground X: "There is sufficient evidence of possible improper conduct by the prosecutor,

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

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

• PCR Ground XI.B: "Counsel was ineffective for failing to require compliance with Arizona Rule of

Evidence 404(b) and 404(c)." (Id. at 60.) This claim alleged that both trial and appellate counsel rendered deficient performance by failing to object to the sufficiency of the trial court's findings regarding the cross-admissibility of evidence of the crimes against each victim at separate trials. (Id. at 60-62.)

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

• PCR Ground XI.D: "Trial Counsel was deficient in his investigation and in presenting information that was learned through investigation," allegedly because: (1) "he failed to retain an expert to assist him" to develop "critical areas of inquiry [regarding] pretrial interviews of the detectives and civilian investigators that were central to the investigation," "educate [himself] as to children's memory formation as well as internal and external factors that can affect children's reports;" (2) he did not present medical evidence to corroborate Petitioner's testimony regarding his "long battle with ataxia," "a medical condition that causes clumsiness and involuntary movements"; and (3) he failed to investigate and present lay witness testimony to "corroborate [Petitioner's] testimony regarding his dedicated service to education and his behavior around children." (Id. at 65-76.)

• PCR Ground XI.E: "Trial counsel provided ineffective assistance by failing to consult with

[Petitioner] before agreeing to allow deliberations to continue." (Id. at 76.)

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

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

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

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

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

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

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

- PCR Grounds I, II, IV, VI, VII, IX, X, and XII were precluded under Rule 32.2(a)(2) and/or Rule 32.2(a)(3), because: (1) Petitioner either previously presented the claim to the Arizona Court of Appeals on direct review or failed to raise the claim at trial and/or on appeal; and (2) Rule 32.1(e) exception for newly discovered evidence was inapplicable because Petitioner failed to exercise due diligence.

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

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

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

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

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

counsel for Petitioner. (Exh. Y: Notice of Appearance [Falgout].)

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

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

On September 6, 2011, Judge Hoffman commenced a 3-day evidentiary hearing to adjudicate Petitioner's unresolved extrinsic-evidence and ineffective-assistance-of-counsel claims. (Exh. BB: R.T. 9/6/11; Exh. CC: R.T. 9/7/11; Exh. DD: R.T. 9/8/11) In lieu of calling any jurors to testify, Petitioner and the State agreed that the judge could consider instead the transcripts of Petitioner's post-verdict interviews or depositions of the jurors whom retained counsel or

their investigators were able to locate and question between May 18, 2008, and June 23, 2011. (Exh. BB: R.T. 9/6/11, at 9-16.) Thus, transcripts of the following jurors' post-verdict statements were admitted in evidence by the parties' stipulation:

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

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

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

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

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

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

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

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

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

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

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

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

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

During the evidentiary hearing, Petitioner called the following witnesses: (1) his trial attorney, Joel Thompson (Exh. CC: R.T. 9/7/11, at 5-48); (2) his appellate counsel, Tracey Westerhausen (id. at 49-71); (3) Dr. Harvey Goodman, whose testimony concerned Petitioner's ataxia-related medical records from the early 1970s to 1989 and an MRI performed in 2008 (id. at 71-115); (4) Michael Piccaretta, a defense attorney who opined that Thompson and Westerhausen rendered ineffective assistance, based upon his examination of the trial record (id. at 115-53); (5) Dr. Philip Esplin, a psychologist with along history of testifying on behalf of the defense, and who opined that this case was complex and therefore necessitated at least consultation with an expert on the reliability of the memories of child witnesses (Exh. DD: R.T. 9/8/11, at 3-62); and (6) Terry Borden, Petitioner's step-father, who detailed his communications and interactions with Thompson and Westerhausen during the course of their representation of Petitioner at trial and on appeal (Id. at 64-93).

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

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

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

> • Petitioner "was deprived of his state and federal constitutional rights to due process, confrontation, an impartial jury, and a fair trial, where the jurors received and considered extrinsic evidence during their deliberations—a child's Teddy Bear—which was presumptively prejudicial and, since that presumption of prejudice was never rebutted, the Defendant is entitled to a new trial." (Doc. 1-14: Petition for Review by Arizona Court of Appeals,

at 1.) Significantly, Petitioner focused exclusively upon his prior argument that the teddy bear at issue constituted improper extrinsic evidence and therefore did not seek review of his other juror-misconduct claims—the jurors "traded votes," engaged in *ex parte* communications with the bailiff: and improperly considered (and grossly underestimated) potential punishment during deliberations. (Id. at 4-9.)

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

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

• Petitioner "was deprived of his state and federal constitutional rights to the effective assistance of trial and appellate counsel where, among other things, counsel failed to undertake an investigation and did not confer with or call necessary expert witnesses." (Id. at 1.) Petitioner specifically alleged that Thompson was ineffective because: (1) he did not "minimally consult with an expert concerning the reliability of children's testimony," and "the jurors would have benefitted from expert testimony on the fallibility of child witnesses," (2) Thompson did not offer medical testimony regarding Petitioner's ataxia to explain his unusual ("creepy and unordinary") appearance and support his defense that any touching was unintentional; (3) after the court declared a mistrial and discharged the jurors, Thompson should have objected to the jury's request to continue deliberations on the ground that the jurors lacked "jurisdiction"; (4) Thompson should have likewise conducted some investigation and consulted with Petitioner before agreeing to allow the jury to resume deliberations; (5) Thompson did not offer lay witnesses to testify that Petitioner behaved appropriately with children; (6) Thompson did not object to videotape footage of Detective Verdugo mentioning "another police investigation of [Petitioner] in New York" during his post-arrest interview; and (7) both Thompson and Westerhausen were ineffective for not challenging the constitutionality of Arizona's child-molestation statutes—an omission that allegedly prejudiced Petitioner because the State argued in its brief in opposition to his petition for certiorari that

Petitioner never raised this argument at trial or on direct review, and the Supreme Court denied the writ (Id. at 14-20.)

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

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

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

> • Petitioner "was deprived of his state and federal constitutional rights to due process and an impartial jury where Arizona Rules of Evidence 404(b) and 404(c) were impermissibly employed to deny a severance of the counts, lessen the prosecution's burden, and allowed evidence of each of the other alleged sexual offense[s] to be admitted at trial as proof of the other counts." (Id. at 2, 21-23.)
>
> • "The cumulative effect of multiple trial errors violated due process and rendered the resulting criminal trial fundamentally unfair." (Id. at 2, 25.)

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

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

> (1) Petitioner's constitutional challenge to A.R.S. § 13-1410(A) is precluded, pursuant to Rule 32.2(a)(3), because Petitioner failed to raise this claim on direct review. (Doc. 1-17: Arizona Court of Appeals' Memorandum Decision, at 2-3, ¶ 2.)
>
> (2) Rule 32.2(a)(3) also precluded Petitioner's "claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application of Rule 404(b) and (c)." (Id. at 3, ¶ 3.)

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

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

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

(6) Petitioner waived two ineffectiveness claims by failing to present them adequately to the trial court in his PCR petition and at the evidentiary

hearing—to wit: (1) Thompson should have raised a jurisdictional challenge to the jury continuing to deliberate after the mistrial's declaration; and (2) trial counsel should have objected to videotape footage referencing another investigation. (Id. at 7, ¶ 11 & n.3.)

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

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

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

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

(1) "The court of appeals misapplied the law and created a harrowing new rule relating to when a claim of extrinsic evidence may be raised." (Doc. 1-

18: Petition for Review by Arizona Supreme Court, CR-12-0416-PR, at 5-7.)

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

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

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

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

(6) "Was Petitioner deprived of his state and federal constitutional right to be convicted only upon proof beyond a reasonable doubt and an impartial jury when the jurors were compelled to vote guilty under undue influence of the Foreman, who, on his own, reassembled the jurors after they had been discharged, and had them recommence deliberations, even though a mistrial had been declared?" (Id. at 16.)

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

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

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

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

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

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

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

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

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

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

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

unordinary" and "like a child molester" ("Ground 4B.2").

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

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

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

• Ground4F: Thompson "failed to identify" that Arizona's child-molestation statutes are unconstitutional for allegedly shifting the burden of an element to the defendant.

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

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

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

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

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

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

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

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

• Ground 6A: The State engaged in prosecutorial vindictiveness by obtaining a second indictment charging Petitioner with four new counts of child molestation against three additional victims (Luis A., Sheldon H., and Nicholas M.) while

Petitioner's motion to remand the original indictment to the grand jury for a new probable-cause determination was still pending decision.

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

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

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

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

(8) "The trial court's failure to properly instruct the jurors, on a critical legal principle concerning how they could use evidence of other acts charged in the multi-count indictment to assess guilt or innocence, denied Stephen May his federal constitutional

rights to due process and a fair trial. U.S. Const. amends. V, VI and XIV."

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

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

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

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

(11) "Stephen May's federal constitutional right to due process was violated when the trial court's instructions to the jury on Arizona's child molestation statute, and the defense that any

touching was not sexually motivated, placed the burden of proof on the Defendant. U.S. Const. amends. V and XIV."

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

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

(14) "Stephen May is actually innocent of the charges and, but for the trial errors and constitutional violations, no reasonable juror would

have found him guilty beyond a reasonable doubt. U.S. Const. amends. V, VI and XIV."

DISCUSSION

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

A. Exhaustion and Procedural Default

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and(c); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

Proper exhaustion requires a petitioner to have "fairly presented" to the state courts the exact federal claim he raises on habeas by describing the operative facts and federal legal theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the

federal courts."). A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.").

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

Even when a claim's federal basis is "self-evident," or the claim would have been decided on the same considerations under state or federal law, a petitioner must still present the federal claim to the state courts explicitly, "either by citing federal law or the decisions of federal courts." Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000) (quotations omitted), amended by 247 F.3d 904 (9th Cir. 2001); see Baldwin v. Reese, 541 U.S.

27, 32 (2004) (claim not fairly presented when state court "must read beyond a petition or a brief ... that does not alert it to the presence of a federal claim" to discover implicit federal claim).

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

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

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

Claims may be procedurally barred from federal habeas review based upon a variety of factual circumstances. If a state court expressly applied a procedural bar when a petitioner attempted to raise the claim in state court, and that state procedural bar is both "independent"[2] and "adequate"[3] review of the merits of the claim by a federal habeas court is barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim that claim can ordinarily not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

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

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

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

Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003) ("A state court's application of a procedural rule is not undermined where, as here, the state court simultaneously rejects the merits of the claim.") (citing Harris, 489 U.S. 16 at 264 n.10).

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002) ("[T]he procedural default rule barring consideration of a federal claim 'applies only when a state court has been presented with the federal claim,' but declined to reach the issue for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally barred.'") (quoting Harris, 489 U.S. at 263 n.9).

In Arizona, claims not previously presented to the state courts via either direct appeal or collateral review are generally barred from federal review because an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive petition is permitted. See Ariz. R Crim. P. 32.1 (d)-(h), 32.2(a) (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior

Rule 32 post-conviction proceedings. See, Stewart, 536 U.S. at 860 (determinations made under Arizona's procedural default rule are "independent" of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S. 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); State v. Mata, 185 Ariz. 319, 334-36, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the "cause and prejudice" test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. "A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis." Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations and internal quotations

omitted). Ignorance of the State's procedural rules or other forms of general inadvertence or lack of legal training and a petitioner's mental condition do not constitute legally cognizable "cause" for a petitioner's failure to fairly present his claim. Regarding the "miscarriage of justice," the Supreme Court has made clear that a fundamental miscarriage of justice exists when a Constitutional violation has resulted in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96.

B. Merits

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

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in

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

[Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 404-05. "A state court's decision can involve an 'unreasonable application' of Federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

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

Regarding the performance prong, a reviewing court engages a strong presumption that counsel rendered adequate assistance, and exercised reasonable professional judgment in making decisions. See id. at 690. "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

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

If the prisoner is able to satisfy the performance prong, he must also establish prejudice. See id. at 691-92; see also Smith, 528 U.S. at 285 (burden is on defendant to show prejudice). To establish prejudice, a prisoner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. A court need not determine whether counsel's performance was deficient before examining whether prejudice resulted from the alleged deficiencies. See Smith, 528 U.S. at 286 n.14. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. (quoting Strickland, 466 U.S. at 697).

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

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

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

C. Petitioner's Grounds for Relief

1. Ground 1

In Ground 1, Petitioner contends that he "is being held in violation of his [Fifth, Sixth, and Fourteenth Amendment] federal constitutional rights, including his right to confront the witnesses against him, right to

an impartial jury, right to a fair trial and due process, [because] the jury foreman introduced extrinsic material, in the form of his daughter's 'large fluffy white stuffed bear,' into the jury deliberations and the jurors conducted unauthorized experiments with the extrinsic evidence (teddy bear) on the ultimate issue of [Petitioner's] intent." (Doc. 1, at 8; Doc. 2, at 24-52.)

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

On October 11, 2007, Petitioner, through Attorney Westerhausen, filed an opening brief that presented four arguments to the Arizona Court of Appeals, none of which alleged juror misconduct. (Doc. 1-2: Opening Brief, at 1-34.) Petitioner's subsequent pleadings on direct review likewise omitted any allegations of juror misconduct. (Doc. 1, at 4; Doc. 1-3: Reply Brief, at 2-19; Doc. 1-4: Memorandum Decision, at 1-7; Doc.1-5: Petition for Review by Arizona Supreme Court, at 1-6.)

The March 30, 2010 PCR petition raised the claim that Foreman Richardson had engaged in jury

misconduct by bringing a stuffed animal into the jury room, stating:

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

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

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

> The jury foreman brought a stuffed bear (or rabbit according to one juror [Mayhew-Proeber]) into the jury room during deliberations and used it briefly to demonstrate how defendant might have touched the victims and how he reached his conclusions in the case. (Hearing Exhibit 29 [Richardson] at 13:14; 14:11). Several other jurors handled the stuffed animal, and one juror also used it to give a visual of "what possibly could have happened" (Hearing Exhibit 31 [Harris] at 11:12-13). One of the jurors said the

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

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

Because the jury considered extrinsic evidence (the stuffed bear), prejudice is presumed unless

> the State proved beyond a reasonable doubt that the extrinsic evidence did not taint the verdict. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P.3d 90, 95 (2003); *State v. Poland*, 132 Ariz. 269, 283, 645 P.2d 784, 798 (1982).
>
> There is no evidence that the presence of the stuffed animal was either favorable or unfavorable to defendant. The stuffed animal was a neutral object used by some of the jurors for demonstrative purposes. Because there is no evidence that the presence of the stuffed animal influenced the verdicts, the Court finds beyond a reasonable doubt that extrinsic evidence did not taint the verdicts.
>
> ...
>
> THE COURT FINDS no evidence that juror misconduct influenced the verdicts they reached in this case.

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

In his petition for review by the Arizona Court of Appeals, Petitioner argued that Judge Hoffman improperly denied post-conviction relief on Ground 1 because: "(1) the jury considered presumptively prejudicial extrinsic evidence; (2) the prosecution failed to rebut the presumption; and (3) the hearing judge misapprehended the presumption of prejudice."(Doc. 1-14: Petition for Review, at 4-9.) The Arizona Court of Appeals, however, found Ground 1 to be precluded because Petitioner did not raise this claim on direct appeal stating:

¶6 May next contends the trial court erred in rejecting his claim of juror misconduct. The jury foreman brought a stuffed animal into deliberations for demonstrative purposes. May argues, as he did below, that the stuffed animal was "extrinsic evidence" and should not have been permitted in the jury room. He contends the court erred by finding he was not prejudiced by its use.

In neither his petition for post-conviction relief nor in his petition for review did May specify the subsection of the rule under which he was seeking relief for this purported misconduct. *See* Ariz. R Crim. P. 32.5 ("The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him...."). To the extent the claim fell under Rule 32.1(a), it clearly was precluded because it could have been raised on appeal. Ariz. R. Crim. P. 32.2(a). But May seemed to assert this claim under Rule 32.1(e) based on newly discovered evidence. In his petition for post-conviction relief, he stated that "significant relevant facts were not available until after trial and appeal." "Evidence is not newly discovered unless ... at the time of trial ... neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶13, 4 P.3d 1030, 1033 (App. 2000). Thus, even assuming May was attempting to raise a claim of newly discovered evidence, he did not show he exercised the requisite due

> diligence in attempting to secure the new evidence. *See* Ariz. R Crim. P. 32.1(e)(2). Consequently, May has not sustained his burden of establishing the trial court abused its discretion by denying relief on this ground.

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

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

The Court finds that Ground 1 does not warrant habeas relief because the Arizona Court of Appeals found this claim precluded, pursuant to Rule 32.2(a) because Petitioner could have raised Ground 1 on direct appeal, but failed to do so. Arizona Rule of Criminal Procedure 32.2(a) is an independent and adequate state ground that bars federal habeas review of constitutional claims. See, e.g., Stewart, 536 U.S. at 860 (determinations made under Arizona's procedural default rule are "independent" of federal law); Smith, 241 F.3d at 1195 n.2 ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S.

856 (2002); see also Ortiz, 149 F.3d at 931-32 (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure).

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

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

Further, Petitioner cannot establish cause for procedurally defaulting Ground 1 by blaming

Thompson and/or Westerhausen for not presenting this claim since Petitioner never presented the state courts with the claim that his trial and appellate attorneys rendered ineffective assistance by failing to raise this juror-misconduct issue; and a federal habeas petitioner trying to excuse his procedural default by showing ineffective assistance of counsel as cause must first have presented the ineffective assistance claim to the state court.

Consequently, Ground 1 is procedurally barred.

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

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

> Ground 2: "Stephen May was denied his federal constitutional rights to trial by jury, due process and a fair trial where, after a mistrial had been granted, the jurors reassembled on their own and recommenced their deliberations without ever being re-sworn or placed under oath and, thus, were

without jurisdiction to render a valid verdict. U.S. Const. amends. V, VI and XIV."[5] (Doc. 1, at 10.)

Ground 4G.2: Trial counsel rendered ineffective assistance because he did not object to the jury resuming its deliberations, based upon the rationale that Judge Stephens' mistrial declaration and her verbal discharge absolved the jurors of their oath and their "jurisdiction to reach a verdict." (Doc. 1, at 17; Doc. 2, at 70.)

Ground 5B: "Stephen May was deprived of his federal constitutional right to the effective assistance of appellate counsel [Tracey Westerhausen] U.S. Const amends. VI and XIV," because Westerhausen did not argue on appeal that the jury lacked jurisdiction to resume deliberations and return a verdict after the declaration of a mistrial. (Doc. 1, at 19.)

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

a. Ground 2

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

> ¶ 4 May contends for the first time on review that he is entitled to relief because "the jury did not have jurisdiction to reach a verdict." He bases this argument on the fact that the jurors continued deliberating after a mistrial initially was declared. [FN2] The propriety of the continued deliberations was raised in May's direct appeal. *May,* No. 1 CA-CR 2007-0144, ¶¶ 7-11.[6] And the trial court correctly found that his claim [alleging that] it had erred by permitting the jury to continue deliberating was precluded because it had been addressed and rejected on appeal. Consequently, to the extent May argues he is entitled to relief due to the jury's consumed deliberations, his argument is precluded. *See* Ariz. R Crim. P. 32.2(a)(3).
>
> FN2. After extensive deliberations, the jury informed the trial court that it was deadlocked. The court dismissed the jury and declared a mistrial. A few minutes

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

> later, the jury asked to begin deliberations again, and both the prosecutor and May's attorney stated they did not object.
>
> ¶ 5 May nevertheless contends he can raise this issue in his petition for review because, given the initial declaration of a mistrial, the jury lacked subject matter jurisdiction to decide his case. But in his petition for post-conviction relief before the trial court, May did not base his argument on subject matter jurisdiction. We will not consider May's argument because we do not consider issues raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review). Moreover, this is not a subject matter jurisdiction issue. *See State v. Maldonado*, 223 Ariz. 309, ¶ 14, 223 P.3d 653, 655 (2010) ("'subject matter jurisdiction' refers to a court's statutory or constitutional power to hear and determine a particular type of case").

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

Thus, the Arizona Court of Appeals upheld the denial of post-conviction relief on Ground 2 because any claim based on lack of subject matter jurisdiction was raised for the first time in his petition for review. Ariz. R. Crim. P. 32.9(c)(1)(ii) confines claims considered in a petition for review to the Arizona Court of Appeals to those claims presented in the trial court. Petitioner's

failure to raise this claim in his original petition in the trial court means this claim was not "fairly presented" in state court and has not been properly exhausted. See Roettgen, 33 F.3d at 38 ("A petitioner has not satisfied the exhaustion requirement unless he has fairly presented his claim to the highest state court. [Citation omitted]. Submitting a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation. [Citation omitted]."). Because the time to present this claim in a state post-conviction proceeding has passed, the claim is procedurally defaulted. See Ariz. R. Crim. P. 32.2(a), 32.4(a).

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

b. Grounds 4G.2 and SB

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

> ¶ 11 May advances several claims of ineffective assistance of trial and appellate counsel. Two of

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

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

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

Moreover, as to the merits of his claims, the Court notes that throughout his habeas petition, Petitioner alleges multiple grounds of ineffective assistance of trial and/or appellate counsel, most of which consist of bald assertions and conclusory suggestions that counsel failed to employ tactics that Petitioner would have chosen with respect to witnesses, evidence, and strategy. "In determining whether the defendant received effective assistance of counsel, '[the court] will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight,' but rather, will defer to counsel's sound trial strategy." Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001) (quoting

Strickland, 466 U.S. at 689). "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." Strickland, 466 U.S. at 681.

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

3. Grounds 3, 4F, and 5A

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

> Ground 3: "Stephen May's convictions violate his federal constitutional right to due process and a fair trial because Arizona's child molestation statutes (A.R.S. § 13-1410 and § 13-1407[E]) are unconstitutional on their face, and as applied,

where they require the defendant, who is actually innocent, to prove that any touching lacked sexual motivation, thereby relieving the State of its burden to prove each essential element beyond a reasonable doubt, and no reasonable jury would have found the defendant guilty without the burden having been shifted to the defense. U.S. Const. amends. V, VI and XIV." (Doc. 1, at 12.)

Ground 4F: Thompson rendered ineffective assistance of trial counsel because he "failed to identify" that Arizona's child-molestation statutes are unconstitutional for allegedly shifting the burden of an element to the defendant. (Doc. 1, at 17.)

Ground 5A: Westerhausen rendered ineffective assistance of appellate counsel because she did not challenge the constitutionality of Arizona's child-molestation statutes on direct review. (Doc. 1, at 19.)

a. Ground 3

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

constitutes an adequate and independent procedural bar.

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

b. Grounds 4F and 5A

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

Initially, the Court finds that Petitioner has failed to establish a reasonable probability that the outcome of his case would have been different, had Thompson and Westerhausen actually challenged the constitutionality of Arizona's child-molestation statutes at trial and on direct appeal and prevailed. The facts demonstrate that Petitioner was motivated by sexual interest when he touched the genitals of Danielle, Luis, and Taylor. The repetition and deliberate nature of sexual contact with these children demonstrates Petitioner's sexual motivation and diminishes any contention that the touching was inadvertent or otherwise innocent. Specifically, Danielle reported that: (1) Petitioner "grabbed" her and seated her on his lap before he began touching her vagina over her bathing suit; (2) when Danielle tried to escape by swimming away, Petitioner caught her and returned her to his lap; (3) although Danielle told Petitioner to stop when

he touched her vagina, he continued doing so; and (4) Petitioner touched her vagina every time she saw him at the pool. (Exh. E: R.T. 1/3/07, at 119-21, 124-25, 128, 130, 137; Exh. F: R.T. 1/4/07, at 97, 109; Exh. H: R.T. 1/9/07, at 54.) Taylor similarly recalled that: (1) Petitioner touched her vagina over her bathing suit while she was sitting on his lap in the pool's Jacuzzi area; and (2) Taylor had been touched in this manner "20 times." (Exh. E: R.T. 1/3/07, at 73-77, 82-84, 87, 106; Exh. I: R.T. 1/10/07, at 9, 11-12, 22, 90-91.) Luis reported that Petitioner placed his open palm on the zipper area of his pants and rested it over his genitals while Petitioner was helping him with a computer in the classroom. (Exh. E: R.T. 1/3/07, at 7-8, 16-17; Exh. F: R.T. 1.4.07, at 7-8.) However, when Luis told his mother, Sandra, that Petitioner had touched his genitals, he demonstrated the act by wiggling his fingers over his crotch and maintained that Petitioner had done this "on purpose." (Exh. E: R.T. 1/3/07, at 52, 55, 57-58, 60.)

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

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

> and determination. You must consider all the evidence in deciding whether the defendant committed the act voluntarily or failed to perform the duty imposed on the defendant.

(Exh. A: P.I., Item 165, at 8; Exh. I: R.T. 1/10/07, at 107.) And, the following instruction on the elements of child molestation also informed the jury that the prosecution was required to prove beyond a reasonable doubt that Petitioner "knowingly" touched the children's genitals—a burden the State could not meet with proof that Petitioner had accidentally done so:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.

(Exh. A: P.I., Item 165, at 8; Exh. I: R.T. 1/10/07, at 107-08.)

The jury was instructed that "knowingly" meant that "a defendant acted with awareness of or the belief in the existence of conduct or circumstances constituting an offense," that "knowingly" could be proven with evidence showing that Petitioner acted "intentionally," and that "intentionally" meant that "a defendant's objective is to cause that result or to engage in that conduct." (Exh. A: P.I., Item 165, at 9-10; Exh. I: R.T. 1/10/07, at 108-09.)

Thus, the jury would have still convicted Petitioner on the child-molestation counts involving Danielle, Luis, and Taylor, even had Thompson successfully

prevailed on a motion to declare Arizona's child-molestation statutes unconstitutional and thereafter obtained jury instructions requiring the State to prove Petitioner's sexual motivation beyond a reasonable doubt. This conclusion also demonstrates that Petitioner's convictions would have been affirmed, even had Westerhausen raised this constitutional argument before the Arizona Court of Appeals on direct review.

Next, Petitioner cannot demonstrate that Thompson and Westerhausen rendered deficient performance. Thompson and Westerhausen reasonably forewent challenging Arizona's child-molestation statutes on federal constitutional burden-shifting grounds and, instead, made the tactical decision to make statutory-based arguments that the State had the burden of disproving Petitioner's defense of lack of sexual motivation beyond a reasonable doubt. As noted above, Thompson argued that the State had to carry the burden of proving sexual interest beyond a reasonable doubt because several months before Petitioner's trial, the Legislature had amended Sections 13-103(B) and 13-205(A) to reassign the burden of proving certain defenses to the State, and the Arizona Court of Appeals held that this amendment retroactively applied to defendants who committed their offenses before this legislation, but had yet to be tried. (Exh. A: P.I., Item 241, at 3; Exh. G: R.T. 1/9/07, at 72-73; Exh. I: R.T. 1/10/07, at 100.) On appeal, Westerhausen likewise advanced a statutory-based argument to challenge Judge Stephens' final instructions, namely that Section 13-1407(E)'s defense of lack of sexual motivation did not fall within Section 13-103(B)'s definition of affirmative defense, and that Section 13-205(A)'s

allocation of the burden of proof to the defendant therefore did not apply to this defense. These tactical decisions were objectively reasonable especially considering that the Arizona judiciary had already rejected burden-shifting federal constitutional challenged to Section 13-1407(E):

> The defendant argues that the statutes defining child molestation are unconstitutional because they impermissibly shift to him the burden of disproving an element of the offense. He also argues that the jury instructions in this case inadequately informed the jury of the state's burden of proof. We reject both contentions.
>
> ...
>
> The defendant asserts that these statutes effectively created a presumption regarding the existence of sexual motivation which he was required to disprove. He argues that this violated due process. *See Mullaney v. Wilbur*, 421 U.S. 684 [] (1975). ...
>
> In any event, we find the argument to be without merit. The statutes in question did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive. This is constitutionally permissible. *Patterson v. New York*, 432 U.S. 197, 205-07 [] (1977); *Gretzler*, 126 Ariz. at 89, 612 P.2d at 1052.
>
> We likewise reject the suggestion that the statutes, which contain no reference at all to a presumption, nevertheless create a presumption

> on the "element" of motivation by sexual interest. *See Patterson*, 432 U.S. at 205 [ ]. Contrary to the defendant's implication, proving the existence of such motivation was not necessary to establish guilt of child molestation under the statute at issue.

Sanderson, 898 P.2d at 490-91. See also State v. Getz, 944 P.2d 503, 505-08 (Ariz. 1997) (holding that statute defining sexual abuse under A.R.S. § 13-1404 must be applied "as written" because its text is "plain on its face," and refusing to "inject" any affirmative defense under § 13-1407 into the crime's elements); State v. Sandoval, 857 P.2d 395, 399 (Ariz. App. 1993) ("A.R.S. section 13-1407(E) makes it a defense to prosecutions brought pursuant to A.R.S. section 13-1410 or to A.R.S. section 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest").

Because Petitioner cannot establish deficient performance or prejudice, he is not entitled to relief on Grounds 4F and 5A. Moreover, Ground 3 remains procedurally defaulted.

4. Ground 4

In Ground 4, Petitioner raises grounds for relief claiming that his attorney, Joel Thompson, was ineffective. Grounds 4A, 4B, 4E, 4G.1, 4G.3, 4H, 4I, and 4J will be addressed in this section. Grounds 4C, 4D, 4F, and 4G.2 are addressed in the sections of this Recommendation discussing Grounds 2, 3, 6A, and 9A.

a. Ground 4A

Ground 4A has four components: (1) the contention that Thompson rendered deficient performance because he did not consult with experts regarding suggestive interview techniques, potential flaws in child-witness testimony, and the psychological profile of child molesters ("Ground 4A.1"); (2) the claim that Thompson should have called an expert to testify about suggestive interview techniques ("Ground 4A.2"); (3) the argument that Thompson should have called Dr. Esplin to testify about how certain factors might render children's memories genuine, but wrong ("Ground 4A.3"); and (4) the contention that Thompson should have called an expert because one juror did not know how child molesters think and whether they are attracted to minors of both genders ("Ground 4A.4"). (Doc. 1, at 14-15; Doc. 2, at 60-68.) The Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

After conducting an evidentiary hearing, Judge Hoffman denied relief on Ground 4A, reasoning as follows:

> Defendant claims his trial counsel was ineffective in failing to investigate and present testimony from expert witnesses and character witnesses. Trial counsel testified that he thought he could point out any deficiencies in the forensic interviews of the victims through cross-examination of the officer who conducted the forensic interviews and through closing

> argument. (Hearing Exhibit 1, at ¶¶ 8-9, 12-13, R.T. of Sept. 7, 2011 at 39.)
>
> He cross-examined each of the child victims, tested their memories of the events, pointed out inconsistencies in their testimony and elicited testimony that supported the defense theory of the case. Dr. Esplin, defendant's expert in the area of child witnesses, testified that he rarely testified for the prosecution. (R.T. of Sept. 8, 2011 at 20-21.) He also testified that trial counsel brought issues regarding credibility of the victims to the attention of the jury. *(Id*. at 34-37.) The Court has considered his testimony at the evidentiary hearing and does not find that his testimony established a reasonable likelihood of a different result had he testified at trial....
>
> THE COURT FINDS that there is no evidence that the performance of either trial or appellate counsel fell below prevailing objective standards. Even if it had, the Court finds no evidence of any resulting prejudice to the defendant.
>
> IT IS HEREBY ORDERED denying defendant's Petition for Post-Conviction Relief as to all grounds raised at the evidentiary hearing.

(Doc. 1-13: Minute Entry, filed on November 7, 2011, at 5-7.)

- **Ground 4A.1**

Petitioner has failed to demonstrate that Thompson's failure to consult experts on forensic

interviews, child witnesses, and the internal thought patterns of pedophiles while preparing for Petitioner's trial constituted deficient performance. Petitioner predicates Ground 4A.1 upon the opinions of Dr. Esplin and his legal expert, Michael Piccarreta, that Thompson should have at least consulted with an expert because the State would call four different children to testify at his consolidated trial. (Exh. CC: R.T. 9/7/11, at 126-27; Exh. DD: R.T. 9/8/11, at 10-11, 62.)

In this case, however, Judge Hoffman received sworn testimony and an affidavit from Thompson establishing that: (1) the Arizona Board of Legal Specialization certified him as a specialist in criminal law; (2) Thompson practiced criminal law exclusively since 1976 and served as a *pro tem* judge for an 8-year period between 1987 and 1995; (3) he had "wide experience representing clients charged with sex offenses" and conservatively estimated that he had "35 to 50 trials" involving such charges; and (4) based upon the aforementioned prior experience, Thompson "consider[ed] himself well-versed and current on literature concerning children's testimony in child sexual abuse cases, with sufficient recognized expertise that [he] had presented a 1992 CLE seminar for the State Bar of Arizona entitled 'The Child Witness.'" (Exh. R: PCR Exhibits [Tab 119], Thompson's Affidavit, at ¶¶ 3, 12; Exh. CC: R.T. 9/7/11, at 6, 26-27.)

Moreover, the prosecution's pretrial disclosure statements failed to notice any experts, let alone one who would offer testimony regarding the characteristics of child molesters and their victims.

(Exh. A: P.I., Items 7, 34, 35.) Additionally, because Luis, Danielle, Sheldon, and Taylor had alleged only that Petitioner had touched their genitals indirectly and over their clothing, neither he nor the prosecution could offer expert testimony regarding any physical, forensic, or medical evidence—such as latent prints, DNA comparisons, or post-assault medical examinations—to bolster or refute these victims' allegations.

Petitioner has also failed to establish prejudice. Indeed, to the extent that Petitioner complains that Thompson's decision not to consult an expert before trial adversely impacted his cross-examination of the victims and the State's other witnesses, Petitioner fails to identify what additional favorable testimony Thompson could have elicited from the State's witnesses, had he consulted with experts on forensic interviews, child witnesses, and the internal thought patterns of pedophiles. And, self-serving speculation is insufficient to prove ineffectiveness:

> We have held that "a defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information ... would have produced a different result.'" *United States v. Kamel*, 965 F.2d 484, 499 n.45 (7th Cir. 1992) (quoting *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir. 1987), *cert. denied*, 498 U.S. 842 [ ](1990)). Rodriguez has explained neither what Santos's responses to further cross-examination might have

> revealed nor how those responses might have affected the result. Accordingly, his ineffective assistance of counsel claim must fail.

U.S. v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995); see Day v. Quarterman, 566 F.3d 527, 539–40 (5th Cir. 2009) ("Day's argument again suffers from speculation. As with her claim regarding counsel's failure to secure the assistance of a medical expert, Day merely 'point[s] to trial counsel's neglect [in] his failure to properly challenge the State's experts via cross-examination' and speculates that '[h]ad counsel investigated the case to any reasonable degree, the inexactness of medicine and the differences of opinion among doctors entail that he would easily have found something more than the perfunctory and peripheral things he used to attempt to challenge the State's conclusions.' Day does not offer a concrete explanation of the testimony that alleged proper cross-examination would have elicited.").

- **Ground4A.2**

Petitioner has failed to demonstrate that Thompson's failure call an expert to testify about suggestive interview techniques constituted deficient performance. In his affidavit, Thompson provided the following explanation for not calling a defense expert on this topic:

> I felt that any deficiencies in the techniques of the forensic interviews conducted in the May case (e.g., leading the children or implanting memories that did not happen) could be better pointed out by me in later argument based upon simply cross-examining the police officer who

> testified about forensic interviewing (Phoenix Police Department Detective Phil Shores) rather than an outside expert.

(Exh. R: PCR Exhibits [Tab 119], Thompson's Affidavit, at 3, ¶ 13.)

During the evidentiary hearing, the State elicited additional testimony from Thompson on this point:

> Q. How about an expert for analyzing police action, somebody to come educate you about whether the police did a good interview or talked to the right people or something like that?
>
> A. Well, certainly, you know, in confession cases, you know, coerced confessions and those types of things, experts as to police procedures are very useful, there are areas where they are, and I have used them.
>
> Q. Okay, How about in this case? Did you feel it was appropriate?
>
> A. I felt that we had the best of both worlds, because one of the witnesses was a police officer who testified on just those issues about the bad way to question a witness and whatnot, so I felt that we had the benefit of what an expert would provide without the taint of my expert being a hired gun coming in.

(Exh. CC: R.T. 9/7/11, at 38-39.)

During trial, Thompson elicited Detective Shores' testimony that: (1) forensic interviewers should ask young children very general, open-ended, and non-

leading questions in order to avoid suggesting desired responses; (2) the interviewer should avoid mentioning the person or event in question until the child has done so; and (3) police officers should never encourage parents to ask their own children about sexual abuse because parents have a tendency to suggest answers to their questions. (Exh. F: R.T. 1/4/07, at 11-13, 20-22, 24-25.)

Detective Shores' testimony on these points enabled Thompson at the end of trial to argue that the Gentry Walk victims were not worthy of belief because: (1) the first adults to speak with these children were their parents who had "loaded agendas," lacked training in proper forensic interview techniques, and therefore reinforced the allegations against Petitioner with suggestive questions (Exh. E: R.T. l/3/07, at 86-87, 103, 126-28; Exh.F: R.T. 1/4/07, at 63-64, 103-04; Exh. G: R.T. 1/8/07, at 36, 65, 97-99; Exh. H: R.T. 1/9/07, at 53; Exh. I: R.T. 1/10/07, at 131, 143-44, 151); and (2) Quihuiz and Johnson deviated from the protocol that Detective Shores detailed by asking Taylor and Danielle, respectively, unduly suggestive questions that "plant[ed] information in a big way" in their recollections (Exh. F: 20 R.T. 1/4/07, at 11-13, 20-22; Exh. I: R.T. 1/10/07, at 12-13, 18, 144-45, 148-49). Even Dr. Esplin's affidavit recognized that Thompson "destroyed" the Mesa Police Department detectives who interviewed the Gentry Walk victims. (Exh. DD: R.T. 9/8/11, at 36, citing Exh. R: PCR Exhibits, Vol. 6, Tab 116: Dr. Esplin's Affidavit, at 10.)

Petitioner also cannot establish resulting prejudice. Petitioner failed to meet this burden because he has

never identified with particularity what testimony an uncalled expert would have offered the jury, above and beyond what Thompson had already presented through cross-examination of the State's witnesses and highlighted during closing argument. See Tinsley v. Million, 399 F.3d 796, 806 (6th Cir. 2005) ("Putting to the side the question whether [relying on cross-examination to impeach the prosecution's blood-spatter expert] was ineffective—it most probably was not—Tinsley has failed to establish prejudice arising from the modest difference between the jury hearing this theory of defense through cross-examination and hearing it through the mouth of another expert."); Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (recognizing that a defendant cannot prove prejudice where his newly proffered evidence was cumulative to that which had already been presented at trial).

- **Ground 4A.3**

Petitioner has failed to demonstrate that Thompson's rendered deficient performance when he failed to call Dr. Esplin to testify about the factors that might render children's memories genuine, but wrong. After the evidentiary hearing, Judge Hoffman found Ground 4A.3 was meritless, based on the following reasoning:

> [Thompson] cross-examined each of the child victims, tested their memories of the events, pointed out inconsistencies in their testimony and elicited testimony that supported the defense theory of the case. Dr. Esplin, defendant's expert in the area of child witnesses, testified that he rarely testified for the

> prosecution. (R.T. of Sept. 8, 2011 at 20-21.) He also testified that trial counsel brought issues regarding credibility of the victims to the attention of the jury. (Id. at 34-37.) The Court has considered his testimony at the evidentiary hearing and does not find that his testimony established a reasonable likelihood of a different result had he testified at trial.

(Doc. No.1-13: Minute Entry, filed on November 7, 2011, at 5.)

Petitioner contends that Thompson rendered ineffective assistance because he did not call Dr. Esplin to educate the jury about the possible scientific reasons why children might encounter difficulties accurately recalling events, including sexual abuse. Petitioner argues, for instance, that such testimony would have assisted the jury because: (1) all of the charged offenses involved "a momentary touch over clothing in a pool or classroom"—events that created "'simplistic' memories ... more subject to 'alteration or malleability' than a more 'complex' event, such as an extended fondling or penetration," and (2) Taylor initially believed that Petitioner's "alleged touch was 'clumsy' or accidental," but changed her mind about his sexual motivation after Danielle reported being touched in a similar manner. (Doc. 2, at 63.)

However, the record reflects that Thompson had made the jury aware of the significant memory problems plaguing Danielle, Luis, Sheldon, and Taylor through cross-examination and/or closing remarks demonstrating the following:

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

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

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

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

• Luis could not make an in-court identification of Petitioner at trial, a deficiency the State remedied by showing Luis a series of photographs of several men, including one depicting Petitioner as he appeared several months after the charged molestation. (Id. at 31-32, 93-95.) Thompson thereafter argued that Luis identified Petitioner from one of these men only because Petitioner was the only depicted person in the courtroom. (Exh. I: R.T. 1/10/07, at 137.)

• Luis did not recall speaking with Detective Shores at school. (Exh. E: R.T. 1/3/07, at 43-44.) Shores

testified that he did not submit Luis' case to the county attorney for charging because Luis could not recall peripheral details, and there was no corroborating evidence. (Exh. F: R.T. 1/4/07, at 10, 15-16; Exh. I: R.T. 1/10/07, at 137.)

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

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

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

• Taylor initially believed that Petitioner had accidentally touched her, but attributed her change of mind to growing older and maturing. (Exh. E:

R.T. 1/3/07, at 80, 84-85, 87; Exh. I: R.T. 1/10/07, at 11, 138-39.)

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

Thompson's cross-examination of the State's witnesses and his closing arguments also alerted the jury to the possibility that external influences might have altered victims' memories:

• Sheldon initially believed that Petitioner touched him accidentally, but changed his mind because Petitioner had contact with his penis on subsequent occasions, and Denise allegedly told him that it was not an accident. (Exh. F: R.T. 1/4/07, at 66, 82-83; Exh. I: R.T. 1/10/07, at 137, 142.)

• Taylor first thought that Petitioner had accidentally touched her genitals, but reconsidered her original interpretation as she "matured" (Exh. E: R.T. 1/3/07, at 80-81, 84-85, 87; Exh. I: R.T. 1/10/07, at 8, 11 [Taylor] id. at 152 [closing argument].)

• The three Gentry Walk victims—Danielle, Sheldon, and Taylor—were exposed to "playground gossip" about Petitioner allegedly molesting other children and therefore convinced themselves that Petitioner had purposefully touched their genitals while in the swimming pool. (Exh. E: R.T. 1/3/07, at 88, 127; Exh. G: R.T. 1/8/07, at 59-63, 69, 96;

Exh. H: R.T. 1/9/07, at 50, 53-55; Exh. I: R.T. 1/10/07, at 7-8, 132, 138, 143, 148, 150.)

• While forensically interviewing Taylor and Danielle, Detectives Quihuiz and Johnson deviated from the protocol that Detective Shores detailed by asking unduly suggestive questions that "plant[ed] information in a big way" in the recollections of both victims. (Exh. F: R.T. 1/4/07, at 11-13, 20-22; Exh. I: R.T. 1/10/07, at 12-13, 18, 144-45, 148-49.)

The foregoing evidence and closing remarks demonstrate that counsel had made the jury aware that the victims had suffered memory problems and might have misinterpreted the charged events because of subsequent exposure to external influences or experiences. Under these circumstances, Thompson's reliance upon non-experts to undermine the victims' credibility was an objectively reasonable tactical decision.

Furthermore, Petitioner has failed to establish that the verdicts would have been different, had Dr. Esplin testified and potentially given the jury a scientific explanation for the memory flaws that Thompson had exposed through cross-examination.

• **Ground4A.4**

Petitioner has failed to demonstrate that Thompson's rendered deficient performance when he failed to call an expert because Juror Root had stated during his post-trial interview that he did not know how child molesters "think" and whether they are attracted to children of both sexes. In the affidavit he submitted during Petitioner's PCR proceeding,

Thompson indicated that he had considered presenting expert testimony regarding the psychological makeup of a pedophile, but elected against this course of action:

> The only expert I even considered was an expert to evaluate Mr. May's risk factors for aberrant sexual behavior. That said, if a defense expert somehow found or felt that Mr. May did show an attraction to children, that fact could become a bad fact for the defense, while evidence that he was not attracted to children (a pedophile) would have been irrelevant, hence inadmissible.

(Exh. R: PCR Exhibits [Tab 119], Thompson's Affidavit, at 2, ¶ 7.)

Elaborating on this affidavit during the evidentiary hearing, Thompson testified that he had called Dr. Gene Abel, "the godfather of risk assessment," to testify at length in a different trial "about what you can learn and not learn from [risk assessments]," but Maricopa County Superior Court Judge Warren Granville later struck Abel's testimony in its entirety because Abel responded, "You can't tell," when asked, "Can you tell whether this person on this occasion did what they're charged with based on your testing?" (Exh. CC: R.T. 9/7/11, at 37-38.) Because Thompson had the same experience in other cases, he further testified that "judges that I've dealt with [routinely] hold that [this type of testimony] is not relevant" (Id. at 38.) Thompson also reiterated his fear that results showing that Petitioner was in fact attracted to children would harm the defense. (Id.)

Thus, Petitioner cannot establish that Thompson rendered deficient performance because: (1) the Sixth Amendment does not obligate an attorney to proffer evidence that is inadmissible; and (2) a lawyer does not render deficient performance by avoiding courses of action that might be detrimental to his client's defense. See, e.g., Matylinsky v. Budge, 577 F.3d 1083, 1092 (9th Cir. 2009); Murtishaw, 255 F.3d at 939 (quoting Strickland, 466 U.S. 3 at 689).

b. Ground4B

In Ground 4B, Petitioner alleges that Thompson should have called an expert to testify about Petitioner's "lifelong battle with a neurological condition called Ataxia," for two different purposes: (1) to demonstrate that any touching was unintentional ("Ground 4 B.1"); and (2) to explain his abnormal physical appearance, which led two jurors to describe Petitioner as "fidgety," "odd," "very scared he got caught doing something," "creepy and unordinary" and "like a child molester, which was the very offense for which he was on trial" ("Ground 4B.2"). (Doc. 1, at 14-15; Doc. 2, at 57-60.) The Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

- **Ground 4B.1**

Thompson's decision not to present ataxia-related expert testimony was neither deficient performance nor prejudicial. During the evidentiary hearing, Thompson testified that he had discussed Petitioner's medical condition with Petitioner and his mother, and that he

had reviewed the medical records that had been prepared by Petitioner's childhood doctors. (Exh. CC: R.T. 11/7/11, at 17-18, 33-34, 46.) Thompson made the tactical decision not to offer expert testimony or medical records regarding this condition, based upon the following reasoning:

> First, because the doctor that [Petitioner] had been see[ingl and diagnosed and treated by was long since deceased It had occurred when he was quite young. My recollection from reviewing the records that his mother shared with me, I believe, he had indicated that it was a condition that [Petitioner] might outgrow as he matured and developed. He had not—[Petitioner] had not been treated by a physician for that condition in his adulthood, there was no doctor locally who had treated him for that condition and under those circumstances, [I] did not feel it was a strong point.

(Exh. CC: R.T. 11/7/11, at 34.)

Moreover, the medical records and expert testimony that Petitioner offered at the evidentiary hearing, as well as Petitioner's own testimony at trial, collectively verified that Petitioner had not sought medical treatment for his ataxia since 1989, when he was 18 years old, and approximately 15 years before the he committed the first of the seven charged offenses. (Exh. I: R.T. 1/10/07, at 25 [Petitioner's testimony that he was born in September 1971], 33, 75-76 [Petitioner's testimony that Dr. Gold, a pediatrician, ceased treating him when he became an adult]; id. at 91 [Petitioner's testimony that he could not recall the last time he had

seen a specialist for his neurological condition and estimating that his last consultation transpired in his late teen years or very early twenties]; Exh. CC: R.T. 11/7/11, at 81, 105, 109-10 [Dr. Goodman's testimony acknowledging the absence of any medical records for Petitioner between 1989 and 2008].)

Further supporting Thompson's assessment that the ataxia-related testimony and medical records he elected against presenting would not have been "a strong point" in Petitioner's defense, the following evidence offered at trial and the PCR evidentiary hearing demonstrates that Petitioner's ataxia affected only his head's movements and progressively improved throughout his childhood:

- Although Petitioner's medical records from childhood were replete with references to his involuntary head movements and complaints about neck pain, neither Dr. Gold nor any other physician reported that Petitioner complained about or manifested the inability to control his hand movements. (Exh. CC: R.T. 11/7/11, at 82-110.)

- In a report prepared in January 1974, Dr. Gold indicated that he was "most pleased with [Petitioner's] improvement and function." (Id. at 85.) This report contained no mention of Petitioner experiencing "movement" difficulties. (Id. at 86.)

- Dr. Gold expressed optimism about Petitioner's progress once again in the report he drafted in September 1974. (Id. at 90.)

- On October 25, 1974, Dr. Gold reported that his "motor examination" of Petitioner revealed "normal,

bulk, tone, and strength of all muscle groups." (Id. at 90-91.) Regarding Gold's entry, "It is of note that his strength in both hands [was] normal, as well as his prehension," Dr. Goodman defined "prehension" as "fine motor control," particularly the "function between the thumb and index finger." (Id. at 91.) This record also reported that Petitioner's "cranial nerve examination was within normal limits." (Id.)

• In February 1975, Dr. Gold reported improvement since his evaluation during the prior October and was "most pleased" that Petitioner was "largely asymptomatic" and displayed "no evidence of paresis." (Id. at 92.) Referring to Petitioner as "this right handed child," Dr. Gold continued, "I could not delineate any evidence of ataxia with regular walking or on making sudden turns. Motor examination showed normal bulk, tone and strength of all muscle groups." (Id. at 93.) Petitioner also manifested "no evidence of a cerebellar deficit" "on finger/nose/finger function." (Id.)

• In March 1975, Dr. Gold reported, "At no time could I delineate any evidence of ataxia and he had no difficulty in making sudden turns. Again, motor examination showed normal bulk, tone and strength of all muscle groups." (Id.) Despite Petitioner's "limited cooperation," Gold found his performance on the finger/nose/finger function to be "grossly normal," that is, "what would be expected for an individual of that age." (Id. at 93-94.) Although this report memonalized Petitioner suffering from large circular movements of his head, Dr. Gold did not

note that Petitioner also experienced involuntary hand or arm movements. (Id. at 94.)

• Although Petitioner had been prescribed Haldol for these head tics until May 1977, this drug was not administered to address any involuntary hand or arm movements. (Id. at 94-96.)

• In July 1978, Dr. Gold advised Petitioner's mother that he believed that Petitioner's condition might have improved. (Id. at 97.)

• In a letter to Dr. Gold written in September 1979, Dr. Stanley Fahn reported finding "no evidence of progressive neurological disease," described Petitioner's "head shaking as mild, hardly noticeable, [and as something that] should not be a major concern." Dr. Fahn did not report that Petitioner experienced involuntary movements in his hands and arms. (Id. at 97-98.) Dr. Fahn also reported, "I did not detect any ataxia" (Id. at 98.)

• In a letter to Petitioner's mother written in May 1980, Dr. Gold wrote, "Stephen, although slightly different in coordinative skill, has improved when compared to my prior evaluation." (Id. at 99-100.)

• In June 1981's report, Dr. Gold memorialized his finding that Petitioner's "detailed neurological examination was within normal limits." (Id. at 100.) Although Petitioner complained of neck pain and requested a neck brace, Dr. Gold did not record any involuntary arm or hand movements. (Id. at 100-01.)

• Dr. Gold's reports in June 1982 and November 1984 memorialized Petitioner's continued difficulties with his head's "most unusual movement disorder of obscure etiology," but omitted any allusion to involuntary hand and arm movements. (Id. at 101-02.)

• A report prepared by Dr. Gruver of the Mayo Clinic during the same time period found "no evidence of a progressive disorder" and indicated that Petitioner might be "able to control his head movements by simple maneuvers, such as touching the mandible or resting his head" (Id. at 102-03.) Dr. Gruver likewise made no mention of involuntary hand or arm movements. (Id.)

• The brain scan conducted in August 1988 was "essentially unchanged from the prior scan." (Id. at 103-04.)

• In September 1988, when Petitioner turned 17 years old, Dr. Gold reported that Petitioner's "isolated muscle testing did not show any evidence of weakness." (Id. at 104.)

• Not surprisingly in light of Dr. Gold's report in September 1988 that Petitioner's "isolated muscle testing" revealed no signs of weakness, Petitioner testified at trial that he first became a life guard when he was 15 years old (sometime in 1986), that he started teaching swim lessons for the American Red Cross in 1990 (when he was 18 and 19 years old), that he served as the aquatic director for a health club, that he continued teaching swimming lessons after he moved to Arizona, and that he

provided swimming lessons at the Gentry Walk apartment complex's community swimming pool after 2001. (Exh. I: R.T. 1/10/07, at 26, 32, 36.)

• Petitioner demonstrated his ability to coordinate and control his hand movements by not only obtaining certification to perform CPR from American Red Cross, but also finding employment as a CPR instructor. (Id. at 26, 28.)

• Consistent with the medical reports detailed above, Petitioner testified that the most prominent symptoms of his neurological disorder affected his vision and caused involuntary head movements. (Id. at 33, 65.)

• Petitioner never listed involuntary hand movements as a symptom of his neurological condition—the name of which (ataxia) he could not recall during trial and therefore called a "condition that doesn't have a diagnosis per se." (Id. at 33-34.)

• Petitioner testified that he did not disclose his neurological disorder to his employers. (Id. at 85.)

• Petitioner testified at trial that his condition did not cause loss of memory or consciousness. (Id. at 86.)

• Petitioner testified that he had no issues driving a car. (Id. at 90.)

The aforementioned evidence supports the following conclusions: (1) Thompson did not render deficient performance when he elected against presenting ataxia-related evidence, above and beyond Petitioner's

testimony, as the medical records and Petitioner's own testimony demonstrated that his condition had improved since childhood, no longer required treatment, and did not affect his ability to perform the hand movements underlying the charged offenses; and (2) there is no reasonable probability the jury would have acquitted Petitioner, had Thompson presented the evidence at issue.

- **Ground 4B.2**

The Court also finds that Thompson's failure to present medical testimony and records to explain Petitioner's appearance to the jury was neither deficient performance nor prejudicial.

During trial, Thompson elicited testimony from Petitioner about his neurological condition:

> Q. We have had access to the interview that you had with Detective Verdugo in November of 2005. You mentioned there that you had a neurological condition. Could you share with us some details about that neurological condition?
>
> A. Sure. From birth, I—some of this I remember, some of this I have been told, but from birth I experienced a lot of hospital stays, a lot of doctor's visits. I had a pediatric neurologist from Columbia Presbyterian that I saw from as young as I can remember all the way to the late teens, probably in the early 20s until I could no longer see a pediatrician, I guess.
>
> I visited the specialist at the Mayo Clinic on his request when I was about eight. I have a

neurological condition that doesn't have a diagnosis per se. It doesn't have a treatment per se, but that soft spot at the top of your head where that's supposed to close when you're a baby, it never closed on me and I have nervous ticks and I tend to be clumsy and also shorter on my left side and making me even more clumsy and I have glasses and eye conditions that go along with that as well.

Q. Okay. So among the symptoms that you have, are there any kinds of body movements that you have that are non-consciously [sic] controlled?

A. Mostly head ticks. I tend to shake my head left and right and I am trying to do it, but don't know exactly how I do it. And up and down, but uncontrollable head-type movements.

Q. While watching the video of your interview with Detective Verdugo, there seemed to be especially in period of times when you were by yourself in the [interview] room, you seemed to be moving your head side to side. Is that symptomatic of the neurological condition that you have?

A. Yes.

Q. Is that something that you are aware of and conscious of when it happens?

A. No.

Q. Were you nervous when you were talking to Detective Verdugo?

A. Yes, very much.

Q. Why?

A. I had never been arrested before. It was very scary.

Q. When you are nervous, does that exacerbate or increase any of your neurological condition symptoms.

A. I have been told that it does.

Q. Are you aware of it?

A. No. Never.

(Exh. I: R.T. 1/10/07, at 33-34.)

During their interviews several years after Petitioner's trial, Jurors Andrews and Harris both recalled that Thompson had offered evidence that Petitioner's abnormal physical mannerisms were the manifestations of a neurological condition. Despite being unable to recall any specifics because of the passage of 4 years since Petitioner's trial, Juror Andrews—who reportedly found Petitioner "creepy and unordinary" and thought that Petitioner's "physical appearance, body language, and personality" comported with the "perfect profile of someone to do such a crime"—told Petitioner's investigator, "I remember there was something wrong of—there was some kind of condition or something was said that I cannot remember about this." (Exh. JJ: Transcript of Interview of Juror Harris, dated 3/5/11, at 3.) When asked whether he considered Petitioner's ataxia while determining whether any sexual contact was

accidental, Juror Andrews responded, "Yeah, I took it into consideration. I think, I know a lot of us on the jury did" (Id.) Juror Harris—who told Petitioner's PCR investigator more than 4 years after trial that he had noticed Petitioner's "fidgety" mannerisms, admitted that Petitioner struck him as "a little odd," thought that "something's not right with this individual" upon viewing Petitioner, and recalled the videotape footage depicting Petitioner" constantly moving as if he was very, very scared that he got caught doing something" after Verdugo left the interview room—likewise demonstrated his recollection that Thompson had offered ataxia-related evidence at trial with the following post-trial interview statement:

> Q. Do you remember anybody bringing up Stephen May's condition called ataxia, a neurological condition?
>
> A. Yes. I do remember that and I believe that is the cause of his ticking, I believe they called it, his constantly moving back and forth of his head. I do remember them bringing that up.

(Exh. JJ: Transcript of Interview of Juror Harris, dated 2/23/11, at 17.)

Significantly, neither Andrews nor Harris ever told Petitioner's investigator that they or any other juror disbelieved Petitioner's testimony that he had this neurological disorder. Of equal importance is the fact that Petitioner's investigator never asked these two jurors whether they would have abandoned their subjective impressions of Petitioner as "creepy and unordinary," "fidgety," "a little odd," and as an

individual with "something [] not right," had Thompson called a physician or admitted medical records to provide them with physiological explanations for Petitioner's physical appearance and involuntary head movements. Consequently, this ineffectiveness claim does not warrant habeas relief because it rests entirely upon Petitioner's speculation that the verdicts would have been different, had Thompson presented evidence regarding Petitioner's neurological condition beyond Petitioner's own testimony. See Hodge v. Haeberlin, 579 F.3d 627, 640 (6th Cir. 2009) ("Hodge's speculation that his testimony would have left a favorable impression with the jury does not demonstrate the required prejudice under *Strickland*."); Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009) (collecting cases holding that "speculation is not sufficient to establish prejudice" in the ineffective-assistance context).

c. Ground4E

In Ground 4E, Petitioner contends that Thompson rendered ineffective assistance of trial counsel because he did not object to the admission of videotape footage of Petitioner's post-arrest interview that included references to a New York investigation that Petitioner contends were "allowed to permeate the trial," and which one juror (Joanna Rzucidlo) found "unsettling." (Doc. 1, at 16-17; Doc. 2, at 68-69; Exh. PP: Transcript of Interview of Juror Rzucidlo, dated 12/18/09, at 6-7.)

The State played the videotape of Petitioner's post-arrest interview during its redirect examination of Detective Verdugo on the fourth day of trial without any defense objection. (Exh. G: R.T. 1/8/07, at 112-13.) The videotape footage to which Thompson did not

object depicted Detective Verdugo confronting Petitioner about a report alleging that Petitioner had been "trying to stare at some little kids at a school or a park or something" in New York on an unspecified occasion in 1996. (Exh. ZZ: DVD of Petitioner's Interview [Trial Exhibit 27], at 10:49-10:50.) Petitioner denied that he had ever been arrested or questioned by police in New York at any time. (Id.) This exchange lasted less than 2 minutes and occurred during the second half of Petitioner's hour-long post-arrest interview. (Id.)

One juror thereafter submitted the question, "Is it a lie that there was an instance in New York?" (Exh. A: P.I., Item 145.) Because Thompson objected, the trial court did not ask this question. (Exh. G: R.T. 1/8/07, at 118-21.) However, the prosecutor subsequently asked Detective Verdugo whether he had "made up out of the blue" the "incident that might have happened in New York," because the jurors had inquired about whether Verdugo fabricated the names of the uncharged children he mentioned during the post-arrest interview and asked another question asking why he lied to Petitioner during the post-arrest interview. (Id. at 17 119-20, 122; Exh. A: P.I., Items 139, 140.) Verdugo responded that the New York incident "was something I referred to." (Exh. G: R.T. 1/8/07, at 122.)

Neither party revisited the New York incident during closing arguments or while questioning the remaining trial witnesses, including Petitioner. (Exh. H: R.T. 1/9/07, at 5-74; Exh. I: R.T. 1/10/07, at 5-159.)

Even assuming that Thompson rendered deficient performance by not objecting to the videotape's brief footage concerning this 1996 New York incident, Petitioner cannot demonstrate that this omission resulted in prejudice.

Juror Rzucidlo's post-trial interview statements do not support Ground 4E, but instead demonstrate that the jury did not consider the New York incident as evidence of Petitioner's guilt, because Rzucidlo told Petitioner's PCR investigator that: (1) no police officers ever testified about the New York incident; (2) the judge did not answer the question she submitted about the New York incident; (3) the jurors construed the court's other-act instructions as "not letting [them] discuss [the New York incident] in the actual trial," which Rzucidlo found to be "a little wrong" because the incident was referenced during the post-arrest interview; (4) the jurors "had no idea" whether the New York incident was similar or dissimilar to the charged offenses. (Exh. PP: Transcript of Interview of Juror Rzucidlo, dated 12/18/09, at 6-7.)

Furthermore, the references to the New York incident were brief and isolated events during a trial that spanned several days. See Brecht, 507 U.S. 619, 639 (1993) (noting that prosecutor's improper remarks comprising less than two pages of a 900-page record, were infrequent, and thus "did not substantially influence the jury's verdict"); Hall v. Whitley, 935 F.2d 164, 165-66 (9th Cir. 1991) ("Put in proper context, the comments were isolated moments in a 3-day trial."). And, Thompson also elicited ample proof that New York law enforcement neither arrested nor charged

Petitioner with any crime in 1996, the State called no witnesses to present testimony about this incident, and Petitioner testified that he had never been arrested before the instant case and was therefore "very much" nervous during his interview on November 9, 2005.

The Court finds that the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

d. Ground 4G

This ineffectiveness claim has three components, all of which concern trial counsel's conduct after Judge Stephens reported that the jurors wanted to resume deliberations following the mistrial declaration: (1) Thompson allegedly should have consulted with Petitioner to a greater extent before announcing his lack of opposition ("Ground 4G.1"); (2) Thompson allegedly should have objected to the jurors continuing to deliberate after Judge Stephens declared a mistrial, based upon the rationale that allowing the mistrial to stand was the best tactical decision ("Ground 4G.2"); and (3) Thompson failed to "make an appellate record" when the "unsworn" jurors announced their desire to resume deliberations ("Ground 4G.3"). (Doc. 1, at 17; Doc. 2, at 70.) The Court finds that the state court's rejection of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law.

- **Ground 4G.1**

Thompson's alleged failure to consult with Petitioner before announcing a lack of opposition to the jurors decision to resume deliberations was not

deficient performance. The Arizona Court of Appeals found as follows regarding Ground 4G.1:

> Similarly, the trial court correctly rejected his fourth claim—that trial counsel "did not adequately confer with [him]" before allowing the jury deliberations to continue. In rejecting this claim, the court found that counsel's decision was "a tactical and strategic decision" that cannot "form the basis for a claim of ineffective assistance." [Doc. 1-13: Minute Entry, filed on 11/10/11, at 6] But the claim also fails because May does not assert he would have made a different decision had he been consulted further. *See* [State v. Salazar, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992)] (defendant must prove prejudice; without it, court need not address counsel's performance); *see also Strickland,* 466 U.S. at 694.

(Doc. 1-17: Memorandum Decision, at 8, ¶ 13.)

The Arizona Court of Appeals' first articulated rationale—the decision to allow the jurors to resume deliberating was a tactical matter exclusively within Thompson's purview—comported with clearly established federal law. Indeed, numerous courts—like the Arizona Court of Appeals in the instant case—have classified the decision to request or refuse a mistrial as a strategic matter falling within the exclusive province of defense counsel, despite a client's contrary wishes. "The Supreme Court has never suggested that decisions about mistrials are 'of such a moment' that they can be made only by the defendant himself, and every circuit to consider the question has concluded

that decisions regarding mistrials belong to the attorney, not the client." U.S. v. Chapman, 593 F.3d 365, 368 (4th Cir. 2010) (collecting federal circuit cases). Courts reaching this conclusion have reasoned that "[t]he decision whether to move for a mistrial or instead to proceed to judgment with the expectation that the client will be acquitted is one of trial strategy." Galowski v. Murphy, 891 F.2d 629, 639 (7th Cir. 1989). Accordingly, these courts have held that an attorney possesses exclusive authority to decide whether to request a mistrial or not, and that the defendant's lack of consent or express opposition is of no consequence. See Chapman, 593 F.3d at 367-70.

Thus, it follows that Thompson's performance cannot be deemed deficient on the basis that he conferred only momentarily with Petitioner before announcing that the defendant had no objection to the jurors resuming their deliberations.

Alternatively, Ground 4G.1 does not warrant habeas relief because the Arizona Court of Appeals reasonably determined that Petitioner could not prove prejudice from the alleged omission because Petitioner did "not assert he would have made a different decision had he been consulted further." (Doc. 1-17: Arizona Court of Appeals' Memorandum Decision, at 8, ¶ 13.) The factual finding is supported by the record because the following passage from Petitioner's affidavit does not mention that he would have opposed the jury's request to resume deliberations, had Thompson conferred with him to a greater extent:

> 9. During trial, after the judge declared a mistrial, the jury was excused and the judge set

> a new trial date. The judge then told me I would remain on release until the new trial on the same terms and conditions of release previously imposed.
>
> 10. The judge then suddenly said that the jury wanted to keep deliberating. After the judge said that, Mr. Thompson and I conferred at the counsel table for a very short time, no more than twenty seconds, before he informed the court that he did not object to the jury continuing deliberations. Mr. Thompson did not discuss with me any of the legal issues underlying this decision, nor did he discuss with me the risks and possible consequences of this decision.
>
> 11. I declare under the penalty of perjury that the foregoing is true and correct.

(Exh. R: PCR Exhibits, Vol. 6, Tab 117: Petitioner's affidavit, dated February 22, 2010, at 2-3.)

Because Petitioner did not testify at the evidentiary hearing, he did not supplement this affidavit with any assertion that he would have opposed the jury's request to resume deliberations, had he and Thompson consulted for a lengthier period of time.

Further, Petitioner also fails to establish prejudice because he has not demonstrated that Judge Stephens would have refused to let the jury continue deliberating, even had Thompson decided to oppose the jury's request after a lengthy conference with Petitioner on the issue. See U.S. v. Taylor, 569 F.3d 742, 748 (7th Cir. 2009) (finding that the failure to oppose a mistrial request foreclosed finding prejudice

because defendant offered no proof that such an objection would have altered the district court's ruling).

Consequently, Petitioner cannot prove either deficient performance or resulting prejudice.

- **Ground 4G.2**

The Court finds that Thompson's failure to object to the jurors continuing to deliberate after Judge Stephens declared a mistrial was neither deficient performance nor prejudicial.

In her minute entry order, Judge Hoffman acknowledged that Petitioner had raised Ground 4G.2 with the following statement in the "Allegations of Ineffective Assistance of Counsel" section: "Michael Piccarreta opined that trial counsel Joel Thompson was ineffective in ... (4) not objecting to continued deliberation after a mistrial was declared." (Doc. 1-13: Minute Entry, filed on November 10, 2011, at 3.) Judge Hoffman denied relief on Ground 4G.2 with the following statements at the end of her order:

> THE COURT FINDS that there is no evidence that the performance of either trial or appellate counsel fell below prevailing objective standards. Even if it had, the Court finds no evidence of any resulting prejudice to the defendant
>
> IT IS HEREBY ORDERED denying defendant's Petition for Post-Conviction Relief as to all grounds raised at the evidentiary hearing.

(Id. at 6-7.)

Petitioner cannot demonstrate that Thompson's consent to the jury's post-mistrial request to resume deliberations constituted deficient performance. The Supreme Court squarely rejected the notion that a tactical decision that ultimately proved unavailing necessarily constitutes deficient performance:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-34 [ ] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689.

Nor can Petitioner establish deficient performance, based upon the fact his legal expert, Michael Piccarreta, testified that he would have opposed the jury's request to resume deliberations and elected instead to "live and fight another day." (Exh. CC: R.T. 9/7/11, at 129.) Petitioner cannot demonstrate that no reasonable attorney in Thompson's place would have agreed to the jury's request to continue deliberating, given the fact that strategic reasons supported Thompson's determination that this course of action might prove beneficial. In his post-trial affidavit,

Thompson expressed concern that if the case was retried, Petitioner would have "to go through another complete trial with the prosecution in possession of a complete transcript of his testimony from the mistried case." (Exh. R: PCR Exhibits [Tab 119], at ¶ 38.)

Moreover, the notes that the jury sent to Judge Stephens before her mistrial declaration, as well as the responses to the jury's questions, provided Thompson with reasonable grounds to conclude that allowing this group of jurors to resume deliberations would benefit Petitioner. Specifically, at 2:58 p.m., the jurors sent their next note, which declared, "We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." (Exh. A: P.I., Item 218.) Despite receiving an impasse instruction and returning to the jury room for further discussion, the jurors informed Judge Stephens less than 30 minutes later that the two sides remained divided over whether reasonable doubt existed:

> Part of the jury believes they have heard sufficient evidence and the evidence is of sufficient quality to resolve reasonable doubt; part of the jury believes the quantity and quality of evidence is not sufficient to resolve reasonable doubt. We do not have significant dispute over the facts or the elements of law, or how to apply the law to the facts. We feel we need more guidance to "proof beyond a reasonable doubt."

(Exh. A: P.I., Item 219 [filed at 3:30 p.m.].)

Instead of providing the jurors with a supplemental instruction clarifying the meaning of reasonable doubt,

Judge Stephens declared a mistrial. (Exh. J: R.T. 1/12/07, at 9-10.) Under these circumstances, Thompson could reasonably conclude that this jury would give Petitioner the benefit of the doubt and acquit him on all counts when they ultimately resumed deliberations.

Nor can Petitioner demonstrate prejudice. As noted above, Petitioner cannot carry his burden through self-serving speculation that Judge Stephens would have sustained any objection that Thompson might have lodged to the jury's request to resume deliberations.

Nor can Petitioner prove a reasonable probability that the outcome on the jury's request to continue deliberations would have been different, had Thompson followed the courses of action Piccarreta enumerated during the evidentiary hearing, which included moving Judge Stephens to: (1) poll the jurors individually about their desire to continue deliberating; (2) conduct an on-the-record inquiry to explore the events or reasons that prompted the jury to have the bailiff convey their desire to resume deliberations moments after the mistrial declaration; and (3) question the bailiff, Mike Fucci, under oath about what the jurors said to him when they asked him to relate to Judge Stephens their desire to continue deliberations. (Exhibit CC: R.T. 9/7/11, at 129-30.) Petitioner improperly speculates that Judge Stephens would have granted these motions.

Thus, Petitioner cannot demonstrate either deficient performance or resulting prejudice.

- **Ground 4G.3**

Lastly, the Court fails to find deficient performance or prejudice in counsel's failure to "make an appellate record" when the "unsworn" jurors announced their desire to resume deliberations. Petitioner's one-sentence claim relies entirely on speculation. He fails to identify – much less demonstrate – any grounds for ineffective assistance.

e. Ground 4H

Petitioner next contends that Thompson rendered ineffective assistance because he "failed to introduce any evidence of [his] good character or reputation for behaving appropriately when working with children in other community activities, even though [Petitioner] and his family provided [Thompson] with names" of "non-expert witnesses who could be called to corroborate [Petitioner's] testimony about his appropriate non-sexual behavior." (Doc. 1, at 17; Doc. 2, at 73.) Petitioner attributes this alleged omission to Thompson's "erroneous [] belie[f] that character evidence was not admissible in a case such as this," despite the fact that "Arizona Rules of Evidence 404(c) and 405 provide for the admissibility of character or reputation testimony that a defendant does not possess the character trait that would cause him to commit the offense." (Id.)

The pertinent state-court decision denying Ground 4H found as follows:

> Defendant claims his trial counsel was ineffective in failing to investigate and present

> testimony from expert witnesses and character witnesses. ...
>
> Defendant claims that his trial counsel was ineffective in failing to present character witnesses at trial. He presented recorded statements from two people who worked with defendant in the past. (Hearing exhibits 38 and 39.) No character witnesses testified at the evidentiary hearing. Trial counsel testified that there was a limited network of possible character witnesses. He also gave reasons for not presenting evidence of defendant's good character and good conduct with children. (Hearing exhibit 1 at ¶¶ 25-26.) Defendant has not demonstrated that trial counsel was ineffective in failing to call character witnesses or a reasonable likelihood of a different result if he had called character witnesses.

(Doc. 1-13: Minute Entry, filed on November 10, 2011, at 5-6.) Judge Hoffman's denial of post-conviction relief on Ground 4H was neither contrary to, nor an unreasonable application of, clearly established federal law.

During the PCR evidentiary hearing, Thompson testified that he consulted with Petitioner and his parents about whether to call character witnesses during the defense case, but only "a pretty limited number of friends and work associates ... were discussed." (Exh. CC: R.T. 9/7/11, at 18.) On cross-examination, Thompson explained that he did consider calling character witnesses, but he did not do so

because these individuals were either unavailable or had been called by the prosecution in its case in chief:

> The witnesses were really not available. I can recall going over a list of potential witnesses with [Petitioner] and focused on one ... one witness in particular [Linda Cano], a woman he had worked with and I believe [that she] was ultimately called by the State to testify, so we got to cross-examine her. I don't recall there being other character-type witnesses.

(Id. at 32-33.) Significantly, the state record reflects that on December 19, 2006, Thompson filed a supplemental disclosure notice announcing his intention to call Linda as a defense witness at trial. (Exh. A: P.I. Item 44.)

Thompson further testified that he "recalled telling [Petitioner and his parents] that [they] can't bring in witnesses to testify that [Petitioner] had other opportunities to molest children and didn't." (Exh. CC: R.T. 9/7/11, at 19.) Petitioner never questioned Thompson during the evidentiary hearing about whether Petitioner and/or his parents had ever informed him that Angela Cazel-Jahn and Kelley Fitzsimmons were willing to testify about Petitioner's non-sexual appropriate behavior toward children. (Id. at 5-23, 42-47.) As Judge Hoffman observed in her order denying relief on Ground 4H, Petitioner did not call either witness at the PCR evidentiary hearing, but instead offered their declarations in evidence. (Exh. BB: R.T. 9/6/11, at 2-16; Exh. CC: R.T. 9/7/11, at 2-153; Exh. DD: R.T. 9/8/11, at 2-93.)

Here, the record reflects that Thompson had an objectively reasonable basis for not calling Angela Cazel-Jahn and Kelley Fitzsimmons to testify that they had observed Petitioner's interactions with children and found his behavior appropriate because such evidence would have been cumulative to evidence that Thompson had already offered through two other trial witnesses, namely, Linda Cano and Desiree Wells. An attorney's decision to forego the presentation of cumulative evidence does not constitute deficient performance. See Matylinsky, 577 F.3d at 1096-97 (counsel's failure to call 41 witnesses who would have testified to defendant's good character was neither deficient performance nor prejudicial because such testimony would have been cumulative to the evidence counsel had introduced to "humanize" the defendant); State v. Gerlaugh, 698 P.2d 694, 708 (Ariz. 1985) ("In particular, the decision whether to call cumulative character witnesses is precisely the kind of strategic choice that will not establish reversible error.").

On cross-examination of Linda Cano, whom Thompson had planned to call as a character witness during the defense case, Thompson elicited testimony that: (1) Linda had hired Petitioner to work in the Special Olympics program, wherein approximately 80% of the athletes were under 18 years of age; (2) Petitioner worked for Linda from October 2004 to December 2005; (3) Petitioner had not only helped coach athletes in swimming, speed skating, golf, and ice skating, but also attended basketball games and practices; and (4) Linda never received any complaints about Petitioner from any of the athletes, their parents, or other staff members who attended or participated in

these events. (Exh. A: P.I. Item 44; Exh. F: R.T. 1/4/07, at 6, 10-13, 18-22.) Such testimony enabled Thompson to remind the jury during closing argument that Linda had received no complaints about Petitioner during his employment at her program. (Exh. I: R.T. 1/10/07, at 144.)

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

Thus, in spite of any alleged belief that Arizona's evidentiary rules precluded him from offering evidence that Petitioner had not molested children on non-charged occasions, Thompson succeeded in presenting such testimony Linda Cano and Desiree Wells. (Exh. F: R.T. 1/4/07, at 6, 10-13, 18-22; Exh. H: R.T. 1/9/07, at 5, 17-18, 29-31; Exh. I: R.T. 1/10/07, at 140, 144.)

The fact that Linda Cano and Desiree Wells gave testimony establishing that Petitioner had not molested other children on other occasions also demonstrates that Petitioner suffered no prejudice as a result of Thompson's allegedly deficient performance. See Hall v. Thomas, 611 F.3d 1259, 1293 (11th Cir. 2010) (rejecting claim that trial counsel rendered ineffective assistance by failing to call two character witnesses whose testimony would have been cumulative to testimony given by other defense witnesses, and where petitioner never demonstrated that these uncalled witnesses "would have made any difference in the outcome of the trial").

f. Ground 4I

This claim alleges that Thompson rendered ineffective assistance because his "representation was conflicted by and corrupted by his contractual relationship with the overburdened Phillips' firm." (Doc. 2, at 74-75.) Thompson testified that he entered into a contract with Phillips & Associates to handle the firm's felony criminal cases something in 1998, and that the firm assigned him Petitioner's case in 2005. (Exh. CC: R.T. 9/7/11, at 6-9.) Petitioner suggests that Thompson was overburdened during the time his case was pending trial because the Arizona Supreme Court had sanctioned the principal attorney of Phillips & Associates regarding the supervision of a law firm that "represented approximately 33,000 clients between 2004 and 2006" and "employed 250 people, including thirty-eight lawyers." In re Phillips, 244 P.3d 549, 550, ¶ 2 (Ariz. 2010). Petitioner further notes that the firm did not compensate Thompson for time spent during

retrials on several mistried cases, and that the firm manager advised him that "there wasn't a budget for experts" during a discussion about Petitioner's case. (Doc. 2, at 74-76; Exh. CC: R.T. 9/7/11, at 15, 21-23.) Finally, Petitioner cites Thompson's testimony, "I would do [the case] very differently today if it [were] my case today." (Doc. 2, at 75; Exh. CC: R.T. 9/7/11, at 22.)

Petitioner must demonstrate that either a specific omission or a particular action by Thompson constituted deficient performance that resulted in prejudice. Petitioner has not sustained this burden.

In any event, Thompson unequivocally testified that: (1) he had "anywhere from 25 to 35 cases that were active at [any] one time" during the years he had a contract with Phillips & Associates; (2) he "wasn't overwhelmed by the numbers" while representing Petitioner; and (3) the decisions he made in the instant case were not affected by any "time issue." (Exh. CC: R.T. 9/7/11, at 21.) Additionally, "[Thompson's] performance throughout the trial demonstrates sufficient preparation and knowledge of the case that 'falls within the wide range of reasonable professional assistance.'" Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990) (quoting Strickland, 466 U.S. at 689). The Court finds that the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

g. Ground 4J

In Ground 4J, Petitioner contends that "the cumulative effect of counsel's many errors" deprived

Petitioner of effective assistance. (Doc. 1, at 18.) Petitioner's one-sentence conclusory statement fails to provide any argument or identify any authority regarding cumulative-error in the ineffective-assistance-of-counsel context.

Even if cumulative error constituted a violation of clearly established federal law, Petitioner's claim fails because: (1) none of the acts and omissions challenged in Grounds 4A through 4I constituted deficient performance by Thompson, and (2) even assuming that Thompson rendered deficient performance with respect two or more of these claims, the resulting prejudice was insufficient to establish a constitutional violation. See Ceja v. Stewart, 97 F.3d 1246, 1254 (9th Cir. 1997) (rejecting relief under cumulative-error doctrine where defendant alleged numerous IAC claims that were found non-prejudicial). Thus, the Court finds no error.

5. Grounds 6A and 4C

Ground 6A and 4C will be consolidated. In Ground 6A, Petitioner alleges that he "was deprived of his federal constitutional rights to due process and a fair trial based upon prosecutorial misconduct," specifically by obtaining a second indictment charging Petitioner with four new counts of child molestation against three additional victims (Luis A., Sheldon H., and Nicholas M.) while Petitioner's motion to remand the original indictment to the grand jury for a new probable-cause determination was still pending (Doc. 1, at 21; Doc. 2, at 106-09.) In Ground 4C, Petitioner seeks habeas relief on the basis that trial counsel rendered ineffective assistance by not objecting to the second indictment on

prosecutorial-vindictiveness grounds. (Doc. 1, at 16; Doc. 2, at 70-71.)

a. Ground 6A

The Court finds that Ground 6A is procedurally barred because the state courts explicitly found his prosecutorial-vindictiveness claim precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), as the result of Petitioner's failure to raise this claim on direct appeal. In its initial ruling on Petitioner's PCR petition, the trial court ruled as follows:

> Defendant's allegation of prosecutorial misconduct is precluded. All of the materials defendant relies on in support of this claim were available at the time the notice of appeal was filed. Because the case was affirmed on direct appeal, there is a presumption that defendant's convictions were regularly obtained and are valid. Defendant bears the burden or rebutting that presumption. *Canion v. Cole*, 210 Ariz. 598, 601, 115 P.3d 1261, 1263 (2005). Defendant has made no showing that he is entitled to relief

(Doc. 1-11: Minute Entry, filed on January 3, 2011, at 3.) The Arizona Court of Appeals affirmed this ruling in the last-reasoned state-court decision denying post-conviction relief on Ground 6A:

> May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on

> appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, at 3, ¶3.) Thus, Ground 6A is procedurally defaulted because preclusion under Rule 32.2(a) constitutes as an adequate and independent procedural bar. See Stewart, 536 U.S. at 860; Smith, 241 F.3d at 1195 n.2; Ortiz, 149 F.3d at 931-32.

Petitioner has not established that any exception to procedural default applies. To the extent Petitioner attempts to establish cause by asserting ineffective assistance counsel (Ground 4C), said claim will be discussed below.

b. Ground 4C

The state court's rejection of Petitioner's ineffectiveness challenge to the second indictment on prosecutorial-vindictiveness grounds was neither contrary to, nor an unreasonable application, of clearly established federal law.

The following ruling constitutes the decision subject for review:

> Defendant presented no evidence that a failure to raise a claim of prosecutorial vindictiveness after more charges were added when the case was remanded to the Grand Jury, was unreasonable conduct under the facts of this case. As defense expert Picarretta

> acknowledged, "It's a difficult motion to prevail on" ([Exh. CC: R.T. 9/7 /22, at 146].) He also failed to establish that there was a reasonable likelihood that he would have prevailed on the claim had it been made. *United States v. Goodwin*, 457 U.S. 368, 372-73, 381 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *State v. Brun*, 190 Ariz. 505, 507, 950 P.2d 164, 166 (App. 1997).

(Doc. 1-13: Minute Entry, filed on November 7, 2011, at 4.)

Petitioner again fails to demonstrate deficient performance and/or prejudice, as he again relies on speculation and conclusory statements to support his claim. Moreover, as both Judge Hoffman and Petitioner's expert, Michael Piccarreta, observed, motions to challenge prosecutorial charging decisions are "difficult ... to prevail on" (Doc. 1-13: Minute Entry, filed on November 7, 2011, page 4, quoting Exh. CC: R.T. 9/7/22, at 146.)

"A criminal defendant faces a substantial burden in bringing a vindictive prosecution claim [because] [a] 'presumption of regularity' attends decisions to prosecute." U.S. v. Johnson, 325 F.3d 205, 210 (4th Cir. 2003) (citing U.S. v. Armstrong, 517 U.S. 456, 464 (1996)). See U.S. v. Stewart, 590 F.3d 93, 122 (2nd Cir. 2009) ("The decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, and a prosecutor's pretrial charging decision is presumed legitimate."). To overcome this presumption of regularity and "establish prosecutorial vindictiveness, a defendant must show through

objective evidence that '(1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus.'" Johnson, 325 F.3d at 210 (quoting U.S. v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001)). Stated differently, "[a] prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right." U.S. v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000).

As the Ninth Circuit observed, prevailing precedent affords defendants two avenues for overcoming the presumption of regularity accorded to prosecutorial charging decisions:

> A defendant may establish vindictive prosecution (1) "by producing direct evidence of the prosecutor's punitive motivation," *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007), or (2) by showing that the circumstances establish a "reasonable likelihood of vindictiveness," thus giving rise to a presumption that the Government must in turn rebut, *United States v. Goodwin*, 457 U.S. 368, 373 [ ] (1982).

U.S. v. Kent, 649 F.3d 906, 912-13 (9th Cir. 2011). "Absent direct evidence of an expressed hostility or threat to the defendant for having exercised a constitutional right ..., to establish a claim of vindictive prosecution the defendant must make an initial showing that charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in circumstances that give rise

to an appearance of vindictiveness." U.S. v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982) (internal citations omitted).

Because Petitioner never proffered any direct evidence of the prosecutor's alleged animus during his PCR proceeding, he asserted an entitlement to the presumption of prosecutorial vindictiveness under the theory that the State created the "appearance of vindictiveness" by procuring an indictment charging him with four additional child-molestation counts involving three new victims (Luis, Sheldon, and Nicholas) after the trial court had granted Petitioner's motion to remand his case for a new probable cause determination. Specifically, Petitioner's complaint was that the State had added new charges in the second indictment before trial, allegedly to punish him for invoking his pretrial procedural right to have the prosecutor convey to the grand jurors his request to testify before returning an indictment.

However, the fact that Petitioner's "appearance of vindictiveness" claim rested upon his exercise of a pretrial right rendered the likelihood of prevailing on such a challenge to his second indictment unlikely:

> While a prosecutor's decision to seek heightened charges after a successful post-trial appeal is enough to invoke a presumption of vindictiveness, "proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the *pretrial* context." *United States v. Miller*, 948 F.2d 631, 633 (10th Cir. 1991) (emphasis added); *accord United States v.*

> *Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000) ("[I]n the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from the defendant's exercise of a right.").

U.S. v. Barner, 441 F.3d 1310, 1316 (11th Cir. 2006). See Stewart, 590 F.3d at 122 ("[T]his court has consistently adhered to the principle that the presumption of prosecutorial vindictiveness does not exist in a pretrial setting."); U.S. v. Frega, 179 F.3d 793, 801 (9th Cir. 1999) (collecting cases).

The Supreme Court has explained several reasons why no presumption of prosecutorial vindictiveness should automatically arise from the governmental filing new charges after the defendant's invocation of a constitutional, statutory, or procedural right before trial:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered

and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. [Footnote omitted.] As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which

> an individual is legitimately subject to prosecution.

Goodwin, 457 U.S. at 381-82. The justifications that the Supreme Court cited as reasons not to presume vindictiveness in the pretrial setting apply to the instant case.

First, Petitioner's motion to remand his case for a new probable cause determination based upon the grand jury not receiving his request to testify at the hearing, was merely an invocation of just one of the many procedural rights that the State expects defendants to assert before trial. The Supreme Court and the Ninth Circuit have therefore found it "unrealistic to assume that the prosecutor's probable response to a defendant's successful pretrial challenge to an indictment is to seek to penalize and deter." Goodwin, 457 U.S. at 381 (listing "pretrial motions to ... challenge the sufficiency and form of an indictment" as insufficient to create a presumption of vindictiveness).

Second, the presentation of evidence to the grand jury is typically brief, consuming few prosecutorial resources—yet another fact militating against the presumption that the trial court's order granting Petitioner's motion for remand engendered a vindictive response from the State. See U.S. v. Moon, 513 F.3d 527, 535 (6th Cir. 2008) ("[T]he fact that the government had to return for a superseding indictment does not constitute a sufficient stake in deterring Defendant's exercise of a protected right.").

Third, the State's response to Petitioner's severance motion demonstrates that the prosecution continued to

investigate Petitioner's crimes and evaluate its evidence beyond November 21, 2005, the date the grand jury returned the original indictment charging Petitioner with only the four counts of child molestation involving Taylor and Danielle. (Exh. DDD: Docket for Maricopa County Superior Court CR 2005-136958, at 2.) The following excerpt from said response states the following:

> The first 6 counts involve a total of 3 victims [involving Danielle A., Taylor S., and Sheldon H.] who were molested by the defendant in the swimming pool of their apartment complex in Mesa. Each of those 3 victims was a resident of the apartment complex, as was the defendant, when the molestations occurred. Each of those offenses came to light during the same investigation; the offenses in counts 5 and 6 [involving Sheldon H.] were also subject to a more complete investigation after the original charges were filed. Count 5 occurred when the victim had just moved into the complex; Count 6 occurred [in] the summer of 2005, when the first 4 counts occurred.
>
> The allegations in counts 7 and 8 arise from earlier investigations from Mesa or East Phoenix. Count 7 [involving Luis A.] came to light just before the crimes in the first 6 counts, but was investigated by a different police agency [the Phoenix Police Department] and therefore was not originally combined in the charges against the defendant. The crime happened on the border between Phoenix and Scottsdale.

> Count 8 came to light in the year 2001, when the defendant molested a child [Nicholas M.] in his care at a Mesa daycare center. Because no other significant allegations had been brought against the defendant at that time, the case was not then pursued for prosecution. The cases that arose in 2005 in Mesa caused the State to reinvestigate the allegations in Count 8.

(Exh. A: P.I., Item 73, at 2.)

The apparent reason why the prosecutor decided to add these four new charges during the 5-week interval between Petitioner's remand motion and the second grand jury presentation is that his review of Petitioner's case clarified: (1) proof that Petitioner touched Luis, Sheldon, and Nicholas' in various settings—a daycare center, a classroom, and the swimming pool—greatly diminished the plausibility of the anticipated defense that Petitioner's contact with Taylor and Danielle's was accidental; and (2) the evidence the prosecutor had to present to prove the original four charges involving Taylor and Danielle would enhance the prospect of convicting Petitioner on the molestation charges involving the three aforementioned boys.

During oral argument on Petitioner's severance motion, the prosecutor stated:

> All the counts are like that. It shows—by showing that one of these events in the trial of another event, you get [Petitioner's] intent, his putting himself into these situations where he will be able to have access to the children, so he

> prepares for it and makes a plan for it, Judge. He certainly, in one case involving one victim, the jury is not [sic] going to be able to say, well, this is probably a mistake. The defense would argue, well, what happened to her or what happened to him was just a mistake. What I am able to show through all of these other witnesses and other victims is that no, this is not a mistake. This is a man that puts himself into a situation where he can have access to children and do bad things to them. It's not absence [sic] of accident, and, definitely, if we need to show this is the man that did it, then we have the other victims coming in and saying he did it, he did it, he did it, and 404(b) allows for that kind of evidence, Judge, not to show that he has a character to do this, but rather to show that he had all the other intentional opportunities.

(Exh. C: R.T. 11/13/06, at 7-8.)

In light of the foregoing, because any objection or motion to dismiss regarding the second indictment on prosecutorial vindictiveness grounds would have failed, the Court finds that the state court's rejection of Ground 4C was neither contrary to, nor an unreasonable application of, Strickland.

6. Ground 6B

Ground 6B alleges that Petitioner "was deprived of his federal constitutional rights to due process and a fair trial based upon prosecutorial misconduct," allegedly when Deputy County Attorney John Beatty met with and coached Luis A. during a recess in his

trial testimony—misconduct that Petitioner alleges that enabled Luis, who failed to make an in-court identification of Petitioner on direct examination, to select a 2005 photograph of Petitioner from a 7-person photo array that the prosecutor showed Luis during redirect examination. (Doc. 1, at 21; Doc. 2, at 111-14; Exh. E: R.T. 1/3/07, at 29-34, 90-95.)

Ground 6B is procedurally barred because the state courts explicitly found this argument precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), as the result of Petitioner's failure to raise this claim on direct appeal. In its initial ruling on Petitioner's PCR petition, the trial court found this claim precluded because Petitioner could have raised it on direct appeal. (Doc. 1-11: Minute Entry, filed on January 3, 2011, at 3.) The Arizona Court of Appeals affirmed this ruling in the last reasoned state court decision rejecting Ground 6B:

> May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, 2 CA-CR 2012-0257-PR, at 3, ¶ 3.)

Thus, Ground 6B is procedurally defaulted because preclusion under Rule 32.2(a) constitutes an adequate and independent procedural bar. See Stewart, 536 U.S. at 860; Smith, 241 F.3d at 1195 n.2; Ortiz,149 F.3d at 931-32.

Petitioner has not established that any exception to procedural default applies.

7. Ground 7

In Ground 7, Petitioner argues that: (1) Jurors Rout and Mayhew-Proeber, who favored acquittal on all counts, were pressured to convict Petitioner on the five counts involving Taylor S., Danielle A., and Luis A. and consequently agreed to a compromise whereby the other 10 jurors agreed to acquit Petitioner on the two counts involving Sheldon H. in exchange (Ground 7A); and (2) Foreman Richardson allegedly persuaded Juror Mayhew-Proeber to change her verdict by opining that Petitioner would likely be imprisoned for just 1-to-2 years (Ground 7B).

a. Ground 7A

The last reasoned state-court decision, which was rendered by the trial court when it denied post-conviction relief, was neither contrary to, nor an unreasonable application of, clearly established federal law. The trial court found as follows:

> Two jurors allege vote trading. Those two jurors stated in open court that they agreed with the verdicts when jurors were polled after the verdicts were read in open court. Interviews and depositions of other jurors do not support the

> allegation of vote trading. The court finds that the defendant has failed to prove his allegation of vote trading.
>
> Even if defendant had proved that jurors traded votes, jurors can compromise in reaching a verdict *United States v. Powell*, 469 U.S. 57, 65 (1984); *State v. Zakhar,* 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. McKenna*, 222 Ariz. 396, ¶36 n.14, 214 P.3d 1037, 1048 n.14 (App. 2009); *State v. Lewis,* 222 Ariz. 321,¶10, 214 P.3d 409, 413 (App. 2009).

(Doc. 1-13: Minute Entry, filed on 11/07/11; at 2.)

As the court noted, not only is compromise in jury verdicts permitted, see, e.g., Powell, 469 U.S. at 65 ("It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."), but (1) Jurors Rout and Proeber "stated in open court that they agreed with the verdicts when jurors were polled after the verdicts were read in open court," and (2) "[i]nterviews and depositions of other jurors do not support the allegation of vote trading." (Doc. 1-13: Minute Entry, filed on 11/07/11, at 2.)

The record reflects:

> • Foreman Richardson told Petitioner's PCR investigator that: (1) no undue pressure was placed on any juror; (2) the not-guilty verdicts were attributable to the lack of sufficient evidence, not to any compromise agreement by which guilty and not

guilty verdicts were exchanged; and (3) he recalled that the jurors were united on the guilty verdicts. (Exh. HH: Transcript of Foreman Richardson, dated 12/10/09, at 25-26, 29.)

• Juror Harris told Petitioner's PCR investigator that: (1) his not-guilty verdicts were attributable to his determination that Sheldon H. was not credible; and (2) he had no recollection of "vote trading," which he considered "completely unethical. (Exh. JJ, at 4, 13.)

• Juror Melton testified that: (1) he had no recollection of the jurors trading verdicts; and (2) his verdicts were attributable to the fact that "some charges had stronger evidence than others. (Exh. KK, at 9-10.)

• Juror Carey told Petitioner's PCR investigator that: (1) the jurors reviewed the evidence "piece by piece" during deliberations; and (2) his not-guilty verdicts were attributable to finding Sheldon H. less credible than the other victims. (Exh. NN, at 7-9.)

• Juror Reeves told Petitioner's PCR investigator that the jurors were not pressured in reaching their verdicts, everyone agreed with the final verdicts, and none of the jurors was upset with the trial's final outcome. (Exh. OO, at 9, 14.)

• Juror Rzucidlo told Petitioner's PCR investigator that: (1) the deliberations were "very civil and cordial"; (2) the jurors were not pressured into returning verdicts; (3) the not-guilty verdicts was attributable to the evidence on those counts being

found lacking; and (4) that vote trading had "not really" occurred. (Exh. PP, at 10, 14-17.)

• Juror Spradlin told Petitioner's PCR investigator that: (1) she did not believe Sheldon and therefore voted not-guilty on those counts; (2) she had no recollection of vote trading; and (3) no juror was pressured. (Exh. QQ, at 5, 9, 20, 23.)

• Juror Lieb had no recollection of vote trading during deliberations. (Exh. LL, at 9.)

• Juror Andrews told Petitioner's PCR investigator that he did not recall "any kind" of vote trading. (Exh. MM, at 11.)

• During her first post-trial interview, Juror Mayhew-Proeber did not attribute the verdicts to vote-trading or intramural "plea bargaining" among the jurors, but instead stated that the convictions were "[b]asically because [the prosecutors] had a little bit more evidence" on those counts. (Exh. EE, at 7-8.) Not until her second interview, which occurred 18 months later, did Mayhew-Proeber attribute the guilty verdicts to a "plea bargain" engineered by Foreman Richardson, against whom she harbored animosity because her fellow jurors elected him as the foreman after she volunteered herself for that office. (Exh. FF, at 1, 16-20.)

• Juror Rout offered varying explanations for the verdicts, ultimately adopted Petitioner's PCR investigator's "trading votes" terminology during the post-verdict interview, and expressed regret that he had not "stuck to his guns." (Exh. II, at 12, 16, 18-23, 26.)

> • When polled by Judge Stephens during trial, Meyhew-Proeber and Rout answered in the affirmative when asked whether they agreed with the verdicts returned in open court. (Exh. L: R.T. 1/16/07, at 5-6.)

b. Ground 7B

The trial court found Mayhew-Proeber's allegation untrue and therefore denied post-conviction relief stating:

> One juror alleged that jurors considered the possible penalty in reaching their verdicts. That juror confirmed that the court had instructed the jurors to not consider the possible penalty. The record indicates that the trial court told the jurors that they were not to consider punishment. (R.T. of Jan. 10, 2007, at 105-106.) The other jurors do not support the allegation that the jurors considered the possible punishment in reaching their verdicts. The Court finds that defendant has failed to prove his allegation that jurors considered punishment in reaching their verdicts.

(Doc. 1-13: Minute Entry, dated 11/7/11, at 3.)

The record demonstrates that Foreman Richardson denied Proeber's allegation that he made statements regarding Petitioner's potential sentence by telling Petitioner's PCR investigator that: (1) he denied any knowledge of the sentencing range for Petitioner's charged offenses; and (2) the jurors did not discuss possible penalties ("It's not our role. It's not what we're being asked to do."). (Exh. I: R.T. 1/10/07, at 105-06;

Exh. HH, at 27-28.) Jurors Carey, Rzucidlo, Spradlin, and Lieb corroborated Foreman Richardson's assertion that possible punishment was not considered during their deliberations. (Exh. LL, at 10 (Lieb: "Never discussed it."); Exh. NN, at 10-11 (Carey did not know range of penalties and stated that such knowledge would not have affected his verdict vote); Exh. PP, at 16-17 (Rzucidlo: "I can't recall anybody saying well, I think for these charges you get this amount of time or anything like that."); Exh. QQ, at 20 (Spradlin: "I don't remember a discussion like that.").) Juror Melton corroborated Foreman Richardson's interview statements about the jury's lack of authority to consider sentencing by testifying during his deposition that he recalled the subject of punishment being "broached," but only because another juror had "piped up and said, 'That's not within the scope. That's not something we're here—we're here to determine what the facts are of the case and to deliberate on those facts.'" (Exh. KK: at 11-12.) Juror Rout likewise had no idea what sentences Petitioner faced and recalled no discussion about the prospective penalty during deliberations. (Exh. II, at 20-21.)

Further, as noted by the trial court, Judge Stephens instructed the jurors, "You must decide whether the defendant is guilty or not guilty by determining what the facts of the case are and applying these jury instructions. You must not consider the possible punishment when deciding on guilt. Punishment is left to the judge." (Exh. I: R.T. 1/10/07, at 105-06.) Thus, the record reveals that the jurors were aware of and intended to abide by the court's instruction, notwithstanding Juror Mayhew-Proeber's interview

statement to the contrary. (Exh. HH, at 27-28 [Richardson]; Exh. KK, at 11-12 [Melton].) These instructions foreclose habeas relief, even assuming that the jurors broached the topic of Petitioner's possible sentence:

> We share the *Silva* and *Bayramoglu* courts' concerns regarding speculation about sentencing by jurors, because such speculation may distort their evaluation of the evidence regarding guilt. However, such speculation was also the subject of the routine admonition by the judge in the instructions, "do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict." Having been so admonished, the other jurors were well armed to disregard the remark, and to remind the foreman that she should not decide the case based on what she thought would happen after sentencing. We ordinarily assume that the jurors follow their instructions. The remark is much like the remarks, or, at the least, unexpressed assumptions, that jurors routinely make about punishment in criminal cases and insurance in civil cases. That is why the admonition is generally given.

Grotemeyer v. Hickman, 393 F.3d 871, 880 (9th Cir. 2004). See Bayramoglu v. Estelle, 806 F.2d 880, 888 (9th Cir. 1986) ("It is also relevant that the trial judge gave a curative instruction to the newly-constituted jury to disregard penalty or punishment when considering guilt or innocence. ... We therefore conclude that [the juror's] misconduct was harmless beyond a reasonable

doubt; that is, that there is not a 'reasonable possibility' that her brief introduction of the subject of penalties affected the jury's ultimate verdict of guilty of second degree murder.").

The Court finds that the state court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law.

8. Grounds 8 and 9B

Grounds 8 and 9B have been consolidated in this Recommendation. These claims seek relief on the following grounds:

> Ground 8: "The trial court's failure to properly instruct the jurors," on a critical legal principle concerning how they could use evidence of other acts charged in the multi-count indictment to assess guilt or innocence, denied Stephen May his federal constitutional rights to due process and a fair trial." (Doc. 1, at 25.)
>
> Ground 9B: The trial court's other-act-evidence instruction allegedly confused the jurors and led them to return guilty verdicts, based upon the clear-and-convincing-evidence standard. (Doc. 1, at 27; Doc. 2, at 116-21.)

On direct appeal, Petitioner failed to challenge the court's pretrial ruling on his motion to sever or the adequacy of the jury instructions as to whether evidence of the charged offenses against one victim could be considered while determining Petitioner's guilt on the charged offenses relating to other victims. (Doc. 1-2: Opening Brief, at 12-13; Doc. 1-3: Reply

Brief, at 2-10; Doc. 1-4: Memorandum Decision, 1 CA-CR 07-0144, at 1-7.)

In his PCR petition, Petitioner sought post-conviction relief on the ground that "the Court did not fulfill its duty to explain, in understandable terms, the critical concept that the jury was required to consider each count separately, under the reasonable doubt standard, and not 'group it all together by clear and convincing evidence decide he must have done them all.'" (Doc. 1-9: PCR, at 34, quoting Exh. J: R.T. 1/12/07, at 7.) Citing the four corroboration-related questions the jury submitted during its deliberations and the post-verdict interview statements of Jurors Mayhew-Proeber and Rzucidlo, Petitioner asserted that Judge Stephens failed to give the jurors adequate guidance on the question of whether the testimony of one victim could be considered as "corroboration" of another's account, despite the instruction requiring that Petitioner's guilt on each count be determined separately—a contention that corresponds with Ground 8 in the instant habeas petition. (Id. at 35-39; Doc. 1, at 25.)

Petitioner raised his second instructional-error claim—one corresponding with Ground 9B of the instant habeas petition—in a different section of his PCR petition, one which he entitled, "The application of Arizona Rules of Evidence 404(b) and (c) in this case unconstitutionally lowered the State's burden of proof and allowed convictions by a non-unanimous jury." (Doc. 1-9: PCR, at 49.) Besides reiterating his previous complaint that the trial judge afforded the jury insufficient guidance on whether each count's evidence

could be offered to corroborate another charge [raised here as Ground 8], this section of the PCR raised two new claims: (1) the trial court failed to determine whether clear and convincing evidence existed for each count before denying Petitioner's severance motion—an argument corresponding to Ground 9A of the pending § 2254 petition; and (2) the supplemental instruction that Judge Stephens gave the jury in response to its corroboration-related questions caused the jurors to convict Petitioner under the clear-and-convincing-evidence standard because "each of the 'other acts' was a separate crime being tried to the same jury." (Id. at 49-51; Doc. 1, at 27; Doc. 2, at 116-21.)

Because Petitioner had not challenged the adequacy of the jury instructions on direct appeal, the trial court found Ground 8 precluded:

> Defendant's allegation that the court failed to properly instruct the jury is precluded. This allegation was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interviews following the verdict and prior to his appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

(Doc. 1-11: Minute Entry, filed on January 3, 2011, at 2.)

The trial court likewise found precluded both claims that Petitioner submitted in "Point X" of his PCR,

which included the contention corresponding to Ground 9B:

> Defendant's allegation that the court improperly applied Rules 404 (b) and (c) in denying his motion to sever counts is precluded. The claim was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient constitutional magnitude that the State is required to prove that he knowing, intelligently and voluntarily failed to raise the issue on direct appeal.

(Id. at 3.)

The Arizona Court of Appeals affirmed the trial court's preclusion ruling in its memorandum decision stating:

> ¶ 3 May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

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

The Court finds that Grounds 8 and 9B are procedurally barred because the state courts explicitly found these other-act-related instructional challenges precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), as the result of Petitioner's failure to raise them on direct appeal. (Doc. 1-11: Minute Entry, at 2-3; Doc. 1-17: Memorandum Decision, 2 CA-CR 2012-0257-PR, at 3, ¶ 3.) Rule 32.2(a) is an adequate and independent state-law ground for denying a federal constitutional claim. See Stewart, 536 U.S. at 860; Smith, 241 F.3d at 1195 n.2; Ortiz, 149 F.3d at 931-32.

Petitioner has not established that any exception to procedural default applies.

9. Grounds 9A and 4D

In Ground 9A, Petitioner alleges that he "was deprived of his federal constitutional rights to due process and an impartial jury where Arizona Rules of Evidence 404(b) and 404(c) were impermissibly employed to deny a severance of the counts, lessen the State's burden, and allowed evidence of each of the other alleged sexual offenses to be admitted at trial as proof of the other counts," in violation of the Fifth, Sixth, and Fourteenth Amendments. Petitioner states that "the trial court ... allowed the ... counts to be tried together without making the four specific findings required to admit other-act evidence under Rule 404(b)." (Doc. 1, at 27; Doc. 2, at 117-18.)

In Ground 4D, Petitioner asserts an ineffectiveness claim challenging trial counsel's failure to object to the sufficiency of Judge Stephens' Rule 404(b) and 404(c) findings. (Doc. 1, at 13, 16; Doc. 2, at 72.)

a. Ground 9A

Ground 9A is procedurally defaulted because the Arizona Court of Appeals affirmed the trial court's ruling that this claim was precluded, pursuant to Arizona Rule of Criminal Procedure 32.2(a), for not having been raised on direct appeal. The pertinent state-court decision reads as follows:

> May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

(Doc. 1-17: Memorandum Decision, at 3, ¶ 3.) And, preclusion under Rule 32.2(a) constitutes as an adequate and independent procedural bar. See Stewart, 536 U.S. at 860.

Petitioner has not established that any exception to procedural default applies. To the extent Petitioner attempts to establish cause by asserting ineffective assistance counsel (Ground 4D), said claim will be discussed below.

b. Ground 4D

This ineffective-assistance claim challenges Thompson's failure to object to the sufficiency of Judge

Stephens' Rule 404(b) and 404(c) findings before trial. (Doc. 1, at 13, 16; Doc. 2, at 72.)

The pertinent state-court decision reads as follows:

> Defendant claims ineffective assistance of trial counsel for failing to require the trial court to make required findings for admission of evidence pursuant to Rule 404(b) and (c). He also claims ineffective assistance of appellate counsel in failing to raise this issue on direct appeal.
>
> Defendant presented nothing to show that Judge Stephens would have failed to make required findings for admission of evidence pursuant to Rule 404(b) and (c), Ariz. R. Evid., had they been requested. He has failed to show any likelihood of a different outcome if trial counsel had raised the issue with Judge Stephens.
>
> There is a presumption that trial courts know the law and apply it correctly in reaching rulings. *State v. Moody*, 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004). Defendant's appellate counsel was aware of that presumption. (R.T. of Sept. 7, 2011, at 68-69). Had appellate counsel raised the issue on appeal, it would have been unsuccessful based on *Moody*.

(Doc. 1-13: Minute Entry, filed on 11/10/11, at 4.)

Thus, the state court concluded that Petitioner could not prove prejudice because Petitioner failed to demonstrated that Judge Stephens would have erred by refusing to make the appropriate findings, had

Thompson lodged a timely objection to the sufficiency of her ruling on the severance motion. The Court finds no error. Petitioner's speculation that Judge Stephens would have erred by disregarding a timely objection resulting in a reversal of his convictions is insufficient to establish prejudice. The state court's rejection of Ground 4D was neither contrary to, nor an unreasonable application of, Strickland.

10. Ground 10

In Ground 10, Petitioner alleges, "The cumulative effect of the errors at trial and on appeal deprived Stephen May of his federal constitutional rights to due process, a fair trial and the effective assistance of counsel. U.S. Const amends. V, VI and XIV." (Doc. 1, at 29.) It appears that Petitioner seeks to aggregate the errors alleged in Grounds 1, 2, 3, 4A, 4B, 4C, 4F, 4G, 4H, 5A, 6A, 6B, 6D, 7A, 7B, and 12B. (Doc. 1, at 29-30.)

Initially, the Court finds that Ground 10 is procedurally barred, in part. In his PCR petition, Petitioner invoked the cumulative-error doctrine with respect to the following alleged jury-related errors:

> In this case, the verdicts against [him] were returned by an unsworn jury after the judge had declared a mistrial [Ground 2], were reached only through an unconstitutional quid pro quo between juror factions [Ground 7A], and were coerced by the judge's failure to provide any instructions when allowing deliberations to continue. The jurors had undocumented ex parte communications with the bailiff [Ground 12B], considered during their deliberations

> information and material that was not introduced into evidence [Grounds 1 and 7B], and even expressed their confusion over a critical aspect of their duty—the meaning of beyond a reasonable doubt standard.

(Doc. 1-9: PCR Petition, at 43.)

Because Petitioner did not raise this claim on direct appeal, the trial court found it not only groundless, but also precluded, in its preliminary ruling on his PCR petition:

> Defendant's allegation that the cumulative effect of numerous serious issued [errors] interfered with the impartiality of the jury is precluded. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal. In addition, Arizona does not recognize the cumulative error doctrine. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

(Doc. 1-11: Minute Entry, filed on January 3, 2011, at 2.)

Because the Arizona Court of Appeals did not expressly address Petitioner's cumulative-error argument in its memorandum decision, Judge Hoffman's ruling constitutes the last-reasoned state court decision for federal habeas review purposes.

Accordingly, Petitioner's cumulative-error claim is procedurally defaulted, at least to the extent that Ground 10 is premised upon the jury-related arguments enumerated above.

Petitioner has not established that any exception to procedural default applies.

Moreover, although the Ninth Circuit has held that in some cases the cumulative effect of several errors may prejudice a defendant so much that his conviction must be overturned, see Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002), here, the Court has not identified any constitutional errors. Indeed, the errors he lists in Ground 10 stem from claims that are either procedurally defaulted or meritless. Thus, Petitioner is not entitled to relief on this claim.

11. Ground 11

In Ground 11, Petitioner claims that "[his] federal constitutional right to due process was violated when the trial court's instructions to the jury on Arizona's child molestation statute, and the defense that any touching was not sexually motivated, placed the burden of proof on the Defendant [in violation of] U.S. Const. amends. V and XIV." (Doc. 1, at 31.) Ground 11 alleges that Judge Stephens misconstrued A.R.S. §§ 13-1410(A) and 13-1407(E) and therefore gave the jury final instructions that unconstitutionally relieved the State of its statutory burden to prove an alleged element of child molestation—that any sexual contact was motivated by sexual interest—by incorrectly classifying the lack of sexual motivation as an

affirmative defense that Petitioner had to prove by a preponderance of the evidence.

The Arizona Court of Appeals resolved this issue holding that motivation by sexual interest is not an element of child molestation, as defined by the version of Section 13-1410(A) in effect when Petitioner committed his offenses, and that the defense of lack of sexual motivation established by Section 13-1407(E) is an affirmative defense Petitioner was required to prove by a preponderance of the evidence:

> A. Defense of Lack of Sexual Motivation.
>
> ¶ 4 May first contends the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of evidence. [FN2: For purposes of this decision, we assume, without deciding, that May was entitled to an affirmative defense instruction. *See State v. Gilfillan*, 196 Ariz. 396, 407, ¶ 40, 998 P.2d 1069, 1080 (App. 2000) (defendant not entitled to self-defense instruction because he denied committing the act underlying his aggravated assault charge).] May argues the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation.
>
> ¶ 5 Under A.R.S. § 13-1410(A) (2001), "[a] person commits molestation of a child by intentionally or knowingly engaging in ... sexual contact ... with a child under fifteen years of age." "'Sexual contact' means any direct or indirect touching,

fondling or manipulating of any part of the genitals, anus or female breast by any part of the body ..." A.R.S. § 13-1401(2)(2001). Pursuant to A.R.S. § 13-1407(E) (Supp. 2007), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest." [FN3: We cite a statute's current version when no changes material to this decision have occurred since the relevant date.]

¶ 6 We rejected May's argument in a recent opinion, *State v. Simpson,* 217 Ariz. 326, 173 P.3d 1027 (App. 2007), in which we held that "[t]he 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather creates an affirmative defense regarding motive." *Id.* at 329, ¶ 19, 173 P.3d at 1030 (internal quotation and citation omitted). We see no reason why *Simpson* does not dispose of this issue. [FN4: The fact that we reviewed the purported trial error in *Simpson* under a fundamental error analysis does not mean the holding in *Simpson* does not apply here. We concluded in *Simpson* that the superior court's failure to *sua sponte* instruct the jury that the State had the burden to prove defendant's sexual motivation was not "error, fundamental or otherwise." *Simpson*, 217 Ariz. at 330, ¶ 23, 173 P.3d at 1031.] The cases May cites do not persuade us otherwise. *State v. Brooks*, 120 Ariz. 458, 586 P.2d 1270 (1978), and *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986), both addressed a prior version of

> § 13-1410 that made it a crime to "knowingly molest[]" a child. *See* 1977 Ariz. Sess. Laws, ch. 142, § 66 (1st Reg. Sess.) (amending and renumbering A.R.S. § 13-653 to § 13-1410); 1993 Ariz. Sess. Laws, ch. 255, § 29 (1st Reg. Sess.) (amending § 13-1410 to reflect its current version). Accordingly, the superior court did not abuse its discretion in instructing the jury that May had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes. *See State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (denial of a requested jury instruction is reviewed for an abuse of discretion).

(Doc. 1-4: Memorandum Decision, at 2, ¶¶ 4-6.)

Thus, given the Arizona Court of Appeals' state-law determinations that motivation by sexual interest is not an element of child molestation under Section 13-1410(A), and that the lack of sexual motivation is an affirmative defense under Section 13-1407(E), the Court finds no error regarding the final instructions at issue since they conditioned conviction upon the State proving every element of child molestation beyond a reasonable doubt and required Petitioner to prove the affirmative defense of lack sexual motivation by a preponderance of the evidence:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child

> molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

(Exh. A: P.I., Item 165, at 8; Exh. I: R.T. 1/10/07, at 107-08.)

The state court's rejection of said claim was neither contrary to, nor an unreasonable application of, federal law.

12. Ground 12

Petitioner raises four sub-claims in Ground 12:

> Ground 12A: "Stephen May's federal constitutional right to an impartial jury, right to due process and guarantee against double jeopardy were violated when the trial judge permitted the jury to reconvene and deliberate further after declaring a

mistrial and discharging the jurors. U.S. Const. amends. V, VI and XIV." (Doc. 1, at 34.)

Ground 12B: The jurors' communication with the bailiff constituted an ex parte communication with the court. (Id.)

Ground 12C: Judge Stephens never explored whether the jurors had been exposed to outside influences. (Id.)

Ground 12D: Judge Stephens "tacitly influenced the verdict by sending a loud and clear message that [she] wanted the jury to reach a decision" by "failing to take [the] rudimentary actions" of asking the jurors why they wanted to resume deliberations, re-charging the jurors, re-administering their oath, and ensuing that the jurors understood the acceptability of not being able to return a verdict at all. (Doc. 2, at 93.)

a. Ground 12A

Petitioner argues that his "federal constitutional right to an impartial jury, right to due process and guarantee against double jeopardy were violated when the trial judge permitted the jury to reconvene and deliberate further after declaring a mistrial and discharging the jurors," in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (Doc. 1, at 34.) The following passage from the Arizona Court of Appeals' memorandum decision constitutes the pertinent state-court ruling on Ground 12A:

¶ 7 May argues the superior court erred by allowing the jury to reconvene to continue deliberating after the court had declared a mistrial. We review only for fundamental error because May failed to object when the superior court reassembled the jury and permitted it to resume deliberating. *See State v. Velazquez*, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, May must show that error occurred, the error was fundamental and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.

¶ 8 The only Arizona case cited to us (or which we have found) in which a jury reconvened after having been discharged is *State v. Crumley*, 128 Ariz. 302, 305-06, 625 P.2d 891, 894-95 (1981). In that case, it was discovered "almost immediately" after the jury was discharged that trial on the issue of prior convictions had been overlooked. *Id.* at 305, 625 P.2d at 894. The bailiff in short order located six of the eight jurors. The other two were reached at their homes, and all eight returned the next day to take up the prior conviction issue. Under those circumstances, our supreme court said:

> Once discharged, we think this jury could not be properly recalled to further decide an issue of this case. It is simply too dangerous a practice to discharge the individual jurors from the duties and

> obligations of their oath, send them back into the community without admonitions or instructions, and then recall those same jurors to make a fair and impartial determination of any remaining issue connected with the case.

Id. at 306, 625 P.2d 891, 625 P.2d at 895.

¶ 9 The facts in this case are different—the jury reconvened only a few minutes after having been discharged. Although nothing in the record tells us the jurors did not interact with the public in the meantime, the court had invited the jurors to gather again in the jury room. In any event, we know that they did not have the extended opportunity for contact with the public that occurred in *Crumley*.

¶ 10 Although the court in *Crumley* might have announced a rule that any verdict rendered after a jury once has been discharged is null and void, it did not; instead, it reasoned that under the facts of that case, a verdict issued after the jury had been "sen[t] ... back into the community without admonitions or instructions" could not stand. [Footnote omitted.] We take from *Crumley*, therefore, that under Arizona law, structural error requiring reversal does not occur whenever a jury that has been discharged reconvenes and issues a guilty verdict. *See State v. Ring*, 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (when structural error occurs, conviction is automatically reversed); *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926)

("the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling" the jury); *Masters v. Florida*, 344 So.2d 616, 620 (Fla App. 1977) (burden on defendant to prove outside influence on jury during period of discharge). *But see Blevins v. Indiana*, 591 N.E.2d 562, 563 (Ind. App. 1992) ("Any action of the jury after its discharge is null and void."); *Michigan v. Rushin*, 37 Mich.App. 391, 194 N.W.2d 718, 721-22 (Mich.App.1971) (error to reconvene Jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green*, 995 S.W.2d 591, 614 (Tenn. 1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia*, 132 Va. 703, 111 S.E. 291, 294 (Va. 1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court"); *cf Arnold v. Alabama*, 639 So.2d 553, 554-55 (Ala. 1993) (new trial granted when jury reconvened over defendant's objection; record did not disclose amount of time that elapsed between discharge and reconvening of jury or where jury was in the meantime).

¶ 11 May argues that we may presume that he was prejudiced when the jury was allowed to reconvene; at oral argument, for example, his counsel urged that we may take as common knowledge that jurors would reach for their cell phones to call friends or family immediately

> upon discharge. May points to nothing in the record that would demonstrate such prejudice, however, and, pursuant to *Henderson*, we will not presume prejudice when, by contrast to the facts in *Crumley*, the record does not disclose that the jury was "sen[t] back into the community" before reconvening. Accordingly, we may not reverse his conviction on this ground.

(Doc. 1-4: Memorandum Decision, at 3-4, ¶¶ 7-11.)

First, regarding Petitioner's contention that the continuation of deliberations after the mistrial request violated Double Jeopardy, the state-court record reflects that Judge Stephens declared a mistrial due to a hung jury: (1) the jurors had deliberated for nearly 2 days before sending a note reporting disagreement on whether the State's evidence proved Petitioner's guilt beyond a reasonable doubt; (2) Judge Stephens issued an impasse instruction and asked the jurors to consider whether agreement could be reached; and (3) less than 30 minutes later, the jurors sent another note reporting continued deadlock. (Exh. A: P.I., Items 214-19; Exh. J: R.T. 1/12/07, at 3-10.) On direct appeal, Petitioner contended that "the discharge of the jury" following this mistrial declaration constituted "a terminating event to the trial," in violation of his "double jeopardy protection." (Doc. 1-3: Reply Brief, 1 CA-CR 07-0144, at 7.) The Arizona Court of Appeals rejected this argument because the Supreme Court has never held that a mistrial based upon jury deadlock constitutes an event terminating jeopardy. Instead, the Supreme Court has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double

Jeopardy Clause," Richardson v. U.S., 468 U.S. 317, 324 (1984), based upon the rationale that "a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled." Yeager v. U.S., 557 U.S. 110, 118 (2009). Because Judge Stephens' mistrial declaration was not a jeopardy-terminating event under Supreme Court precedent, the Arizona Court of Appeals reasonably concluded that Petitioner suffered no violation of the Fifth Amendment's Double Jeopardy Clause when Judge Stephens rescinded her mistrial order and allowed the jury to resume deliberations, with Petitioner's consent. The Court finds no error.

Next, Petitioner contends that allowing the jurors to resume deliberations after the mistrial declaration violated his right to an impartial jury and due process. The Court finds that the Arizona Court of Appeals' rejection of this portion of Ground 12A was objectively reasonable because the record demonstrates that no juror had entered public areas of the courthouse or had otherwise been exposed to external influences impairing their fairness: (1) after declaring a mistrial, Judge Stephens thanked the jurors for their service, reported that the attorneys wished to speak with them, and asked them "to wait back in the jury room" if they desired to talk to the lawyers; (2) the jurors left the courtroom at 3:25 p.m.; (3) while Judge Stephens, counsel, and Petitioner remained inside the courtroom to discuss a new trial date, "the bailiff ... received a communication from the jury that they do not wish to have a hung jury and wish to continue deliberating and wish to communicate that to counsel"; (4) during the

ensuing discussion about the jury's request neither Judge Stephens nor counsel reported that any juror had been observed exiting the courtroom and entering the adjacent public hallway; (5) after both parties had agreed to permit the jury continue its deliberations, Judge Stephens recessed the proceeding at 3:30 p.m.—just 5 minutes after the jury had left the courtroom; and (5) the jury took a 14-minute recess in. its deliberations 3 minutes later, at 3:33 p.m. (Exh. B: M.E., Item 220; Exh. J: R.T. 1/12/07, at 9-11.)

The Arizona Court of Appeals' refusal to speculate that any juror was exposed to external influences during this brief 5-minute-long interval comports with precedent holding that the existence of error should not be presumed from a silent record. Accordingly, the appellate court's rejection of this portion of Ground 12A was neither contrary to, nor an unreasonable application of, clearly established federal law.

b. Ground 12B

This claim seeks habeas relief on the ground that the jurors' communication with the bailiff constituted an improper communication with Judge Stephens. (Doc. 1, at 34.) This contention concerns two separate statements between the jury and bailiff: (1) the jury's request that Judge Stephens be informed that it wished to continue deliberating; and (2) the bailiff's verbal transmission of Judge Stephens' message granting that request to the jurors. Ground 12B is procedurally defaulted.

First, Petitioner never raised this claim on direct appeal. (Doc. 1-2: Opening Brief at 12-33; Doc. 1-3:

Reply Brief, at 2-10; Doc. 1-3: Petition for Review, at 1-6.) Second, although Petitioner's PCR petition raised the claim that "[t]he judge, through her agent the bailiff, had substantive unrecorded ex parte communications with the jury" (Doc. 1-9: PCR Petition, at 25), he failed to include that claim in his petition for review by the Arizona Court of Appeals, wherein his sole jury-related contentions alleged that the jurors improperly considered extrinsic evidence, and that the mistrial declaration and verbal discharge of the jurors rendered the jury without jurisdiction to return a valid verdict (Doc. 1-14: Petition for Review by Arizona Court of Appeals, at 1-2, 4-12.) Petitioner's failure to present Ground 12B to the Arizona Court of Appeals on direct review and during his PCR proceedings renders this claim unexhausted. See Castillo, 399 F.3d at 999; Swoopes, 196 F.3d at 1011. And, any attempt to return to state court would be futile. See Ariz.R.Crim.P. 32.2(a)(3) and 32.4(a).

Petitioner has not established that any exception to procedural default applies.

c. Ground 12C

This claim alleges that Judge Stephens should have explored whether the jurors had been exposed to outside influences and committed reversible error by not doing so. (Doc. 1, at 34.) Ground 12C is procedurally defaulted.

Petitioner failed to present this claim on direct review, in his PCR petition, or in his petition for review to the Arizona Court of Appeals. Not until he filed his petition for review with the Arizona Supreme Court did

Petitioner suggest that reversible error occurred because Judge Stephens did not explore whether an external influence motivated the jurors to make their post-mistrial request to continue deliberations. Thus, Petitioner did not fairly present this argument to the state judiciary because he raised it, for the first time, to the Arizona Supreme Court.

Petitioner's failure to present Ground 12C to the Arizona Court of Appeals on direct review and during his PCR proceedings renders this claim unexhausted. See Castillo, 399 14 F.3d at 999; Swoopes, 196 F.3d at 1011. And, any attempt to return to state court would be futile. See Ariz.R.Crim.P. 32.2(a)(3) and 32.4(a).

Petitioner has not established that any exception to procedural default applies.

d. Ground 12D

Petitioner contends that Judge Stephens "tacitly influenced the verdict by sending a loud and clear message that [she] wanted the jury to reach a decision," allegedly because of her failure to "take such rudimentary actions" like inquiring why the jurors decided to continue deliberating after the mistrial declaration, re-administering the oath to the jurors, re-charging the jury with some unspecified instructions, and reiterating the acceptability of returning no verdicts whatsoever. (Doc. 2, at 93.)

Ground 12D is procedurally defaulted. Petitioner never raised this coercion claim on direct appeal, (Doc. 1-2: Opening Brief), or in his petition for review by the Arizona Court of Appeals in his PCR proceedings, (Doc. 1-14: Petition for Review by Arizona

Court of Appeals). Petitioner's failure to present Ground 12D to the Arizona Court of Appeals on direct review and during his PCR proceedings renders this claim unexhausted See Castillo, 399 F.3d at 999; Swoopes, 196 F.3d at 1011. And, any attempt to return to state court would be futile. See Ariz.R.Crim.P. 32.2(a)(3) and 32.4(a).

Petitioner has not established that any exception to procedural default applies.

13. Ground 13

In Ground 13, Petitioner alleges that the trial court violated the Eighth Amendment by imposing consecutive 15-year prison sentences for each child-molestation conviction resulting in "the cumulative effect of 75 years' imprisonment [which] violated [his] federal constitutional right to be free from cruel and unusual punishment U.S. Const amends. VIII and XIV." (Doc. 1, at 35; Doc. 2, at 132.)

Petitioner raised this issue on direct appeal, and the Arizona Court of Appeals found, as follows:

> Finally, May contends that the individual sentences for each count and his lengthy aggregate sentence constitute cruel and unusual punishment. As May concedes, he did not raise this argument below. Therefore, he has waived this issue and we need not address it. *See State v. Navarro*, 201 Ariz. 292, 298 n.6, ¶ 22, 34 P.3d 971, 977 n.6 (App. 2001) (Eighth Amendment argument that was not raised before the trial court is waived on appeal). Even if we were to consider this argument, however, pursuant to

> *State v. Berger*, 212 Ariz. 473, 476, ¶¶ 15-16, 134 P.3d 378, 381 (2006), we would be compelled to conclude that his sentence is not grossly disproportionate to his crimes.

(Doc. 1-4: Memorandum Decision, at 5, ¶ 16.)

As to Petitioner's claim that the trial court erred by imposing a 15-year prison term for each conviction for child molestation, the Supreme Court in Harmelin v. Michigan, 501 U.S. 957 (1991), set forth the framework governing Eighth Amendment challenges to the length of non-capital sentences. See Graham v. Florida, 560 U.S. 48, 59-60 (2010); Ewing v. California, 538 U.S. 11, 23-24 (2003). Specifically, the Court stated:

> All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring). However, outside of the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.... Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted

criminals." Solem v. Helm, 463 U.S. 277, 289-90 (1983). Generally, a court will not overturn a sentence on Eighth Amendment grounds if the sentence does not exceed statutory limits. See United States v. Zavala–Serra, 853 F.2d 1512, 1518 (9th Cir. 1988) (upholding sentence of ten years' imprisonment for conspiracy to possess and distribute 2,000 grams of cocaine when sentence was within statutory range).

In analyzing an Eighth Amendment proportionality challenge, a court must determine whether a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992)(citing Harmelin, 501 U.S. at 1001 (finding that sentence of life imprisonment without possibility of parole did not raise inference of disproportionality when imposed on a felon in possession of a firearm)).

The objective reasonableness of the Arizona Court of Appeals' ultimate conclusion that Petitioner's 15-year prison terms did not raise an inference of gross disproportionality is demonstrated by Supreme Court precedent upholding far lengthier prison terms for property and drug-related offenses that lack the gravity of crimes victimizing children. See Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (upholding two statutorily-mandated consecutive prison terms of 25 years to life for two counts of petty theft under California's recidivist statute); Ewing, 538 U.S. at 30-31 (upholding mandatory prison term of 25 years to life for California recidivist convicted of felony grand theft); Harmelin, 501 U.S. at 1005 (upholding mandatory life

imprisonment without parole for a first-time offender who stood convicted of simple possession of 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 375 (1982) (upholding two consecutive 20-year prison terms imposed for selling 3 ounces of marijuana and possessing 6 ounces of marijuana for distribution); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (upholding life sentence, with parole eligibility, imposed upon a Texas recidivist whose three theft-related crimes involved money and property having an aggregate worth of $229.11).

Here, the Court finds that Petitioner's mitigated 15-year sentence for each conviction was not grossly disproportionate to his crime.

Regarding Petitioner's challenge to the consecutive nature of his sentences which had "the cumulative effect of 75 years' imprisonment," the Eighth Amendment analysis "focuses on the sentence imposed for each specific crime, not on the cumulative sentence." United States v. Aiello, 864 F.2d 257, 265 (2nd Cir: 1988). As the Supreme Court has made clear, if the defendant

> has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.

O'Neil v. State of Vermont, 144 U.S. 323, 331 (1892).

Even if this Court did consider Petitioner's sentence in the aggregate, the Court still finds no error. Indeed, the Supreme Court has held in several contexts that consecutive sentences do not pose a constitutional problem where the legislature has specifically provided for such sentences. See Whalen v. United States, 445 U.S. 684, 689 (1980) (noting that it is fully within the power of Congress to provide cumulative punishments, the only question was whether or not it had done so); Gore v. United States, 357 U.S. 386, 392 (1958) (holding that Congress clearly has the power to determine separate sentences for separate offenses); Carter v. McClaughry, 183 U.S. 365, 394 (1902) ("Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute."). In addition, there is no constitutional right to receive sentences concurrently; rather, the "specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures." Oregon v. Ice, 555 U.S. 160 (2009).

Therefore, Petitioner cannot establish that the state court's rejection of his Eighth Amendment claim was contrary to, or an unreasonable application of, clearly established federal law.

14. Ground 14

In his final ground for habeas relief, Petitioner contends that he "is actually innocent of the charges and, but for the trial errors and constitutional

violations, no reasonable juror would have found him guilty beyond a reasonable doubt," and asserts that this claim is supported by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (Doc. 1, at 37.) In the memorandum accompanying his habeas petition, Petitioner elaborates that he "is actually innocent" because the State did not have any physical evidence to corroborate the victims' allegations, the prosecutor allegedly "coached" one victim, and Petitioner turned down an advantageous plea offer because he never touched any child with sexual motivation. (Doc. 2, at 139.) Petitioner also contends that his verdict was "impaired by a number of egregious errors including: (1) being tried under a statutory scheme that shifted the burden on sexual intent from the prosecution to the defense; (2) having jurors who exploited extrinsic evidence, smuggled into the jury room, to conduct unauthorized experiments and demonstrations regarding the dispositive issue of sexual intent; and (3) having a trial lawyer who, inexplicably, failed to introduce available evidence to support [Petitioner's] critical medical defense, and failed to call or confer with other experts, among other deficiencies." (Id. at 140.)

Assuming that Petitioner's freestanding actual innocence claim under Herrera v. Collins, 506 U.S. 390 (1993) is cognizable in these proceedings,[7] the Court

[7] The United States Supreme Court has not explicitly held that a "freestanding" claim of factual innocence, i.e., one unaccompanied by a substantive claim of constitutional error in trial proceedings, provides a basis for federal habeas relief in a non-capital case. See Jones v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014) ("'We have not

finds that Petitioner has not met his burden under this claim. "[T]he *Herrera* majority's statement that the threshold for a freestanding claim of innocence would have to be extraordinarily high, contemplates a stronger showing than insufficiency of the evidence to convict" See Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (internal citations omitted). "A habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Id. Petitioner has not done so.

While the State lacked physical evidence, each victim's testimony regarding his or her own sexual abuse was sufficient to support a conviction. And, the jury was not required to accept as true Petitioner's self-serving testimony that any contact with the children's genitals was not sexually motivated.

CONCLUSION

Having determined that Petitioner's claims are procedurally defaulted and/or fail on the merits, the Court will recommend that Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**.

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resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although we have assumed that such a claim is viable.").

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right and because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's

recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 15th day of September, 2015.

s/_____
Michelle H. Burns
United States Magistrate Judge

APPENDIX I

[Seal]

SUPREME COURT
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET,
SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

Rebecca White Berch
Chief Justice

Janet Johnson
Clerk of Court

April 24, 2013

RE: STATE OF ARIZONA v STEPHEN EDWARD MAY
Arizona Supreme Court No. CR-12-0416-PR
Court Court of Appeals Division Two
No. 2 CA-CR 12-0257 PRPC
Maricopa County Superior Court
No. CR2006-030290-001SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 23, 2013, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Justice Timmer did not participate in the determination of this matter.

There is no record to return.

Janet Johnson, Clerk

TO: Joseph T Maziarz
Gerald R Grant
JoAnn Falgout
Herald Price Fahringer
Erica T Dubno
Stephen Edward May, ADOC #214465, Arizona State Prison, Florence - Eyman Complex-Meadows Unit
Cory Engle
Mikel P Steinfeld
Daniel Joseph Pochoda
Kelly J Flood
James Duff Lyall, ACLU Foundation of Arizona
Jeffrey P Handler
adc

APPENDIX J

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. *See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CR 2012-0257-PR
DEPARTMENT B

[Filed: September 7, 2012]

THE STATE OF ARIZONA,	)
	)
Respondent,	)
	)
v.	)
	)
STEPHEN EDWARD MAY,	)
	)
Petitioner.	)
	)

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006030290001SE

Honorable Kristin C. Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant

Phoenix
Attorneys for Respondent

The Law Office of JoAnn Falgout, P.L.C.
By JoAnn Falgout

Tempe

and

Fahringer & Dubno
By Herald Price Fahringer and Erica T. Dubno

New York, NY
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Following a jury trial, petitioner Stephen May was convicted of five counts of child molestation. He was sentenced to consecutive prison terms totaling seventy-five years. He appealed, and this court affirmed the convictions and sentences imposed. *State v. May*, No. 1 CA-CR 2007-0144, ¶ 17 (memorandum decision filed July 24, 2008). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court

summarily denied relief on several of his claims. Following an evidentiary hearing on his remaining claims, which consisted primarily of claims of ineffective assistance of trial and appellate counsel, the court denied the petition in its entirety. This petition for review followed. "We will not disturb a trial court's ruling on a petition for post- conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

Precluded and Waived Claims

¶2 May argues the trial court erred when it rejected his claim that his conviction must be reversed because A.R.S. § 13-1410(A), the statute under which he was convicted, shifts from the state to the defendant the burden of proving lack of sexual motivation and is, therefore, unconstitutional. But, as the court correctly concluded, May is precluded from raising this claim, having waived it by not raising it at trial or on appeal.[1] *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding"). Indeed, on appeal May argued the court had erred when it instructed the jury that lack of sexual motivation was an affirmative defense he was required to prove, but he did not challenge the constitutionality of the statute. *See May*, No. 1 CA-CR

[1] Although May does not argue to the contrary, we note the trial court correctly concluded this "claim does not implicate constitutional rights which are considered personal to the defendant . . . and is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal." *See Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d at 951.

2007-0144, ¶¶ 4-6. Relying on *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), May asserts in his reply to the state's response to his petition for review that the error was fundamental and that this issue is, therefore, "ripe," and he is not precluded from raising it. But May misapplies *Henderson* and the fundamental error doctrine. Our supreme court explained in *Henderson* that error not raised at trial still may be addressed on appeal when the error is "fundamental." 210 Ariz. 561, ¶ 19, 115 P.3d at 607. However, a claim is not excepted from the rule of preclusion applicable to Rule 32 proceedings simply because the alleged error involved may be characterized as fundamental. *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958. The trial court did not abuse its discretion in finding this claim precluded.

¶3 May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. See Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

¶4 May contends for the first time on review that he is entitled to relief because "the jury did not have jurisdiction to reach a verdict." He bases this argument on the fact that the jurors continued deliberating after

a mistrial initially was declared.[2] The propriety of the continued deliberations was raised in May's direct appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11. And the trial court correctly found that his claim it had erred by permitting the jury to continue deliberating was precluded because it had been addressed and rejected on appeal. Consequently, to the extent May argues he is entitled to relief due to the jury's continued deliberations, his argument is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 May nevertheless contends he can raise this issue in his petition for review because, given the initial declaration of a mistrial, the jury lacked subject matter jurisdiction to decide his case. But in his petition for post-conviction relief before the trial court, May did not base his argument on subject matter jurisdiction. We will not consider May's argument because we do not consider issues raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review). Moreover, this is not a subject matter jurisdiction issue. *See State v. Maldonado*, 223 Ariz. 309, ¶ 14, 223 P.3d 653, 655 (2010) ("'subject matter jurisdiction' refers to a court's statutory or constitutional power to hear and determine a particular type of case").

---

[2] After extensive deliberations, the jury informed the trial court that it was deadlocked. The court dismissed the jury and declared a mistrial. A few minutes later, the jury asked to begin deliberations again, and both the prosecutor and May's attorney stated they did not object.

Alleged Juror Misconduct

¶6 May next contends the trial court erred in rejecting his claim of juror misconduct. The jury foreman brought a stuffed animal into deliberations for demonstrative purposes. May argues, as he did below, that the stuffed animal was "extrinsic evidence" and should not have been permitted in the jury room. He contends the court erred by finding he was not prejudiced by its use.

¶7 In neither his petition for post-conviction relief nor in his petition for review did May specify the subsection of the rule under which he was seeking relief for this purported misconduct. *See* Ariz. R. Crim. P. 32.5 ("The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him . . . ."). To the extent the claim fell under Rule 32.1(a), it clearly was precluded because it could have been raised on appeal. Ariz. R. Crim. P. 32.2(a). But May seemed to assert this claim under Rule 32.1(e) based on newly discovered evidence. In his petition for post-conviction relief, he stated that "significant relevant facts were not available until after trial and appeal." "Evidence is not newly discovered unless . . . at the time of trial . . . neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Thus, even assuming May was attempting to raise a claim of newly discovered evidence, he did not show he exercised the requisite due diligence in attempting to secure the new evidence. *See* Ariz. R. Crim. P. 32.1(e)(2).

Consequently, May has not sustained his burden of establishing the trial court abused its discretion by denying relief on this ground.

Ineffective Assistance of Counsel Claims

¶8 May also challenges the trial court's denial of relief on his claims of ineffective assistance of trial and appellate counsel, which the court rejected after an evidentiary hearing. To establish such a claim, a defendant must show that counsel's performance fell below prevailing professional norms and the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The Sixth Amendment does not entitle a defendant to mistake-free representation. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006); *see also State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (defendants "not guaranteed perfect counsel, only competent counsel"), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). And there is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel's conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶9 "Matters of trial strategy and tactics are committed to defense counsel's judgment . . . ." *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988); *accord State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) ("Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel."). And "'disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis.'" *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), *quoting State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987).

¶10 Furthermore, even if counsel's strategy proves unsuccessful, tactical decisions normally will not constitute ineffective assistance. *State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975); *see also Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d at 636 ("strategic decision to 'winnow[] out weaker arguments on appeal and focus[] on' those more likely to prevail is an acceptable exercise of professional judgment"), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (alterations in *Febles*). And, when the trial court has held an evidentiary hearing, we defer to its factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶11 May advances several claims of ineffective assistance of trial and appellate counsel. Two of his claims—that counsel was ineffective for failing to raise a jurisdiction challenge to the continued deliberations and failing to object to a video of post-arrest questioning—are being raised for the first time on

review.[3] Therefore, we do not address these claims. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶12 May also contends the trial court erred in rejecting his claim that trial counsel was ineffective for failing to object to the continued jury deliberations. But even assuming, without deciding, that counsel's performance was deficient, May cannot show prejudice because we rejected the underlying claim of error on appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11; *see also Strickland*, 466 U.S. at 694 (to establish prejudice, defendant must show "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Inability to show prejudice is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance.").

¶13 Similarly, the trial court correctly rejected his fourth claim—that trial counsel "did not adequately confer with [him]" before allowing the jury deliberations to continue. In rejecting this claim, the court found that counsel's decision was "a tactical and strategic decision" that cannot "form the basis for a

---

[3] May asserts in his reply to the state's response to his petition for review that the issue of the video was raised below. Although this claim was mentioned briefly in May's petition for post-conviction relief and during the evidentiary hearing, he did not present the trial court with sufficient argument to allow it to rule on the issue. *Cf. State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy").

claim of ineffective assistance." But the claim also fails because May does not assert he would have made a different decision had he been consulted further. *See id.* (defendant must prove prejudice; without it, court need not address counsel's performance); *see also Strickland*, 466 U.S. at 694.

¶14 With respect to the remaining claims of ineffective assistance of counsel, the trial court correctly identified and resolved them in a manner permitting this or any other court to review and determine the propriety of its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by restating the court's ruling, and because the ruling is supported by the record and the applicable law, we adopt it. *See id.*

¶15 Accordingly, although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

APPENDIX K

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-030290-001 SE

[Filed: November 7, 2011]

HONORABLE KRISTIN HOFFMAN

STATE OF ARIZONA,	)
	)
v.	)
	)
STEPHEN EDWARD MAY, (001)	)
	)

CLERK OF COURT
D. Sanchez
Deputy

JOHN F. BEATTY
GERALD R. GRANT

STEPHEN EDWARD MAY
ASPC - EYMAN #214465
PO BOX 3200
FLORENCE AZ 85132
JOANN FALGOUT

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-SE

FAHRINGER & DUBNO
120 EAST 56TH STREET
SUITE 1150
NEW YORK NY 10022

POST-CONVICTION RELIEF DENIED

The Court took this matter under advisement after an evidentiary hearing on Defendant's Petition for Post-Conviction Relief. This is Defendant's first Petition for Post-Conviction Relief.

The parties stipulated that instead of live testimony from jurors in the May trial, the Court could consider transcripts of recordings of juror interviews and transcripts of juror depositions.

The court heard the testimony of Joel Thompson, Tracey Westerhausen, Dr. Harry Goodman, M.D., Michael Piccarreta, Dr. Phillip Esplin, Ph.D., and Terry Borden.

The court has considered the testimony of the witnesses, the exhibits admitted at the evidentiary hearing, all pleadings filed in conjunction with this petition for post-conviction relief and the transcripts of the evidentiary hearing.

ALLEGATIONS OF JUROR MISCONDUCT

Two jurors allege vote trading. Those two jurors stated in open court that they agreed with the verdicts when jurors were polled after the verdicts were read in open court. Interviews and depositions of other jurors do not support the allegation of vote trading. The court

finds that the defendant has failed to prove his allegation of vote trading.

Even if defendant had proved that jurors traded votes, jurors can compromise in reaching a verdict. *United States v. Powell*, 469 U.S. 57, 65 (1943); *State v. Zakahr*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. McKenna*, 222 Ariz. 396, ¶ 36 n. 14, 214 P.3d 1037, 1048 n. 14 (App. 2009); *State v. Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App. 2009).

The jury foreman brought a stuffed bear (or rabbit according to one juror) into the jury room during deliberations and used it briefly to demonstrate how defendant might have touched the victims and how he reached his conclusions in the case. (Hearing Exhibit 29 at 13:14; 14:11). Several other jurors handled the stuffed animal, and one juror also used it to give a visual of "what possibly could have happened." (Hearing Exhibit 31 at 11:12-13). One of the jurors said the presence of the stuffed animal helped the jurors to see "how he was holding the kids on his lap and how he put his hands between their legs and different things like that." (Hearing Exhibit 49 at 17:22-24). Another said "He was just showing how different way that could have been, if he could have held it on his lap or how things could have happened this way." (Separate Appendix to Defendant's Memorandum in Support of Petition for Post-Conviction Relief, Tab 73, 17:6-17:8). Another said, "[w]e brought it in to kind of discuss about it to kind of look at specifics where if a child points here does that really mean this and just kind of see exactly what that translates to in person instead of on the video." (*Id.*, Tab 76, 10:6-9). It was used "Just to

develop a visual of, you know, different way that that—the person's hand could be if they were going to toss a child in a pool, for instance, and try to elaborate on how the children said that they had been touched as he threw them in a pool or that sort of thing." (*Id*., Tab 77, 22:26-23:1).

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

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

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

One juror alleged that jurors considered the possible penalty in reaching their verdicts. That juror confirmed that the court had instructed the jurors to not consider the possible penalty. The record indicates that the trial court told the jurors that they were not to consider

punishment. (R.T. of Jan. 10, 2007, at 105-106.) The other jurors do not support the allegation that the jurors considered the possible punishment in reaching their verdicts. The Court finds that defendant has failed to prove his allegation that jurors considered punishment in reaching their verdicts.

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

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Michael Piccarreta opined that trial counsel Joel Thompson was ineffective in (1) not filing a motion pretrial challenging the constitutionality of the Arizona child molestation statute and Arizona statute setting forth the burden of proof as set forth in A.R.S. §13-1407 and §13-1410, (2) not considering the use of experts, either for use as consulting experts or testifying experts, (3) not asserting a claim of prosecutorial vindictiveness after more charges were filed after a successful motion to remand to the Grand Jury, (4) not objecting to continued deliberation after a mistrial was declared, (5) not considering the use of character witnesses both as to defendant's character for truthfulness and honesty and his lack of possession of an aberrant sexual propensity to commit the offenses charged (Ariz.R.Evidence 404(a)(1), (c).

He opined that once the court has ruled that 404(c) evidence has come in, the prosecutor has opened the door to evidence under 404(a)(1), and that an effective trial attorney would gather evidence, make disclosure,

see what happens, and then decide whether to use character evidence.

Dr. Harvey Goodman, M.D. reviewed the medical records of Defendant and opined that he has a congenital static encephalopomy.

Dr. Phillip Esplin opined that an expert in the area of child witnesses should have been consulted in this case noting that the case was complex to investigate given Defendant's work history, other history, four complaints within the apartment complex regarding events that were brief and not very complex, and the fragility of memory of complainant five at the time of the police interview. He opined that expert testimony would have been helpful to the jury as the testifying police detective was experienced but not a memory expert. He opined that an expert witness can let the jury know about vulnerabilities, memory contamination and age differences in memory. He stated that in thirty years of practice he has never seen a case like this without a pretrial consultation with an expert.

Terry Borden, defendant's stepfather from the time he was almost fifteen, testified that he and his wife provided trial counsel with Dr. Gold's medical records of this treatment of defendant, spoke to trial counsel about calling experts and was told that expert testimony was not needed, discussed calling character witnesses to testify that there was no inappropriate touching at other places defendant worked, that defendant was an honest, straight-forward and truthful person, and supplied trial counsel with people who had known defendant most of his life. He testified that

defendant provided trial counsel with names of trait character witnesses.

Defendant presented no evidence that a failure to raise a claim of prosecutorial vindictiveness after more charges were added when the case was remanded to the Grand Jury was unreasonable conduct under the facts of this case. As defense expert Picarretta acknowledged, "It's a difficult motion to prevail on." (R.T. of Sept. 7, 2001, at 146.) He also failed to establish that there was a reasonable likelihood that he would have prevailed on the claim had it been made. *United States v. Goodwin*, 457 U.S. 368, 372-73, 381 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *State v. Brun*, 190 Ariz. 505, 507, 950 P.2d 164, 166 (App. 1997).

Defendant claims ineffective assistance of trial counsel for failing to require the trial court to make required findings for admission of evidence pursuant to Rule 404(b) and (c). He also claims ineffective assistance of appellate counsel in failing to raise this issue on direct appeal.

Defendant presented nothing to show that Judge Stephens would have failed to make required findings for admission of evidence pursuant to Rule 404(b) and (c), Ariz. R. Evid. had they been requested. He has failed to show any likelihood of a different outcome if trial counsel had raised the issue with Judge Stephens.

There is a presumption that trial courts know the law and apply it correctly in reaching rulings. *State v. Moody*, 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004). Defendant's appellate counsel was aware of that

presumption. (R.T. of Sept. 7, 2011, at 68-69). Had appellate counsel raised the issue on appeal, it would have been unsuccessful based on *Moody*.

Defendant claims ineffective assistance of trial and appellate counsel in failing to challenge the constitutionality of the child molestation statute. His expert did not opine on whether such a challenge would have been successful. (R.T. of Sept. 7, 2011, at 122-125). Defendant must show a reasonable likelihood that a challenge to the constitutionality of the child molestation statute would have been successful in order to demonstrate prejudice. *State v. Berryman*, 178 Ariz. 617, 622, 875 P.2d 850, 855.

The Arizona Court of Appeals held that sexual interest is not an element of the crime of child molestation and that absence of sexual interest is an affirmative defenses regarding motive. *State v. Simpson*, 217 Ariz. 326, ¶¶ 18-19, 173 P.3d 1027, 1030 (App. 2007). Defendant's appellate attorney was aware of this opinion. (R.T. of Sept. 7, 2011, at 69-70.)

Arizona's child molestation statute is not significantly different that the murder statutes approved in *Patterson v. New York*, 432 U.S. 197 (1997). Under *Patterson*, the Arizona child molestation statute does not violate the constitution of the United States.

Defendant has failed to show a reasonable likelihood that either his trial or appellate attorney would have been successful in challenging the constitutionality of the child molestation statute of the State of Arizona and has failed to establish prejudice.

Defendant claims his trial counsel was ineffective in failing to investigate and present testimony from expert witnesses and character witnesses.

Trial counsel testified that he thought he could point out any deficiencies in the forensic interviews of the victims through cross-examination of the officer who conducted the forensic interviews and through closing argument. (Hearing Exhibit 1 at ¶¶8-9, 12-13, R.T. of Sept. 7, 2011 at 39.)

He cross-examined each of the child victims, tested their memories of the events, pointed out inconsistencies in their testimony and elicited testimony that supported the defense theory of the case. Dr. Esplin, defendant's expert in the area of child witnesses, testified that he rarely testified for the prosecution. (R.T. of Sept. 8, 2011 at 20-21.) He also testified that trial counsel brought issues regarding credibility of the victims to the attention of the jury. (*Id*. at 34-37.) The Court has considered his testimony at the evidentiary hearing and does not find that his testimony established a reasonable likelihood of a different result had he testified at trial.

Defendant claims that his trial counsel was ineffective in failing to present character witnesses at trial. He presented recorded statements from two people who worked with defendant in the past. (Hearing exhibits 38 and 39.) No character witnesses testified at the evidentiary hearing. Trial counsel testified that there was a limited network of possible character witnesses. He also gave reasons for not presenting evidence of defendant's good character and good conduct with children. (Hearing exhibit 1 at

¶¶ 25-26.) Defendant has not demonstrated that trial counsel was ineffective in failing to call character witnesses or a reasonable likelihood of a different result if he had called character witnesses.

Defendant claims that his trial counsel was ineffective in failing to present evidence about his neurological condition. Dr. Goodman testified that he never examined defendant, that defendant's neurological condition apparently did not require treatment between 1989 and 2008, and acknowledged that medical doctors who examined defendant prior to 1989 did not detect problems with fine motor control of his hands. (R.T. of Sept. 7, 2011 at 80-81, 85-86, 90-91, 106-107.) Defendant testified about his medical condition at trial. The court finds no reasonable probability that testimony of an expert witness on defendant's neurological condition would have resulted in different verdicts at trial.

Defendant claims that his trial counsel was ineffective in failing to consult with him regarding whether to object to resumption of jury deliberations and failing to object to resumption of jury deliberations. Trial counsel testified that he consulted with his client briefly before agreeing to allow the jury to resume deliberations (Hearing Exhibit 1, ¶ 38., R.T. of Sept. 7, 2011 at 20-21.) The decision on whether to object to resumption of jury deliberations was a tactical and strategic decision by defense counsel that can't form the basis for a claim of ineffective assistance of counsel. Actions of defense counsel attributable to trial tactics will not support a claim of ineffective assistance of trial

counsel. *State v. Webb*, 164 Ariz. 348, 351, 793 P.2d 105, 108 (App. 1990.)

Defendant claims that his trial counsel was ineffective in failing to present expert testimony and character witnesses at sentencing. Defense counsel presented a letter from defendant's mother and medical records at sentencing. (Separate Appendix to Defendant's Memorandum in Support of Post-Conviction Relief, Tab 43.) He also presented numerous letters from friends, relatives and supporters of defendant. (*Id*., Tabs 43 and 44.)

Defendant has not identified any additional information his trial attorney could have presented.

He has failed to establish ineffective assistance of trial counsel in failing to present expert testimony or character witnesses at sentencing. He has also failed to demonstrate that presentation of expert testimony or character witnesses at trial would have resulted in a different sentence.

THE COURT FINDS that there is no evidence that the performance of either trial or appellate counsel fell below prevailing objective standards. Even if it had, the Court finds no evidence of any resulting prejudice to defendant.

IT IS ORDERED denying defendant's Petition for Post-Conviction Relief as to all grounds raised at the evidentiary hearing.

APPENDIX L

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-030290-001 SE

[Filed: January 3, 2011]

HONORABLE KRISTIN HOFFMAN

STATE OF ARIZONA,	)
	)
v.	)
	)
STEPHEN EDWARD MAY, (001)	)
	)

CLERK OF COURT
N. Hannahoe
Deputy

GERALD R. GRANT

KATHLEEN O'MEARA
JEAN JACQUES CABOU

COURTADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-SE

MINUTE ENTRY

This case is eFiling eligible:
http://www.clerkofcourt.maricopa.gov/efiling/default.asp

Defendant filed this petition for post-conviction relief after his convictions were affirmed on direct appeal. This is defendant's first petition for post conviction relief.

Defendant raises eleven grounds for post-conviction relief.

Defendant's claim that he was deprived of his right to trial by jury is precluded. The claim was considered on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal.

Defendant's claim that the trial court coerced the verdict by allowing the jurors to continue deliberations after a mistrial had been declared is precluded. Defendant agreed to the jury's request to continue deliberations. In addition, the claim was considered on direct appeal.

Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. The claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

Defendant's allegation that jurors traded votes is not precluded. However, only one juror states that the

Foreman gave his opinion as to the possible length of sentence in order to persuade the juror to find defendant guilty.

Defendant's allegation that the court failed to properly instruct the jury is precluded. This allegation was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interviews following the verdict and prior to his appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

Defendant's allegation that the jury considered extrinsic material is not precluded.

Defendant's allegation that the cumulative effect of numerous serious issued interfered with the impartiality of the jury is precluded. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal. In addition, Arizona does not recognize the cumulative error doctrine. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

Defendant's claim that the Arizona child molestation statute is unconstitutional is precluded. Defendant did not raise the issue in the trial court. Because he did not raise the issue in the trial court, it is waived on direct appeal. *State v. Schwartz*, 188 Ariz. 313, 320, 819 P.2d

978, 985 (App. 1991). Because it is waived on direct appeal, it is also waived in a proceeding for post-conviction relief. It is also precluded under Rule 32.2(a)(3). The claim does not implicate constitutional rights which are considered personal to the defendant, and is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal.

Defendant's allegation of actual innocence because the child molestation statute unconstitutionally relieves the State of its burden of proving the "core element" of sexual motivation fails. Defendant's claim that the child molestation statute is unconstitutional is precluded. Defendant has not demonstrated by clear and convincing evidence, as required by Rule 32.1(h) Ariz. R. Crim. P, that the facts underlying this allegation claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offenses beyond a reasonable doubt.

Defendant's allegation that the court improperly applied Rules 404 (b) and (c) in denying his motion to sever counts is precluded. The claim was not raised on direct appeal. Defendant claims newly discovered facts arising from juror interviews. There is no showing that the jurors were unavailable for interview following the verdict and prior to his direct appeal. His claim is not of sufficient constitutional magnitude that the State is required to prove that he knowing, intelligently and voluntarily failed to raise the issue on direct appeal.

Defendant's allegation of prosecutorial misconduct is precluded. All of the materials defendant relies on in

support of this claim were available at the time the notice of appeal was filed. Because the case was affirmed on direct appeal, there is a presumption that defendant's convictions were regularly obtained and are valid. Defendant bears the burden or rebutting that presumption. *Canion v. Cole*, 210 Ariz. 598, 601, 115 P.3d 1261, 1263 (2005). Defendant has made no showing that he is entitled to relief.

Defendant's allegation of ineffective assistance of counsel is not precluded.

It is ordered summarily dismissing defendant's petition for post-conviction relief with the exception of the following allegations: allegation of jury vote trading, allegation that jury considered extrinsic evidence, and allegation of ineffective assistance of counsel.

It is ordered setting this matter or Informal Conference pursuant to Rule 32.2, Ariz. R. Crim. P. on 01/06/2011 at 8:30 a.m.

It is ordered waiving defendant's presence at the Informal Conference.

APPENDIX M

February 10, 2009

RE: STATE OF ARIZONA v STEPHEN EDWARD MAY
Arizona Supreme Court No. CR-08-0281-PR
Court of Appeals Division One
No. 1 CA-CR 07-0144
Maricopa County Superior Court
No. CR2006-030290-001 SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 10, 2009, in regard to the above-referenced cause

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 10th day of February, 2009.

Rachelle M. Resnick, Clerk

TO:
Robert A. Walsh, Assistant Attorney General, Arizona Attorney General's Office
Tracey Westerhausen, Debus Kazan & Westerhausen LTD
Stephen Edward May, ADOC #214465, Arizona State Prison, Florence - Eyman Complex-Meadows Unit
West Publishing Company

Lexis Nexis
Philip G. Urry, Clerk, Court of Appeals, Division One, Phoenix
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APPENDIX N

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. *See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CR 07-0144

DEPARTMENT D

[Filed: July 24, 2008]

STATE OF ARIZONA,	)
	)
Appellee,	)
	)
v.	)
	)
STEPHEN EDWARD MAY,	)
	)
Appellant.	)
	)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-03029-0001 SE

The Honorable Sherry K. Stephens, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Randall M. Howe, Chief Counsel.
Criminal Appeals Section,
Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Debus, Kazan & Westerhausen, Ltd. Phoenix
By Tracey Westerhausen
Attorneys for Appellant

J O H N S E N, Judge.

¶1 Stephen Edward May appeals his convictions and sentences imposed after a jury found him guilty of five counts of child molestation, all Class 2 felonies and dangerous crimes against children. May argues the superior court erred in instructing the jury that he had the burden of proving lack of sexual motivation as a defense to the alleged offenses. He also contends the superior court erred when it allowed the jury to reconvene after first ordering a mistrial. May also asserts his sentences are excessive. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 May was tried on seven counts of child molestation. During deliberations, the jury twice notified the court that it was deadlocked. Upon the second notification,

---

[1] We review the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against May. *State v. Long,* 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App.2004).

the court declared a mistrial. The court then thanked the jurors for their service and told them that the lawyers had indicated they might want to speak with them. "You are certainly under no obligation to do so," the court told the jury. "If you are willing to speak with the lawyers, I would ask that you wait back in the jury room and they will be in shortly." The court announced that the jury was excused and then observed, "The record will show the jury has left the courtroom." According to the record, approximately four minutes later, the court noted that some of the jurors had informed the bailiff that they did not want a "hung jury," and they asked to continue deliberations. The court asked counsel if there was an objection to granting the jury's request. The prosecutor and defense counsel both responded that they did not object.

¶3 After several additional hours of deliberation, the jury returned guilty verdicts on five of the seven charges. May moved for a new trial, which the superior court denied. The court sentenced May to consecutive slightly mitigated 15-year terms for each conviction. After May's timely appeal, we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and-4033(A)(1) (2001).

DISCUSSION

A. Defense of Lack of Sexual Motivation.

¶4 May first contends the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a

preponderance of evidence.[2] May argues the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation.

¶5 Under A.R.S. § 13-1410(A) (2001), "[a] person commits molestation of a child by intentionally or knowingly engaging in ... sexual contact ... with a child under fifteen years of age." " 'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body ..." A.R.S. § 13-1401(2) (2001). Pursuant to A.R.S. § 13-1407(E) (Supp.2007), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest."[3]

¶6 We rejected May's argument in a recent opinion, *State v. Simpson,* 217 Ariz. 326, 173 P.3d 1027 (App.2007), in which we held that "[t]he 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather creates an affirmative defense regarding motive." *Id.* at 329, ¶19, 173 P.3d at 1030 (internal quotation and citation omitted). We see no reason why *Simpson* does not

---

[2] For purposes of this decision, we assume, without deciding, that May was entitled to an affirmative defense instruction. *See State v. Gilfillan,* 196 Ariz. 396, 407, ¶ 40, 998 P.2d 1069, 1080 (App.2000) (defendant not entitled to self-defense instruction because he denied committing the act underlying his aggravated assault charge).

[3] We cite a statute's current version when no changes material to this decision have occurred since the relevant date.

dispose of this issue.[4] The cases May cites do not persuade us otherwise. *State v. Brooks,* 120 Ariz. 458, 586 P.2d 1270 (1978), and *State v. Turrentine,* 152 Ariz. 61, 730 P.2d 238 (App.1986), both addressed a prior version of § 13-1410 that made it a crime to "knowingly molest[ ]" a child. *See* 1977 Ariz. Sess. Laws, ch. 142, § 66 (1st Reg.Sess.) (amending and renumbering A.R.S. § 13-653 to § 13-1410); 1993 Ariz. Sess. Laws, ch. 255, § 29 (1st Reg.Sess.) (amending § 13-1410 to reflect its current version). Accordingly, the superior court did not abuse its discretion in instructing the jury that May had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes. *See State v. Johnson,* 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (denial of a requested jury instruction is reviewed for an abuse of discretion).

B. Continuing Jury Deliberations After Discharge.

¶7 May argues the superior court erred by allowing the jury to reconvene to continue deliberating after the court had declared a mistrial. We review only for fundamental error because May failed to object when the superior court reassembled the jury and permitted it to resume deliberating. *See State v. Velazquez,* 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also*

---

[4] The fact that we reviewed the purported trial error in *Simpson* under a fundamental error analysis does not mean the holding in *Simpson* does not apply here. We concluded in *Simpson* that the superior court's failure to *sua sponte* instruct the jury that the State had the burden to prove defendant's sexual motivation was not "error, fundamental or otherwise." *Simpson,* 217 Ariz. at 330, ¶ 23, 173 P.3d at 1031.

State v. Henderson, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, May must show that error occurred, the error was fundamental and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.

¶8 The only Arizona case cited to us (or which we have found) in which a jury reconvened after having been discharged is *State v. Crumley,* 128 Ariz. 302, 305-06, 625 P.2d 891, 894-95 (1981). In that case, it was discovered "almost immediately" after the jury was discharged that trial on the issue of prior convictions had been overlooked. *Id.* at 305, 625 P.2d at 894. The bailiff in short order located six of the eight jurors. The other two were reached at their homes, and all eight returned the next day to take up the prior conviction issue. Under those circumstances, our supreme court said:

> Once discharged, we think this jury could not be properly recalled to further decide an issue of this case. It is simply too dangerous a practice to discharge the individual jurors from the duties and obligations of their oath, send them back into the community without admonitions or instructions, and then recall those same jurors to make a fair and impartial determination of any remaining issue connected with the case.

Id. at 306, 625 P.2d 891, 625 P.2d at 895.

¶9 The facts in this case are different – the jury reconvened only a few minutes after having been discharged. Although nothing in the record tells us the jurors did not interact with the public in the meantime,

the court had invited the jurors to gather again in the jury room. In any event, we know that they did not have the extended opportunity for contact with the public that occurred in *Crumley*.

¶10 Although the court in *Crumley* might have announced a rule that any verdict rendered after a jury once has been discharged is null and void, it did not; instead, it reasoned that under the facts of that case, a verdict issued after the jury had been "sen[t] ... back into the community without admonitions or instructions" could not stand.[5] We take from *Crumley,* therefore, that under Arizona law, structural error requiring reversal does not occur whenever a jury that has been discharged reconvenes and issues a guilty verdict. *See State v. Ring,* 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (when structural error occurs, conviction is automatically reversed); *Summers v. United States,* 11 F.2d 583, 586 (4th Cir.1926) ("the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling" the jury); *Masters v. Florida,* 344 So.2d 616, 620 (Fla.App.1977) (burden on defendant to

[5] The common-sense approach articulated in *Crumley* is like that taken by the court in *Washington v. Edwards,* 15 Wash.App. 848, 552 P.2d 1095 (Wash.App.1976). As here, the jury in that case was reconvened minutes after discharge. The court said, "A discharge will occur in fact when a jury is permitted to pass from the sterility of the court's control and allowed to separate or disperse and mingle with outsiders." Although the court noted that "contamination is presumed" when the discharged jury mingles with the public, it did not reverse the verdict because "the jury did not pass from the control of the court but merely exited the courtroom to the adjacent jury room," to which no member of the public had access. *Id.* at 850-51.

prove outside influence on jury during period of discharge). *But see Blevins v. Indiana,* 591 N.E.2d 562, 563 (Ind.App.1992) ("Any action of the jury after its discharge is null and void."); *Michigan v. Rushin,* 37 Mich.App. 391, 194 N.W.2d 718, 721-22 (Mich.App.1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green,* 995 S.W.2d 591, 614 (Tenn.1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia,* 132 Va. 703, 111 S.E. 291, 294 (Va.1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court"); *cf. Arnold v. Alabama,* 639 So.2d 553, 554-55 (Ala.1993) (new trial granted when jury reconvened over defendant's objection; record did not disclose amount of time that elapsed between discharge and reconvening of jury or where jury was in the meantime).

¶11 May argues that we may presume that he was prejudiced when the jury was allowed to reconvene; at oral argument, for example, his counsel urged that we may take as common knowledge that jurors would reach for their cell phones to call friends or family immediately upon discharge. May points to nothing in the record that would demonstrate such prejudice, however, and, pursuant to *Henderson,* we will not presume prejudice when, by contrast to the facts in *Crumley,* the record does not disclose that the jury was "sen[t] back into the community" before reconvening. Accordingly, we may not reverse his conviction on this ground.

C. Sentencing Issues.

¶12 Finally, May argues the superior court abused its discretion in sentencing him to only "slightly mitigated" sentences because his "conduct was far milder than the usual child molest case." We find no abuse of discretion.

¶13 A superior court has broad discretion to determine the sentence to impose, and we will not disturb a sentence that is within statutory limits, as is May's, unless the court clearly abused its discretion. *State v. Cazares,* 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App.2003). We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *Id.* Provided the superior court fully considers the factors relevant to imposing sentence, we generally will find no abuse of discretion, and the weight to be given any factor asserted in mitigation rests within the superior court's sound discretion. *See id.*

¶14 Prior to sentencing, the court announced it had considered the nature and circumstances of the offenses and May's contact with the victims, the position of trust May enjoyed with the victims' families, the ongoing relationship he had with them, the impact the offenses had on the victims and their families and the need to protect the community. In mitigation,[6] the court considered May's social background, his physical

[6] The State dismissed its allegation of aggravating circumstances prior to the sentencing hearing.

impairment,[7] lack of criminal history, his extensive family and community support and the letters submitted on May's behalf. We discern no abuse of discretion in the court's imposition of consecutive 15-year prison sentences, two years less than the presumptive 17-year term for a single offense. *See* A.R.S. § 13-604.01(D) (Supp. 2007).

¶15 May alternatively requests we exercise our authority under A.R.S. § 13-4037(B) (2001) to order that certain of his sentences run concurrent with each other, so as to effectively reduce his aggregate sentence by 30 years. A sentence that is within the statutory limits will not be reduced absent a showing that it was the result of "arbitrariness, capriciousness, or failure to conduct adequate investigation into facts relevant to sentencing." *State v. Ramos,* 133 Ariz. 4, 7, 648 P.2d 119, 122 (1982). Having determined the superior court properly considered the facts relevant to sentencing, we decline to order May's sentences to run concurrently in the manner he requests. *See State v. Fillmore,* 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App.1996) (court of appeals' statutory discretion to reduce excessive sentences must be exercised with great caution).

¶16 Finally, May contends that the individual sentences for each count and his lengthy aggregate sentence constitute cruel and unusual punishment. As May concedes, he did not raise this argument below. Therefore, he has waived this issue and we need not address it. *See State v. Navarro,* 201 Ariz. 292, 298 n. 6, ¶ 22, 34 P.3d 971, 977 n. 6 (App.2001) (Eighth

[7] May has a neurological condition that causes his head to uncontrollably "tick" and other physical manifestations.

Amendment argument that was not raised before the trial court is waived on appeal). Even if we were to consider this argument, however, pursuant to *State v. Berger,* 212 Ariz. 473, 476, ¶¶ 15-16, 134 P.3d 378, 381 (2006), we would be compelled to conclude that his sentence is not grossly disproportionate to his crimes.

CONCLUSION

¶ 17 May's convictions and sentences are affirmed.

s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

s/_____
JON W. THOMPSON, Judge

s/_____
ANN A. SCOTT TIMMER, Judge

APPENDIX O

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: September 2, 2020]

No. 17-15603

D.C. No. 2:14-cv-00409-NVW
District of Arizona, Phoenix

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
DAVID SHINN, Director; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellants.	)

No. 17-15704

D.C. No. 2:14-cv-00409-NVW
District of Arizona, Phoenix

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellant,	)
	)

v.	)
	)
DAVID SHINN, Director; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellees.	)
	)

ORDER

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

The panel has unanimously voted to deny appellee/appellant's petition for rehearing. Judge Ikuta and Judge Friedland have voted to deny the petition for rehearing en banc, while Judge Block recommends that it be granted. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

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

APPENDIX P

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: September 9, 2020]

No. 17-15603

D.C. No. 2:14-cv-00409-NVW
District of Arizona, Phoenix

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
DAVID SHINN, Director; MARK BRNOVICH, Attorney General,	)
	)
Respondents-Appellants.	)

No. 17-15704

D.C. No. 2:14-cv-00409-NVW

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee,	)
	)
v.	)

DAVID SHINN, Director; MARK BRNOVICH, Attorney General,	)
Respondents-Appellants.	)

ORDER

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

The Motion to Stay the Mandate (ECF No. 121) is GRANTED. Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure, the mandate is stayed for 150 days to permit Petitioner-Appellee to file a petition for writ of certiorari in the Supreme Court. Should the Supreme Court grant certiorari, the mandate will be stayed pending disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this Court immediately upon the Supreme Court's decision.

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

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-14-00409-PHX-GMS

[Filed: June 21, 2021]

Stephen Edward May,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

A review of the Court's docket reflects that on March 27, 2020, the Ninth Circuit Court of Appeals' issued a consolidated memorandum decision reversing this Court's March 28, 2017 judgment granting habeas relief and the formal Mandate was issued March 30, 2021 (Doc. 91).

Pursuant to the Mandate and the Unopposed Motion for Order Requiring Petitioner to Appear (Doc. 92), the Court held a hearing on May 17, 2021, remanding the Petitioner into custody (Doc. 101). On May 19, 2021 the Court ordered releasing the signature

appearance bond (Doc. 102). The proceedings in this matter are concluded.

IT IS HEREBY ORDERED directing the Clerk shall terminate this case.

Dated this 21st day of June, 2021.

s/_____
G. Murray Snow
Chief United States District Judge

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-14-00409-PHX-GMS (MHB)

[Filed: January 5, 2023]

Stephen Edward May,	)
	)
Petitioner,	)
	)
v.	)
	)
David Shinn, et al.,	)
	)
Respondents.	)
	)

ORDER

Pending before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Michelle H. Burns (Doc. 112) issued November 14, 2022, regarding Petitioner's Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b) (Doc. 105), Respondents' Response (Doc. 108) and Petitioner's Reply (Doc. 111). The R&R recommends that the Motion be denied. The Magistrate Judge advised the parties that they had fourteen days to file objections to the R&R. (R&R at 7 citing 28 U.S.C. § 636(b)(1); Rules

72, 6(a), 6(b), Federal Rules of Civil Procedure). No objections were filed.

Because the parties did not file objections, the Court need not review any of the Magistrate Judge's determinations on dispositive matters. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Thomas v. Arn*, 474 U.S. 140, 149 (1985) ("[Section 636(b)(1)] does not . . . require any review at all . . . of any issue that is not the subject of an objection."). The absence of a timely objection also means that error may not be assigned on appeal to any defect in the rulings of the Magistrate Judge on any non-dispositive matters. Fed. R. Civ. P. 72(a) ("A party may serve and file objections to the order within 14 days after being served with a copy [of the magistrate's order]. A party may not assign as error a defect in the order not timely objected to."); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996); *Phillips v. GMC*, 289 F.3d 1117, 1120-21 (9th Cir. 2002).

Notwithstanding the absence of an objection, the court has reviewed the R&R and finds that it is well taken. The court will accept the R&R and deny the Motion for Relief from Judgment (Doc. 105). See 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate").

IT IS THEREFORE ORDERED that Report and Recommendation of the Magistrate Judge (Doc. 112) is accepted.

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment denying Petitioner's Motion for Relief from Judgment (Doc. 105).

Any request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Dated this 5th day of January, 2023.

s/_____
G. Murray Snow
Chief United States District Judge

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-14-00409-PHX-GMS (MHB)

[Filed: November 14, 2022]

Stephen Edward May,	)
	)
Petitioner,	)
	)
v.	)
	)
David Shinn, et al.,	)
	)
Respondents.	)
	)

ORDER

TO THE HONORABLE G. MURRAY SNOW, UNITED STATES DISTRICT COURT:

Petitioner Stephen Edward May, through counsel, has filed a Motion for Relief from Judgment pursuant to Fed.R.Civ.P. 60(b) (Doc. 105). Respondents have filed a Response (Doc. 108) and Petitioner has filed a Reply (Doc. 111).

BACKGROUND

The procedural history of this matter has been thoroughly discussed both in this Court and in proceedings before the Ninth Circuit Court of Appeals. As such, it will not be repeated in similar detail here. Briefly, and as pertinent to the instant Motion, in March 2017, the district court granted habeas relief and subsequently ordered that Petitioner be released from custody. (Doc. 70.) After Petitioner's release, Respondents filed a Notice of Appeal to the Ninth Circuit Court of Appeals. (Doc. 72.) Then, on April 27, 2017, the district court granted the parties' Stipulations Regarding Release Conditions During the Pendency of Respondents' Appeal, and a Signature Bond for Appearance of Petitioner Pending Appeal was filed on June 30, 2017. (Docs. 82, 87.)

After briefing was completed, the Ninth Circuit affirmed the district court's decision.[1] See May v. Ryan, 766 Fed. Appx. 505, 509 (9th Cir. 2019). Thereafter, Respondents filed petitions for rehearing and rehearing en banc and, in March 2020, the Ninth Circuit issued an Opinion and accompanying Memorandum reversing the district court's grant of habeas relief and rejecting Petitioner's alternative grounds for affirmance.[2] See

[1] Notably, in his second brief of cross-appeal, Petitioner argued that the appeal is moot and the court failed to have jurisdiction over the habeas proceeding because (1) he had been released from custody, (2) the State did not obtain a stay of the Judgment, and (3) he no longer had continuing collateral consequences of a wrongful conviction.

[2] As part of its Memorandum rejecting Petitioner's alternative grounds for affirmance, the Ninth Circuit stated, "We disagree

May v. Shinn, 954 F.3d 1194 (9th Cir. 2020); May v. Ryan, 807 Fed. Appx. 632 (9th Cir. 2020). Petitioner's subsequent petitions for rehearing and rehearing en banc were denied in September 2020, and his petition for writ of certiorari was denied in March 2021. The formal Mandate issued on March 30, 2021. (Doc. 91.)

On April 1, 2021, Respondents filed an Unopposed Motion for Order Requiring Petitioner to Appear before the Court. (Doc. 92.) Because appellate proceedings on the matter had concluded, and Petitioner's convictions and sentences were affirmed, Respondents sought to effectuate Petitioner's transfer back to the custody of the State authorities. The Court granted the Motion, and a hearing was held on May 17, 2021, remanding Petitioner into custody. (Docs. 94, 101.) Then, on June 21, 2021, "[p]ursuant to the Mandate and the Unopposed Motion for Order Requiring Petitioner to Appear," and all proceedings in this matter having concluded, the Court issued an Order directing the Clerk of Court to terminate the case. (Doc. 103.)

Eight months later, in the Ninth Circuit Court of Appeals, Petitioner filed a motion to recall the March 30, 2021 Mandate, arguing that the entire proceeding from the beginning was void for lack of subject matter jurisdiction. Specifically, Petitioner argued that the federal courts lost jurisdiction over this case on March 29, 2017, when the State released Petitioner from custody pursuant to the district court's Order.

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with May that this appeal is moot." May, 807 Fed. Appx. at 636 n.4.

On June 10, 2022, the Ninth Circuit denied Petitioner's motion stating, in pertinent part:

> May's motion to recall the mandate (Dkt. No. 135) is **DENIED**. "[M]otions that assert a judgment is void because of a jurisdictional defect generally" must show that "the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) (citations omitted). May has not met that standard in arguing that the statutory "in-custody" requirement was unsatisfied. *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) (per curiam); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Nor do the additional details provided in the motion and accompanying exhibits demonstrate that this Court's holding on mootness lacked an arguable basis. *Kernan v. Cuero*, 138 S.Ct. 4, 7 (2017) (per curiam).

May v. Shinn, 37 F.4th 552 (9th Cir. 2022).

Petitioner's subsequent July 26, 2022 petitions for rehearing and rehearing en banc were denied on August 19, 2022. Thereafter, the Ninth Circuit denied Petitioner's motion for appointment of CJR counsel to file petition for writ of certiorari. On October 31, 2022, the Ninth Circuit docket reflects that a letter was filed from the Supreme Court of the United States indicating that Justice Kagan has extended the time within which to file a petition for a writ of certiorari to January 16, 2023.

DISCUSSION

In his Motion for Relief from Judgment pursuant to Fed.R.Civ.P. 60(b), Petitioner moves for relief from the final order entered by the Court on June 21, 2021, and related orders -- requiring Petitioner to appear (Doc. 94), remanding Petitioner into custody (Doc. 101), and directing the Clerk to terminate this case (Doc. 103). Petitioner claims he is entitled to relief under Rule 60(b)(1) based upon the district court's mistake of law in directing Petitioner to appear in federal court and remanding him into custody when the proceeding in this Court was void for lack of subject matter jurisdiction. Petitioner argues that this Court lost jurisdiction once Petitioner was released from custody pursuant to the district court's March 2017 Order.

"Federal Rule of Civil Procedure 60(b) permits 'a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances.'" Kemp v. United States, 142 S.Ct. 1856, 1861 (2022) (quoting Gonzalez v. Crosby, 545 U.S. 524, 528 (2005)). The rule "provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." Engleson v. Burlington N. R. Co., 972 F.2d 1038, 1044 (9th Cir. 1992) (quoting Ben Sager Chem. Int'l, Inc. v. E. Targosz & Co., 560 F.2d 805, 809 (7th Cir. 1977)). "Under Rule 60(b)(1), a party may seek relief based on 'mistake, inadvertence, surprise, or excusable neglect.'" Kemp, 142 S.Ct. at 1861. "[A] 'mistake' under Rule 60(b)(1) includes a judge's errors of law." Id. at 1861-62. However, "a motion for reconsideration may not be used to raise arguments or present evidence for the

first time when they could reasonably have been raised earlier in the litigation." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009). "Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound discretion of the district court." Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004).

This is the third time Petitioner has argued that either this Court and/or the Ninth Circuit lacked jurisdiction over this matter because Petitioner was released from custody pursuant to the district court's March 2017 Order. Specifically, in his second brief on cross-appeal, Petitioner argued "this appeal is moot and the Court does not have jurisdiction over this habeas proceeding because (1) he has been released from custody, (2) the State did not obtain a stay of the Judgment, and (3) he no longer has continuing collateral consequences of a wrongful conviction. … Stephen was released from State custody forthwith… . The Court subsequently required a signature bond and notification when Stephen travels out-of- state … . But, there are no collateral consequences from the vacated conviction." Then, in his motion to recall the mandate, Petitioner argued that "the entire proceeding in [the Ninth Circuit] is, and was from the beginning, void for lack of subject matter jurisdiction. … Specifically, this motion challenges the jurisdiction of this Court. Once Petitioner was unconditionally released from all state confinement, the federal courts were divested of jurisdiction." And, in the instant Motion, Petitioner argues that this Court lost jurisdiction once Petitioner was released from custody pursuant to the district court's March 2017 Order.

It is well settled that "'[w]hen a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court.'" United States v. Luong, 627 F.3d 1306, 1309 (9th Cir. 2010) (quoting Firth v. United States, 554 F.2d 990, 993 (9th Cir. 1977)). Stated differently, all issues decided on appeal are "'considered as finally settled,'" and the district court "'is bound by the decree as the law of the case, and must carry it into execution according to the mandate.'" United States v. Thrasher, 483 F.3d 977, 981 (9th Cir. 2007) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895)). Under the rule of mandate, the Court "cannot vary [from that decree], or examine it for any other purpose than execution; or give any other or further relief[.]" Thrasher, 483 F.3d at 981. Violation of the rule of mandate is a jurisdictional error. See Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012); Thrasher, 483 F.3d at 982.

Similarly, under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." Thomas v. Bible, 983 F.2d 152, 154 (9th Cir.) (cert. denied 508 U.S. 951 (1993)). For the doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition. See Herrington v. County of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993). A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law

has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. See Thomas, 983 F.2d at 155.

The record reflects that on March 27, 2020, as part of its Memorandum decision reversing the district court's grant of habeas corpus, the Ninth Circuit addressed Petitioner's argument that "this appeal is moot and the Court does not have jurisdiction over this habeas proceeding" because "Stephen was released from State custody forthwith." The court stated summarily, "We disagree with May that this appeal is moot." May, 807 Fed. Appx. at 636 n.4. The formal Mandate reversing the district court's grant of habeas relief issued on March 30, 2021. (Doc. 91.)

After the Mandate issued, the Ninth Circuit again addressed Petitioner's contention that the entire habeas proceeding was void for lack of jurisdiction because Petitioner was unconditionally released from all state confinement. The court denied Petitioner's motion to recall the mandate finding that Petitioner failed to demonstrate that the Ninth Circuit "lacked even an 'arguable basis' for jurisdiction" in alleging that the statutory "in-custody" requirement was unsatisfied.

Petitioner attempts to distinguish the argument he asserts in the instant Motion stating that new counsel recently identified that the federal courts lost jurisdiction over this case on March 29, 2017, when the State released Petitioner pursuant to the district

court's Order. Petitioner states that this Motion relates to the district court's subject matter jurisdiction to remand Petitioner -- not the Ninth Circuit's jurisdiction to vacate Judge Wake's decision. The Court is not persuaded.

While a district court has no authority to depart from matters settled by an appellate decision, see Thrasher, 483 F.3d at 982, the "rule of mandate allows a lower court to decide anything not foreclosed by the mandate." Herrington, 12 F.3d at 904; see also Nguyen v. United States, 792 F.2d 1500, 1502 (9th Cir. 1986) (Although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it "leaves to the district court any issue not expressly or impliedly disposed of on appeal."). As noted previously, on two different occasions in Ninth Circuit, Petitioner has raised the same argument based on the same set of circumstances – the federal court's lack of jurisdiction based the district court's grant of habeas relief and Petitioner's subsequent release from custody. The Court fails to find a distinction between the issues raised in the Ninth Circuit and the issue he now raises in his Rule 60(b) Motion.

Accordingly, the Ninth Circuit having previously resolved Petitioner's jurisdictional claim, and Petitioner failing to raise any new or additional argument not resolved or foreclosed by the Ninth Circuit, the mandate rule and law of the case compel the conclusion that this Court is precluded from considering the same argument raised in Petitioner's Rule 60(b) Motion for Relief. See Thrasher, 483 F.3d at

982; see also U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) ("a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case"); DeWeerth v. Baldinger, 38 F.3d 1266, 1270 (2d Cir. 1994) ("a district court does not have jurisdiction to alter an appellate ruling where the appellate court has already considered and rejected the basis for the movant's Rule 60(b) motion").

CONCLUSION

Having determined that this Court is precluded from considering the argument raised in Petitioner's Motion for Relief from Judgment pursuant to Fed.R.Civ.P. 60(b) (Doc. 105), the Court will recommend that Petitioner's Motion for Relief be denied.

IT IS THEREFORE RECOMMENDED that Petitioner's Motion for Relief from Judgment pursuant to Fed.R.Civ.P. 60(b) (Doc. 105) be **DENIED**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for

the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

Dated this 14th day of November, 2022.

s/_____

Honorable Michelle H. Burns
United States Magistrate Judge

APPENDIX T

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 17-15603, 17-15704

[Filed: February 9, 2022]

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee/Cross-Appellant,	)
	)
v.	)
	)
DAVID SHINN; MARK BRNOVICH,	)
	)
Respondent-Appellants/Cross-Appellees.	)

On Appeal from the United States District Court
for the District of Arizona
2:14-cv-00409-NVW
Hon. Neil V. Wake

MOTION TO RECALL MANDATE

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Petitioner Stephen May respectfully requests that this Court recall its mandate filed on March 30, 2021 (ECF 91) and vacate this Court's judgment because the entire proceeding in this Court is, and was from the beginning, void for lack of subject matter jurisdiction. This Court may recall the mandate pursuant to its inherent authority and the All Writs Act, 28 U.S.C. § 1651, which permits this Court to "issue all writs necessary or appropriate in aid of [its] jurisdictions and agreeable to the usages and principles of law." *See, e.g., Demjanujuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (recalling mandate and vacating prior decision based on both All Writs Act and court's inherent authority).

This is not a second or successive habeas petition because this motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceeding." *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Specifically, this motion challenges the *jurisdiction* of this Court. Once Petitioner was unconditionally released from all state confinement, the federal courts were divested of jurisdiction.

PROCEDURAL HISTORY

This case is truly extraordinary, as evinced by its unique procedural history and facts. Stephen May, who has no prior criminal history, was convicted under

Arizona's unique—and subsequently disavowed[1]—molestation statute, based upon allegations that he momentarily touched three children over their clothing, in public places where other adults were present. Three federal judges assigned to this case have cast significant doubt on those allegations, even under that unusually expansive definition of molestation.

Arizona was then the only state where anyone who intentionally or knowingly touched a child's genitals was presumed guilty of child molestation. Instead of requiring the State to prove sexual intent as an element of the crime, Arizona put the burden on the accused to disprove sexual intent. The Arizona Supreme Court upheld the statute in 2016 over a sharply worded dissent which noted that "[p]arents and other caregivers who have changed an infant's soiled diaper or bathed a toddler will be surprised to learn that they have committed a class 2 or 3 felony." *State v. Holle*, 240 Ariz. 300, 311 (2016) (Bales, C.J., dissenting in part). Petitioner was sentenced to prison for 75 years.

After exhausting his state-law remedies, Petitioner sought federal habeas relief. In granting the petition, Judge Wake, of the District of Arizona, found that, "[m]easured against the Supreme Court's standards and criteria, the burden-shifting scheme in Arizona's child molestation law violates due process plain and simple." He determined that the scheme violated Petitioner's "right to be convicted of a crime only if the State proves each element beyond a reasonable doubt

[1] *See* Ariz. HB2283 (2018) (amending A.R.S. §§ 13-1401(A)(3) and 13-1407(E)).

and to have the jury so instructed." And, based on the unique and case-specific facts adduced below, he concluded that there was a "significant likelihood" Petitioner "would not have been convicted had constitutional instructions been given" to the jury. Judge Wake ordered Petitioner released "forthwith." *May v. Ryan*, 245 F.Supp.3d 1145, 1172 (D. Ariz. 2017). This was not the "typical relief granted in federal habeas corpus" cases, which is "a conditional order of release." *Herrera v. Collins*, 506 U.S. 390, 403 (1993). Rather, Judge Wake issued an unconditional or "absolute" writ. *See Phifer v. Warden*, 53 F.3d 859, 865-66 (9th Cir. 1995) (describing the difference between conditional and unconditional writ).

Pursuant to Fed. R. Civ. P. 62(a), the District Court's judgment would have been automatically stayed for thirty days – meaning that the State had at least that amount of time to file a notice of appeal and seek a stay pending appeal. Fed. R. Civ. P. 62(d). The State, however, did not seek a stay of the district court's order. Instead, the Attorney General's office directed the Arizona Department of Corrections ("ADC') to release Petitioner from its custody the following day. *See* **Exhibit A**, Declaration of Erica Dubno ("Dubno Decl.") at ¶¶ 5-6. Petitioner walked out of prison a free man; he was not subject to any supervision from ADC or the State of Arizona. He was not subject to the order of a state court. At that time, because the State had not appealed or sought any surety from Petitioner, he was not subject to any supervision or detention by the District Court.

The parties later entered into a stipulation intended to ensure Petitioner's return to court if needed. Dubno Decl. at ¶¶ 8-11. Judge Wake requested briefing as to whether the court had jurisdiction to issue an order pursuant to the parties' stipulation. The State responded by arguing that (1) "the Arizona judiciary is no longer exercising personal jurisdiction over" Petitioner; (2) the State's filing of a notice of appeal did not divest the district court of jurisdiction to issue orders regarding Petitioner's custody; and (3) "the stipulated conditions of release presently pending before this Court actually contemplate that the Maricopa County Attorney's Office will *not* invoke the superior court's personal jurisdiction over Petitioner while Respondents' appeal is pending." (DC ECF 81 at 5, 8, 9 (emphasis in original)). No one addressed subject matter jurisdiction and Judge Wake issued an order pursuant to the stipulation.

A divided panel of this Court reversed Judge Wake's finding that counsel was ineffective when he failed to object to the constitutionality of the molestation statute. However, the panel affirmed Judge Wake on the alternate ground that Petitioner's counsel was ineffective when he failed to object to allowing the jury to resume deliberations after a mistrial was declared. *May v. Ryan*, 766 Fed. Appx. 505 (9th Cir. 2019).

A year later, the panel reversed itself and held that counsel was not ineffective. *May v. Shinn*, 954 F.3d 1194 (9th Cir. 2020). Judge Friedland, who wrote the new majority opinion, noted in a separate concurrence that the evidence against Petitioner was "very thin," and the potential that he was "wrongly convicted is

especially concerning because he was sentenced to seventy-five years in prison—a term that all but ensures he will be incarcerated for the rest of his life." Judge Friedland also agreed with the dissent that "this case, and in particular [Petitioner's] sentence, reflects poorly on our legal system." *Id.* at 1209.

Judge Block dissented, concluding that the "facts of this case unequivocally show" that counsel's hasty decision to allow the jurors to resume deliberations after the mistrial was declared was ineffective and the "antithesis of an informed decision." Rehearing *en banc* and certiorari were denied.

This Court issued its mandate on March 30, 2021, and the case returned to the district court. Petitioner, who had been at liberty without incident for more than four years, was returned to ASPC-Eyman, where he still resides. He has approximately 65 years left on his sentence.

Thereafter, undersigned counsel – who was not a part of Petitioner's original defense team – was retained to evaluate his case. Counsel identified for the first time that the federal courts lost jurisdiction over the case on March 29, 2017, when the State released Petitioner pursuant to Judge Wake's unconditional writ. This application is made directly to this Court because its jurisdiction to vacate the district court's grant of habeas relief is being called into question.

ARGUMENT

This Court should recall the mandate, vacate its opinion, and reinstate Judge Wake's release order

because it lacked jurisdiction to hear the appeal. Its order reversing the district court was ultra vires.

I. THE FEDERAL COURTS LOST JURISDICTION OVER PETITIONER'S HABEAS CASE WHEN HE WAS UNCONDITIONALLY RELEASED FROM CUSTODY

On March 29, 2017, ADC unconditionally released Petitioner. He was no longer "in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a), or under the control of ADC or the State of Arizona. He was subject to no collateral consequences that restrained his freedom. The State did not file its notice of appeal until the next day, March 30, 2017. By then, the case was moot and this Court never acquired subject-matter jurisdiction over the State's appeal.

A. This Court never acquired jurisdiction because Petitioner was unconditionally released prior to the State's notice of appeal.

After Petitioner was released from state custody, the case no longer presented a live case or controversy, as required by U.S. Const. Art. III, § 2 for federal jurisdiction. *See Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) (holding that the "'in custody' requirement is jurisdictional" and federal courts lacks jurisdiction where the habeas petitioner is not in custody). Courts cannot "proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez*, 177 U.S. 378, 390 (1900).

In the normal civil case, of course, an appellate court does not lose jurisdiction by one party voluntarily complying with the order of the District Court. But the statutory, constitutional, and historical underpinnings of the "great writ" demonstrate that it is a unique remedy under federal law. The Supreme Court has made clear that "[i]f there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of detention, it has been held that there is no habeas corpus jurisdiction." *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). The Supreme Court has also clarified that the requirement that a petitioner be "in custody" is a continuing requirement such that the unconditional release of a prisoner at any time during the proceeding deprives the federal courts of jurisdiction to consider a habeas petition. *See Johnson v. Hoy*, 227 U.S. 245, 248 (1913) ("The defendant is now at liberty, and having secured the very relief which the writ of habeas was intended to afford to those held under warrants issued on indictments, the appeal must be dismissed.").

For this Court to exercise jurisdiction over a habeas petition, the petitioner must be "in custody" and the custody must be "pursuant to the judgment of a state court." 28 U.S.C. § 2254(a). But the "in custody" requirement is more than just a statutory precondition for federal jurisdiction – it is a historical artifact that long predates the Constitution. Because the common law writ took the form of a directive to the jailer to bring forth his prisoner, the element of custody was long an inherent requirement of the writ's operation. Today, it is well-established that either the voluntary release of a petitioner or vacating the underlying

conviction deprives an appellate court of jurisdiction to consider an appeal from the grant or denial of a writ. In *Burnett v. Kindt*, 780 F.2d 952 (11th Cir. 1986), for example, the Eleventh circuit held that, when the state voluntarily complies with a writ of habeas corpus, and that voluntary compliance results in a petitioner's release from custody, the habeas case becomes moot and the appellate court loses jurisdiction. *Id.* at 952 ("Because the respondent voluntarily complied with the writ and…released petitioner from custody, this controversy has become moot. We therefore dismiss this appeal for want of a case or controversy."). Similarly, in *Dominguez v. Kernan*, 906 F.3d 1127 (9th Cir. 2018), this Court held that when a state court vacates the conviction underlying the state custody, the case becomes moot and the Court of Appeals loses jurisdiction over the appeal. The implication of these cases is clear – where a petitioner is either released unconditionally or has his underlying conviction vacated, this Court does not have jurisdiction to consider any appeal from the district court's grant or denial of a writ.

There is no doubt that the district court had jurisdiction over this habeas petition when Petitioner filed it because he was then in state custody. But that changed once he was released. Federal courts have determined that subsequent developments in a petitioner's case can render a habeas petition moot and deprive them of jurisdiction. For example, claims stemming from pretrial detention "are moot and thus not cognizable on federal habeas corpus" upon a subsequent conviction. *See Barker v. Estelle*, 913 F.2d 1433, 1440 (9th Cir. 1991). This is true both in the

district court and on appeal. *See McCullough v. Graber*, 726 F.3d 1057, 1059-60 (9th Cir. 2013) (dismissing a habeas petition as moot where "the relief requested … is no longer available"); *Burnett*, 780 F.2d 952, 952 (dismissing appeal as moot because respondent voluntarily complied with the writ and released petitioner from prison).

This case became moot upon the State's voluntary compliance with the district court's order because Petitioner was no longer in custody and because the state conviction under which he was held was vacated.

B. After Petitioner was released from custody, he was subject to no collateral consequences from his vacated state conviction.

In the typical habeas case, the federal courts are not divested of jurisdiction by the completion of a prisoner's sentence and his subsequent release. *See, e.g.*, *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005); *Cox v. McCarthy*, 829 F.2d 800, 802-03 (9th Cir. 1987). This is so because mere release from custody does not usually free a petitioner from restraints on his freedom flowing from his conviction. This is known as the "collateral consequences" doctrine, first announced by the Supreme Court in *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968), which overruled the Court's contrary opinion in *Parker v. Ellis*, 362 U.S. 574 (1960). As the *Carafas* Court explained, although the petitioner's sentence had expired and he was discharged from parole, he "will continue to suffer, serious disabilities" as a result of his conviction. *Id.* at 239. "Because of these 'disabilities or burdens [which] may flow from'

petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Id.* (alteration in original).

This doctrine does not apply here. The district court's order did not merely release Petitioner from custody; it invalidated his state conviction altogether. An invalid conviction carries no collateral consequences. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court considered one type of collateral consequence flowing from a criminal conviction, namely the inability to bring an action pursuant to 28 U.S.C. § 1983 for "damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid …." *Id.* at 487. A prisoner could not bring such a claim unless he could show that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, **or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254**." *Id.* (emphasis added). And, lest there be doubt that the Court considered a grant of federal habeas as nullifying the underlying conviction, the majority went on to say: "A claim for damages bearing that relationship to a conviction or sentence that has *not* been **so invalidated** is not cognizable under § 1983." *Id.* (second emphasis added). All but one of the concurring Justices agreed: "A state prisoner may seek federal court §1983 damages for unconstitutional conviction or confinement, but only if he has previously established the unlawfulness of **his**

conviction or confinement, as **on appeal or on habeas**." *Id.* at 498 (Stevens, J., concurring) (emphasis added). An unconditional grant of habeas thus invalidates the conviction on which the detention is based, and an invalid conviction is a legal nullity; it carries no collateral consequences.

Moreover, the district court here *expressly* vacated petitioner's state conviction. Here is the full text of the prayer for relief in petitioner's § 2254 motion:

> Petitioner asks that the Court grant the following relief: That the judgment of conviction and sentences be vacated; and the indictment dismissed or that a hearing be ordered; or any other relief to which Stephen May, who is actually innocent, may be entitled.

(DC ECF 1 at 39 (underline in original)). And here is the district court's order granting the petition:

> IT IS THEREFORE ORDERED that the Report and Recommendation (Doc. 35) is ADOPTED IN PART and REJECTED IN PART as provided in this order.
>
> IT IS FURTHER ORDERED that petitioner's Petition for Writ of Habeas Corpus (Doc. 1) is GRANTED.
>
> IT IS FURTHER ORDERED that the Clerk of the Court enter judgment in favor of Petitioner Stephen Edward May against Respondent

> Charles L. Ryan that Respondent release Petitioner from custody forthwith.

(DC ECF 15-1).

The district court was careful to note that it only partially adopted the Magistrate Judge's Report and Recommendation, but it granted the habeas petition without any such limiting language. And the petition prayed that the state conviction and sentence be vacated. Petitioner also asked for "any other relief" to which petitioner may be entitled, and the district court, in fact, did grant such additional relief, namely his release from confinement "forthwith." *See Dickerman v. N. Tr. Co.*, 176 U.S. 181, 193 (1900) (holding that "forthwith" means "as soon as by reasonable exertion, confined to the object, it may be accomplished."). The portion of the order granting the petition can thus *only* be read as vacating the conviction; any other reading would render the portion of the order granting release superfluous and redundant.

"[T]he Supreme Court has explained that the remedial power possessed by habeas courts is not limited to ordering a prisoner's discharge from physical custody… [and includes] the power to order expungement of the record of conviction." *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006); *see, e.g., Carafas,* 391 U.S. at 239 ("[T]he [habeas] statute does not limit the relief that may be granted to discharge of the applicant from physical custody."). This Court has concluded that this power is derived from many sources of authority: "the Civil Rights Act, the habeas corpus statutes, the statutory preservation under the All Writs Act of a district court's authority to

issue a writ of error coram nobis to correct an unlawful conviction, or the Constitution itself." *United States v. Sumner*, 226 F.3d 1005, 1012 (9th Cir. 2000) (footnotes and citations omitted). And, in *Hirabayashi v. United States,* 828 F.2d 591, 608 (9th Cir. 1987), this Court ordered the district court on remand "to grant Hirabayashi's petition to vacate both convictions." Arizona courts recognize and accept this federal power. *Milke v. Mroz,* 339 P.3d 659, 663 (Ariz. Ct. App. 2014) (holding federal court "granted [Milke] a conditional writ of habeas corpus in 2013, **setting aside her convictions and sentences**." (emphasis added)). Indeed, ADC itself appears to acknowledge that Petitioner's conviction was vacated when it released him from custody. *See* **Exhibit C** (printout from ADC online inmate datasearch tool noting "sentence vacated" on 3/29/2017, last accessed 1/31/2022).

There can be no doubt that the district court had authority to grant Petitioner sweeping relief, and in fact did so. As a consequence, when Petitioner was released, he was not merely free from physical restraint; he was free from all collateral consequences of a conviction that had become a legal nullity. He was not barred from any business or office, or from voting or serving as a juror. He was not required to register as a sex offender. In the words of *Carafas,* he lost any "substantial stake in the judgment of conviction." The case became moot and judges bound by Article III lost authority to make any further rulings in his case.

Courts routinely deny consideration to habeas petitioners and other litigants who have failed to strictly adhere to jurisdictional rules. *See, e.g., United*

States v. Marcello, 212 F.3d 1005 (7th Cir. 2000) ("Foreclosing litigants from bringing their claim because they missed the filing deadline by one day may seem harsh, but courts have to draw the line somewhere"). When the Court lacks jurisdiction, the same rule applies whether the appellant is a prisoner or the State.

C. The district court's order imposing release conditions could not breathe life into a moot case.

After Petitioner's unconditional release from State custody, the State expressed concern that Petitioner might flee. Petitioner's then-counsel stipulated to a district-court order securing petitioner's return to court in case of reversal. Dubno Decl. at ¶ 11.

This order did not resuscitate the case for two independent reasons. First, the district court's conditions-of-release order was ultra vires. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). The string was cut, the case was moot, and the federal courts lost jurisdiction when Petitioner was unconditionally released. Anything the district court and this Court did thereafter was a legal nullity.

Second, even if the district court had authority to restrain petitioner, the order would have been insufficient to support federal habeas jurisdiction because Petitioner was not then "in custody pursuant to the judgment of a State court," as required by 28 U.S.C. § 2254(a). Petitioner's constraint was entirely federal. Had petitioner fled, *federal* agents would have pursued him. If captured, he would have been returned

to the custody of the district court, not the state court or any state agent or instrumentality. The state admitted as much in support of the proposed stipulated detention order when it represented that "the Arizona judiciary is no longer exercising personal jurisdiction over" Petitioner. (DC ECF 81 at 5, 8, 9). Judicial estoppel now precludes the State from claiming otherwise. *Pegram* v. *Herdrich*, 530 U.S. 211, 227, n.8 (2000) ("Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.")

Nor was a detainer placed with the federal authorities to ensure that Petitioner would be returned to state custody. *Compare Maleng v. Cook*, 490 U.S. 488, 493 (1989) (habeas petitioner was "'in custody' under his … state sentences at the time he filed" because he was incarcerated in a federal prison and the State of Washington had placed a detainer to ensure his return to state custody at the conclusion of the federal sentence). The *federal* restraint on Petitioner's freedom imposed by Judge Wake could not have supported subject-matter jurisdiction over the § 2254 petition because "the status requirement that the petition be 'in behalf of a person in custody pursuant to the judgment of a State court'" is a separate jurisdictional requirement. *Dominguez*, 906 F.3d at 1136.

II. THE COURT SHOULD RECALL ITS MANDATE IN ORDER TO PROTECT THE INTEGRITY OF ITS PROCESSES

"[T]he courts of appeals are recognized to have an inherent power to recall their mandates …." *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). But, as this Court held in *Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007), it should do so only "to protect the integrity of our processes," and "in exceptional circumstances." Both prongs of this standard are satisfied here.

A. Recalling the mandate will protect the integrity of this Court's judicial processes.

No principle is more fundamental to the operation of the federal judiciary than scrupulously observing the limits of its jurisdictional authority. This principle has particular force where the limits are imposed, not merely by Congress, but by the Constitution itself. Our tripartite form of government assigns a limited role to judges appointed pursuant to Article III; they may exercise their authority only when deciding "Cases" and "Controversies." U.S. Const. art. III, § 2. This limitation serves numerous salutary purposes such as avoiding entanglement with the political branches, respecting the separation of powers and conserving scarce judicial resources by eschewing disputes where the parties lack a concrete stake in the outcome. This constraint has defined the character and scope of judicial power since 1793 when the Supreme Court politely but firmly declined President Washington's invitation for an advisory opinion. *See* Letter from the Justices of the Supreme Court of the United States to

President George Washington (Aug. 8, 1793), https://founders.archives.gov/documents/Washington/05-13-02-0263 (last accessed January 17, 2022).

That judges refrain from rendering decisions once cases become moot is one of the constitutional limitations on Article III authority. Unlike virtually every other rule of civil procedure, the parties cannot waive lack of subject-matter jurisdiction by express consent, by conduct, or by estoppel. *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."). The federal courts are obliged to dismiss cases over which they lack subject-matter jurisdiction, whether it is brought to their attention or on their own motion. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court **must** dismiss the action." (emphasis added)). The Supreme Court routinely vacates lowercourt opinions rendered without jurisdiction. *See, e.g.*, *Hollingsworth v. Perry,* 558 U.S. 183 (2010).

This case became moot when the State failed to seek a stay and released Petitioner after the district court unconditionally erased his conviction. At that point, there ceased to be a case or controversy. Every action by a federal court after that date, including this Court's March 7, 2021, opinion reversing Judge Wake's decision, is a legal nullity.

Petitioner casts no aspersions on the Court's integrity or good faith in this matter—or on the integrity and good faith of the parties involved. The Court was simply misled into acting when it lacked

authority to do so. This case is thus sharply distinguishable from *Calderon v. Thompson*, where the reason for recalling the mandate was an internal "malfunction" of this Court's en banc processes. 523 U.S. at 551. And, of course, *Calderon* did not result in any ultra vires judicial action; the case was not moot, nor had the Court published any advisory opinions. The so-called "malfunction" did not implicate the integrity of the judicial process.

This case is much different. The question here is not whether a minor procedural hiccup deprived a single off-panel judge, by operation of the Court's rules and procedures, from calling for en banc review, but whether this Court ever had jurisdiction over the state's appeal from Judge Wake's order. If this Court lacked jurisdiction over the appeal, it had no authority to review Judge Wake's order or issue its mandate. An order by a Court without jurisdiction is void. *In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985).

As Judge Ikuta noted in her concurrence, this Court's duty is to "uphold the fundamental principles of our legal system." 954 F.3d at 1208. No principle is more fundamental than observing jurisdictional limits. Now that the advisory nature of this Court's opinion has been brought to its attention, only recalling the mandate and vacating the offending opinion can serve those fundamental principles.

B. This case presents "exceptional circumstances" that justify recalling the mandate.

This case is truly exceptional. It is the rare case where a court—through no fault of its own—has issued an opinion after the case became moot. The bizarre facts leading up to this mistake—the prayer and order to vacate, the State's failure to seek a stay of the unconditional vacatur (itself reserved for cases meriting unusually strong medicine), the State's immediate release of the prisoner, the parties' failure to note the jurisdictional problem—are so unusual as to qualify as "exceptional." And the result of this chain of events is that the Court acted when it had no authority to do so. This alone makes the case exceptional.

Ruling that this Court lost jurisdiction upon Petitioner's release will not trigger an avalanche of similar petitions. The facts of this case are unique and unlikely to be repeated. Indeed, the Attorney General's office notified defense counsel that, as a result of this case, ADC changed its policy so that the inmate will not be released while the State applies for a stay. Dubno Decl. at ¶ 8. Granting Petitioner relief will have no ripple effects on the administration of justice. The Court can honor its constitutional duty by observing its jurisdictional limits, do justice in Petitioner's case, and rest assured that no other prisoner will follow in his footsteps. The concern expressed in *Carrington* about inviting mandate-recall petitions by "countless defendants" is inapplicable here. 503 F.3d at 893. Rather, this is precisely the kind of case where recall of the mandate is appropriate because petitioner has

made a "showing of truly extraordinary circumstances and equities." *Id.*

III. THIS MOTION IS TIMELY

This Court's mandate issued on March 30, 2021, about ten months ago. There is no time limit within which a party must file a Motion to Recall the Mandate. *See Greater Boston Television Corp. v. FCC*, 463 F.3d 268, 276 (D.C. Cir. 1971) (noting that Fed. R. App. P. 40 and 41 do not contain any limitation on a motion to recall the mandate).

Absent a rule directly on point, Fed. R. Civ. Pro. 60(b) provides useful guidance. *See Demjanjuk*, 10 F.3d at 356 (relying on Rule 60(b) in recalling the mandate). Rule 60(b) lists various bases for relief from a judgment or order, one of those being that "the judgment is void." Fed. R. Civ. Pro 60(b)(4). This Court interprets the timing requirements for bringing a motion under this rule permissively: "The rule requires that a 60(b)(4) motion 'be made within a reasonable time,' but if a judgment is void, a motion to set it aside may be brought at any time." *See* 11 C. Wright A. Miller, *Federal Practice and Procedure* § 2862 at 197 (1973). Moreover, a void judgment cannot acquire validity because of laches." *In re Center Wholesale, Inc.*, 759 F.2d at 1447-48.

Petitioner brings this motion well within the time allowed even for a 60(b) motion based on such mundane grounds as mistake, inadvertence or excusable neglect. As described in the attached declarations, Petitioner's prior counsel was not aware of the jurisdictional issue, Dubno Decl. at ¶¶ 14-15, nor

has a diligent search found binding authority directly on point. *Cf. Hirabayashi,* 828 F.2d at 605 (holding *coram nobis* petition timely, even though the materials on which it was based were in the public domain **for decades**, because "[p]rofessional historians had failed to discover it as well").

Petitioner's current counsel did not become aware that these unique circumstances deprived this Court of subject matter jurisdiction until October 2021, shortly after he was retained. *See* **Exhibit B**, Declaration of Randal McDonald ("McDonald Decl.") at ¶¶ 5-6. Counsel diligently researched this issue until he was satisfied that the claim was meritorious. McDonald Decl. at ¶¶ 7-8; Ariz. Ethical R. 3.1. This motion was brought as soon as possible given the difficulty in identifying and briefing the issue.

CONCLUSION

Petitioner respectfully requests that the Court recall its mandate, vacate its judgment vacating the unconditional writ, and grant such other relief as may be just, including oral argument if the Court believes it would be helpful.

This request is made in good faith and not for purposes of delay. On February 7, 2022, Assistant Attorney General Jim Nielsen advised that the State opposes this motion. This Court granted a prior motion by Petitioner to recall the mandate which had been "issued in error" on February 1, 2021 (ECF 128, 129). A prior application to stay the mandate pending an application for certiorari was granted on September 9,

2020. (ECF 121, 125). No other application for this relief has been made to this or any other Court.

Dated: February 9, 2022

LAW OFFICE OF RANDAL B. MCDONALD

/s/ Randal McDonald
Randal McDonald

Attorney for Petitioner-Appellee
Stephen Edward May

Exhibit A

Declaration of Erica T. Dubno, Esq.

Erica T. Dubno, Esq., declares pursuant to 28 U.S.C. § 1746, and under penalty of perjury, as follows:

1. I am a member of the firm of Fahringer & Dubno -- Herald Price Fahringer PLLC, with offices at 43 West 43rd Street, Suite 261, New York, New York 10036. I am an attorney admitted to practice in the United States Courts of Appeals for the Second, Third, Fourth, Eighth, Ninth and Tenth Circuits, the United States Supreme Court, the courts of the State of New York, New Jersey, and Arizona, as well as federal district courts.

2. I make this Declaration, which is based on personal knowledge, in support of Petitioner Stephen Edward May's motion to recall and stay the mandate, and vacate this Court's judgment for lack of subject matter jurisdiction.

3. I was admitted pro hac vice and represented Stephen throughout his state and federal proceedings since 2011. On January 6, 2022, I was admitted to the Arizona Bar. I was lead counsel for Stephen since my partner, Herald Price Fahringer, passed away in February of 2015. Together with veteran Arizona attorneys Michael D. Kimerer and Robert James McWhirter, I represented Stephen at all stages in his habeas corpus proceedings.

4. I have been handling post-conviction proceedings in state and federal courts throughout the country for more than 25 years. However, in March of 2017, I was confronted with circumstances that I had never previously encountered. On March 28, 2017, Senior District Judge Neil V. Wake issued an Order granting Stephen's Petition for Writ of Habeas Corpus and directing the Clerk of the Court to enter judgment that Respondent Charles L. Ryan—Director of the Arizona Department of Corrections—release Stephen "from custody forthwith" (ECF No. 69). That same day the Clerk issued the Judgment ordering Stephen's release "from custody forthwith" (ECF No. 70).

5. The State did not seek a stay or invoke the automatic stay provisions of Fed. R. Civ. P. 62.

6. On March 29, 2017, the Department of Corrections released Stephen from its custody.

7. On March 30, 2017, the State filed a notice of appeal (ECF Nos. 71, 72).

8. On April 3, 2017, I spoke with Assistant Attorney General Robert Walsh who indicated that the Department of Corrections had contacted him before it released Stephen. He indicated that his office approved Stephen's release because they did not want the Department to be held in contempt in light of the "forthwith" language in the Judgment, and he did not learn about the automatic stay provisions of Fed. R. Civ. P. 62 until the next

day. He also noted that, as a result of this case, the Department of Corrections changed its policy so that in all future cases the inmate shall not be released while the State makes an application for a stay.

9. The Attorney General's office indicated that they were considering seeking a stay from the Ninth Circuit. I did not believe the State would prevail on such an application in part because of the strength of Judge Wake's decision and Fed. R. App. P. 23(c), which provides that "[w]hile a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety."

10. However, I was very concerned that the State might seek to arrest Stephen and take him back into custody.

11. As a consequence, we entered into a stipulation intended to allow Stephen to remain completely at liberty but also to assure his return to federal court if needed. (ECF No. 75).

12. The day after the stipulation was filed, Judge Wake requested briefing addressing whether the court had jurisdiction to grant the parties' stipulation. The State submitted briefing urging that (1) "the Arizona judiciary is no longer exercising personal jurisdiction over" Stephen;

(2) the State's filing of a notice of appeal did not divest the district court—rather than the Court of Appeals—of jurisdiction to issue orders regarding the habeas petitioner's custody; and (3) "the stipulated conditions of release presently pending before this Court actually contemplate that the Maricopa County Attorney's Office will *not* invoke the superior court's personal jurisdiction over Petitioner while Respondents' appeal is pending." (ECF No. 81 at 5, 8, 9) (emphasis in original).

13. On April 27, 2017, Judge Wake issued an Order directing Stephen to post a $100,000 signature bond, not apply for a passport or travel outside of the United States, agree to reasonable travel reporting requirements and to notify a federal pretrial services officer during interstate travel, and to have no contact with any of the alleged victims or families. The Order expressly allowed that Stephen could travel anywhere within the United States without limitation or prior approval and would not have to register as a sex offender or be subject to an ankle monitor or any other form of monitoring. Stephen also could not be subject to any limitations on his daily freedom. The Order further provided that the "State of Arizona will neither refile any of the charges in Maricopa County Superior Court CR 2006-030290, nor undertake to have Petitioner remanded into custody on the charges filed in CR 2006- 030290, or related thereto, during the pendency of the appeal and cross-appeal from

this Court's judgment in the instant case." (ECF No. 82).

14. It did not occur to me or apparently anyone else on our team that, unlike a case with collateral consequences, the truly unique unconditional relief issued by Judge Wake, taken in combination with the State's truly unique unconditional release of Stephen without first seeking a stay, creates a rare exception to the general rule that once federal jurisdiction has attached in the district court, it is not defeated by the release of the petitioner prior to completion of proceedings on the application.

15. It was not until recently—after all of the proceedings in the Ninth Circuit, Supreme Court, and remand to the district court—that I learned and realized that the federal courts had already been divested of subject matter jurisdiction when Stephen was released unconditionally on March 29, 2017.

16. The parties were all operating in good faith throughout all of the proceedings after Stephen was released from State custody. Stephen was at liberty for four years without incident, during which he got certified and worked as a paralegal. My co-counsel and I dedicated ourselves tirelessly to this case. We would have raised the lack of subject matter jurisdiction issue immediately if we had become aware of it earlier. Moreover, throughout the process Assistant Attorney Generals Robert Walsh and Jim Nielsen were extremely professional and

demonstrated compassion in this extremely difficult case which, as noted by Judge Friedland, "reflects poorly on our legal system."

RESPECTFULLY SUBMITTED this 21st day of January, 2022.

/s/ Erica T. Dubno
Erica T. Dubno, Esq.
Fahringer & Dubno
43 West 43rd Street, Suite 261
New York, NY 10036
(212) 319-5351
erica.dubno@fahringerlaw.com

Exhibit B

Declaration of Randal B. McDonald, Esq.

Randal B. McDonald, Esq., declares pursuant to 28 U.S.C. § 1746, and under penalty of perjury, as follows:

1. I am the sole member and owner of the Law Office of Randal B. McDonald, PLLC.

2. I am also the supervising attorney at the Post-Conviction Clinic at the ASU Sandra Day O'Connor College of Law in Phoenix, Arizona.

3. I am an attorney admitted to practice in the United States Courts of Appeals for the Ninth Circuit and the courts of the State of Arizona, Nevada, and California, as well as the federal district courts in Arizona and Nevada.

4. I make this Declaration, which is based on personal knowledge, in support of Petitioner Stephen Edward May's motion to recall and stay the mandate and vacate this Court's judgment for lack of subject matter jurisdiction.

5. I was retained by Stephen May in October 2021 to investigate and pursue additional legal remedies available to him after the Ninth Circuit vacated the District Court order granting his petition for writ of habeas corpus.

6. Shortly after I was retained, I became aware of the possibility that this Court was deprived of subject matter jurisdiction as a result of the District Court's unconditional writ of habeas corpus and Stephen's subsequent release without terms or conditions.

7. Because I had never encountered a situation like this one, I researched the issue thoroughly to comply with my ethical duty under Arizona Ethical Rule 3.1. I researched similar cases and consulted treatises on federal habeas corpus. I also spoke to Stephen's prior counsel regarding the events surrounding his release in 2017.

8. After a thorough investigation, I concluded that there was "a good faith basis in law" for pursuing a Motion to Recall the Mandate in this Court.

9. I then prepared and filed this Motion.

RESPECTFULLY SUBMITTED this 7th day of February, 2022.

s/_____

Randal McDonald
Law Office of Randal B. McDonald
112 N. Central Ave,
Suite 100
602.325.3092
randy@rbmcdonaldlaw.com

Exhibit C

Inmate 214465

Last Name	First Name	Middle Initial
MAY	STEPHEN	E

Gender	Height (Inches)	Weight	Hair Color
MALE	71	180	BROWN

Eye Color	Ethnic Origin	Custody Class	Admission
BROWN	CAUCASIAN	Medium/ Lowest	05/17/2021

Projected Eligible Release Date	
Prison Release Date	Release Type
09/29/2085	Sentence Expiration

Most Recent Location		As of Date	
Complex	Unit	Last Movement	Status
Eyman	ASPC-E Meadows I	06/01/2021	Active

Inmate Mailing Address
ASPC Eyman, Meadows Unit STEPHEN E. MAY 214465 PO Box 3300 Florence, AZ 85132 United States

Earned Credit Release Date is provided for guidance. Confirmation can be sought by contacting ADCRR.

It is important to note that all Release Dates are ***projected*** and are ***subject to change***; confirm with ADCRR Time Computation Unit or the Offender Information Unit where the inmate is housed for potential changes

If you are a victim of crime, please call or email the Office of Victim Services for assistance with your victim rights or concerns: 602-542-1853 azvictims@azadc.gov

Details of inmate offenses can be accessed by reviewing the case file at the Office of the Clerk of the Court where the case was adjudicated.

Commitment and Sentence Information *5 records*

Commit #	Sentence Length	Sentence County	Court Cause#	Offense Date	Sentence Date	Sentence Status	Crime
B01	014Y/11M/28D	Maricopa	200603290	06/01/2005	02/16/2007	Imposed	Molestation of Child

B02	014Y/11M/28D	Maricopa	2006030290	06/01/2005	02/16/2007	Imposed	Molestation of Child
B03	014Y/11M/28D	Maricopa	2006030290	06/01/2005	02/16/2007	Imposed	Molestation of Child
B04	014Y/11M/28D	Maricopa	2006030290	06/01/2005	02/16/2007	Imposed	Molestation of Child
B07	014Y/11M/28D	Maricopa	2006030290	01/11/2005	02/16/2007	Imposed	Molestation of Child

Disciplinary Infractions *0 record*

Disciplinary Appeals *0 record [Info]*

Profile Classification *4 records [Info]*

Complete Date	Classification Type	Custody Risk	Internal Risk
Active Classification	Initial Classification	Medium	Lowest
05/21/2021	Reclassification	Medium	Lowest
02/29/2008	Reclassification	Medium	Low
02/23/2007	Initial Classification	Medium	Low

Parole Action *0 record*

Parole Placement *5 records*

Custody Date	Class Type	Approved Date	Next Review	Parole Class
03/29/2017	Sentence Vacated Vines Release			R
02/28/2007	Tr Ineligible			0
02/23/2007	Initial Cl.	02/23/2007	02/23/2008	1
08/30/2006	Par. Cl. Chg.		11/28/2006	1/177 Day(s)
08/30/2006	Admission	08/30/2006	12/28/2006	2

Work Program *4 records*

Assigned Date	Completed Date	Work Assignment
02/02/2017	03/29/2017	Peer Facilitator
06/07/2010	01/20/2015	Aide-Program
03/02/2010	06/07/2010	Aide-Recreation
09/17/2009	03/02/2010	Aide-Recreation

Notification Requests, Detainers, and/or Warrants *0 record*

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 17-15603, 17-15704

[Filed: February 17, 2022]

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee/Cross-Appellant,	)
	)
v.	)
	)
DAVID SHINN, ET AL.,	)
	)
Respondents-Appellants/Cross-Appellees.	)

On Appeal from the United States District Court
for the District of Arizona
No. 2:14-cv-00409-NVW
Hon. Neil V. Wake

RESPONDENTS-APPELLANTS/CROSS-APPELLEES' RESPONSE TO MOTION TO RECALL THE MANDATE

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SUMMARY

This Court should deny the motion to recall the mandate because Petitioner, Stephen May, fails to show any "exceptional circumstances" that would warrant a recall more than ten months after it was issued. *Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007). Although May claims his new attorney only recently discovered an alleged technicality that divested this Court of jurisdiction to resolve Respondents' appeal, the record shows May made the same claim four years ago and this Court rejected it. May's jurisdictional claim was meritless four years ago, and it still is today. Thus, there is no reason to recall the mandate. *See Calderon v. Thompson*, 523 U.S. 538, 549–50 (1998) (although "courts of appeals are recognized to have an inherent power to recall their mandates," the "power can be exercised only in extraordinary circumstances" and "[t]he sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, *unforeseen* contingencies") (internal citations omitted and emphasis added).

PROCEDURAL HISTORY

In 2017, the district court erroneously granted habeas relief and ordered that May be released from custody "forthwith." *May v. Ryan*, 245 F. Supp. 3d 1145, 1172 (D. Ariz. 2017). Respondents did not seek a stay of the district court's order and the Arizona Department of Corrections released May the following day. The day after May was released, Respondents filed their notice of appeal. In March 3 2018, May argued in his Second Brief on Cross-Appeal that Respondents' appeal was moot and that this Court did not have jurisdiction because "(1) he ha[d] been released from custody, (2) the State did not obtain a stay of the Judgment, and (3) he no longer ha[d] continuing collateral consequences of a wrongful conviction." *See* ECF 31, at 113 (Cause No. 17-15603).[1] Respondents addressed May's jurisdictional claim in their Third Brief on Cross-Appeal, arguing that the case was not moot because "the consequence of any reversal of [the district court]'s grant of habeas relief—and Respondents-Appellants' stated objective—is that May will resume serving his prison terms." *See* ECF 53, at 74–76.

This Court initially affirmed the district court's grant of habeas relief, and thus did not reach May's claim that the appeal was moot. *See May v. Ryan*, 766 Fed. Appx. 505, 509 (9th Cir. 2019) ("We need not reach May's other arguments for affirmance."). However, after Respondents moved for rehearing, this Court issued (1) a revised opinion reversing the district

[1] All citations to the ECF record are to the docket for Cause No. 17-15603, and page citations are to the electronic page number.

court's grant of habeas relief, *see May v. Shinn*, 954 F.3d 1194, 1196 & n.1 (9th Cir. 2020); and (2) a separate memorandum decision rejecting May's alternative grounds for affirmance, including his claim that the appeal was moot, *see May v. Ryan*, 807 Fed. Appx. 632, 636 n.4 (9th Cir. 2020) ("We disagree with May that this appeal is moot.").

May's petitions for rehearing *en banc* and for certiorari were both denied, and this Court issued its mandate on March 30, 2021. ECF 132. At a hearing in the district court on May 17, 2021, May was remanded into custody.

More than ten months after this Court issued its mandate, May now asks this Court to recall it, claiming his new attorney "identified for the first time that the federal courts lost jurisdiction over the case on March 29, 2017, when the State released Petitioner pursuant to Judge Wake's unconditional writ." ECF 135-1, at 5.

ARGUMENT

I. Recall of the Mandate Is Not Warranted Because This Court Already Rejected May's Jurisdictional Argument.

In habeas cases, this Court's inherent power to recall its mandates must be tempered against "the profound societal costs that attend the exercise of habeas jurisdiction" and federal courts' "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Thompson*, 523 U.S. at 554–556 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). An appellate court should not "recall[] its

mandate to revisit the merits of its earlier decision denying habeas relief." *Id.* at 557. Thus, "in the absence of a strong showing of 'actua[l] innocen[ce],' the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Here, May does not move to recall the mandate based on a "strong showing of actual innocence," but rather attempts to re-argue that an alleged technicality in the way he was released before the Respondents filed their notice of appeal divested this Court of jurisdiction. This does not meet the Supreme Court's "miscarriage of justice" exception for recalling mandates, which "is concerned with actual as compared to legal innocence." *Id.* at 559. Accordingly, because this Court has already rejected May's jurisdictional claim before, *see May*, 807 Fed. Appx. at 636 n.4, and because his argument hinges on an alleged technicality rather than actual innocence, May fails to show extraordinary circumstances warranting a recall of the mandate. This court should therefore deny his motion to recall the mandate.

II. In Any Event, May's Jurisdictional Claim Is Meritless.

In any event, May's claim is meritless. As Respondents pointed out when May first raised this claim, his release did not render the appeal moot because the relief sought by Respondents was the reinstatement of May's convictions and his return to prison. ECF 53, at 63–65. May relies almost exclusively on cases where the habeas petitioner, not the

government, sought habeas or appellate relief after being released from custody. *See, e.g.*, *Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) (petitioner released from custody before ever filing habeas petition in district court); *Ex parte Baez*, 177 U.S. 378, 390 (1900) (appellate relief sought by habeas petitioner would come only after he had been released, thus the issue was moot); *Johnson v. Hoy*, 227 U.S. 245, 248 (1913) (pretrial detainee, having posted bond, could not invoke rare subset of habeas relief to challenge the constitutionality of the statute for which he was charged, because he was now at liberty pending trial). These cases only show that when an appellant seeks relief that they have already obtained through other means, the appeal becomes moot. Here, Respondents sought (1) the reversal of the district court's erroneous grant of habeas relief, (2) the reinstatement of May's convictions, and (3) his return to prison—relief that this Court could (and did) grant.

May cites one case in which the government's appeal from the grant of habeas relief was deemed moot, but even this case does not support his argument. In *Burnett v. Kindt*, 780 F.2d 952, 954 (11th Cir. 1986), the petitioner agued he was entitled to a parole hearing. *Id.* at 954. The district court granted habeas relief and ordered the Parole Commission (a non-party) to either "afford petitioner a parole hearing the next day or to release him immediately." *Id.* The respondent did not request a stay, nor did the Parole Commission request to intervene so it could challenge the Court's findings. *Id.* Instead, both the respondent and Commission "voluntarily complied with the terms of the writ," and then later appealed the district court's

ruling. *Id.* In its appeal, the respondent sought "a declaration from [the Eleventh Circuit] that [the respondent] did not have to provide petitioner access to a parole hearing" and asked the court to "vacate the district court's dispositive order." *Id.* While the appeal was pending, the Commission ordered that the petitioner be released on parole after ten months of imprisonment. *Id.* And, before the circuit court could render a decision, the petitioner's parole term expired. *Id.*

The Eleventh Circuit held that the case was moot because "[a] favorable ruling [for the government] would do nothing more than answer a hypothetical question and perhaps provide guidance in future cases." *Id.* Because the respondent had voluntarily released the petitioner on parole, and the parole term had then expired, a circuit court ruling on whether the district court properly ordered the Commission to provide access to a parole hearing "would not restore respondent to the status quo ante, thus enabling [it] to maintain petitioner in custody until the consecutive terms of incarceration prescribed by his sentences expired[.]" *Id.*

Burnett does not help May's cause. In *Burnett*, the government's narrow request for relief on appeal would not have returned it to the status quo ante because it had already voluntarily provided the petitioner with access to the parole hearing, which then resulted in the defendant's early release on parole. Access to a parole hearing was a one-time event, a bell that could not be unrung even if the circuit court concluded no hearing was required. Here, in contrast, Respondents' request

for relief—reinstatement of May's convictions and his return to prison to complete his sentences—was precisely the type of relief that would return them to the status quo ante. Thus, if anything, *Burnett* supports the proposition that this Court had jurisdiction to hear Respondents' appeal.

Finally, although May claims that upon his release, "he lost any 'substantial stake in the judgment of conviction,'" *see* ECF 135-1, at 14 (quoting *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)), this is not the proper inquiry because Respondents were the party seeking appellate relief. Rather, the inquiry is whether "the parties have a concrete interest, however small, in the outcome of the litigation[.]" *Dominguez v. Kernan*, 906 F.3d 1127, 1132 (9th Cir. 2018) ("[A] case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'") (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Here, both parties had a significant interest in the outcome of Respondents' appeal. Respondents' interest was the reversal of an erroneous grant of habeas relief and the reinstatement of May's convictions and sentences. For May, despite his claims of disinterest, if the district court's decision was reversed, he faced remand to prison to complete his sentences. Thus, like the Respondents, May's interest in the outcome of Respondents' appeal was substantial.

CONCLUSION

For these reasons, this Court should deny the motion to recall the mandate.

Respectfully submitted,

Mark Brnovich
Attorney General

J.D. Nielsen
Habeas Unit Chief

/s/_____
Casey D. Ball
Assistant Attorney General

Attorneys for Respondents-
Appellants/Cross-Appellees

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 17-15603, 17-15704

[Filed: March 17, 2022]

STEPHEN EDWARD MAY,	)
	)
Petitioner-Appellee/Cross-Appellant,	)
	)
v.	)
	)
DAVID SHINN; MARK BRNOVICH,	)
	)
Respondent-Appellants/Cross-Appellees.	)

On Appeal from the United States District Court
for the District of Arizona
2:14-cv-00409-NVW
Hon. Neil V. Wake

REPLY IN SUPPORT OF MOTION TO RECALL MANDATE

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Attorney for Petitioner-Appellee
Stephen Edward May

It has been said that if the facts are in your favor, you pound the facts, if the law is in your favor, you pound the law, and if neither is in your favor you pound the table. The State engages in a good bit of table-pounding by arguing that the case was not moot. But that is not the basis for this motion to recall the mandate. Instead, Petitioner's argument is that this Court lacked subject-matter jurisdiction based on the jurisdictional grant in the habeas statute. This Court never obtained jurisdiction over Petitioner because he was not "in custody," as required by 28 U.S.C. § 2254(a), at the time the notice of appeal purporting to invoke this Court's jurisdiction was filed. This textual, statute-based jurisdictional argument is akin to pointing out a diversity case does not satisfy the statutory text's requirement of more than $75,000 in controversy.

Mootness, a creature of Article III rather than statute, may partake of a jurisdictional character but is a fundamentally different issue than statutory jurisdiction. A live controversy between the parties cannot be brought in federal court if there is no diversity or the case does not raise a federal question. Conversely, the federal courts may have jurisdiction but no live controversy, such as where a criminal appellant dies while pursuing an appeal. Mootness and statutory subject-matter jurisdiction are distinct concepts.[1]

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[1] The law of federal courts is replete with examples that show how statutory jurisdiction may be lost even though constitutional jurisdiction remains. Consider an *in rem* claim against a ship that sails before it can be arrested. Or the addition of a diversity-destroying party. "Subject-matter jurisdiction, then, is an Art. III

Petitioner's motion raises a single question: Did, as a matter of the habeas statute's text, the federal courts lack jurisdiction over the case once Petitioner was unconditionally released and thus was no longer "in custody pursuant to the judgment of a state court…" 28 U.S.C. § 2254(a). The plain language of this jurisdictional statute, as well as copious caselaw cited in Petitioner's motion, answers this question in the affirmative.

The State seeks to distract the Court by arguing that the case was not moot because there continued to be a live controversy between the parties. Even if true, this is irrelevant. The federal courts lacked jurisdiction to resolve any such controversy once Petitioner was unconditionally released from custody, at which point section 2254(a) no longer authorized the federal courts to act. To this, the State has no answer; it never mentions section 2254(a) and the phrase "in custody requirement" or its cognates appear nowhere in its brief. The state has forfeited the point.

The only remaining issue is whether the case merits recall of the mandate under the Supreme Court's ruling in *Calderon v. Thompson*, 523 U.S. 538, 549 (1998) and its progeny. It clearly does.

I. THIS COURT NEVER ACQUIRED SUBJECT MATTER JURISDICTION.

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as well as a statutory requirement." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Mootness, like standing, is an Article III issue. The "in custody" requirement is a statutory one. One could, of course, imagine a constitutionally permissible habeas statute without an "in custody" requirement, but that is not the statute we have.

More important than what the State's Response says is what it does not say. The State does not dispute that Petitioner was released from state custody immediately after the district court issued its order granting habeas relief, and before the state filed its notice of appeal. Nor does the State dispute that the district court's order vacated Petitioner's state conviction or that the state courts no longer had jurisdiction over Petitioner. Nor could it, in light of its earlier concession that "the Arizona judiciary is no longer exercising personal jurisdiction over" Petitioner. (DC Doc. 81 at 5, 8, 9). Finally, the State does not dispute that, once Petitioner's conviction was vacated, Petitioner suffered no collateral consequences as a result of that conviction. Indeed, the State represented to this Court that he did not: "May presently faces no collateral consequences from his convictions." Doc. 53, at 62. Thus, the collateral consequences doctrine, which plays a key role in many cases concluding that release from custody does not free a prisoner from all state restraints, does not apply here. Petitioner was free from state restraint—indeed from all restraint whatsoever—as soon as Arizona set him free in compliance with the district court's order. At that point, federal-court jurisdiction over the case terminated.

The State disparages (at 5) the solid body of caselaw holding that the "in custody" requirement is jurisdictional because most of the cases involved situations "where the habeas petitioner, not the government, sought habeas or appellate relief after being released from custody." But this Court's jurisdiction does not depend on who is bringing the

appeal. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself…and **without respect to the relation of the parties to it**." *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (emphasis added). Jurisdiction is more than the "alleged technicality" that the State describes (at 5). It is the font of this Court's authority. No matter who brings the appeal, if the Court lacks jurisdiction, it may not speak. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Cases where the state appeals a grant of habeas corpus are relatively rare, so opinions discussing this issue are far more likely to arise when the prisoner appeals. But jurisdiction is a two-way street; if the court lacks jurisdiction when the prisoner appeals there is no theory under which it can acquire jurisdiction when the state appeals.

The State spills much ink on *Burnett v. Kindt*, 780 F.2d 952, 954 (11th Cir. 1986), where it was the State that appealed. But *Burnett* was decided on mootness grounds. *Id.* at 955 ("this appeal is dismissed as moot"). Again, Petitioner's argument is that this Court lacked jurisdiction under 28 U.S.C. § 2254(a); mootness is beside the point. And as to jurisdiction the State makes no argument. Its silence speaks louder than words.

In short, the State has said *nothing* to contradict the basis for Petitioner's argument that this Court never acquired jurisdiction over the State's appeal.

II. THIS COURT HAS NOT PREVIOUSLY CONSIDERED ITS OWN SUBJECT-MATTER JURISDICTION OVER PETITIONER'S CASE.

The State points to four sentences in Petitioner's 98-page brief (Doc. 31 at 97) and a footnote in the subsequent memorandum disposition. It also concedes (at 3) that its own response to this argument addressed mootness, not subject-matter jurisdiction. *See* Doc. 53 at 63-65. But it now argues that the Court's footnote, which specifically addresses mootness but not jurisdiction, is nevertheless a ruling on jurisdiction, an issue not briefed or argued by the parties. To state the proposition is to refute it.

The four sentences in Petitioner's brief do not discuss subject-matter jurisdiction or the "in custody pursuant to the judgment of a state court" requirement of 28 U.S.C. § 2254(a). Rather, Petitioner then argued that the case was moot. This Court rejected that argument and Petitioner does not challenge that ruling. But whether there continued to be a live controversy between the parties has nothing to do with whether the case met this Court's jurisdictional requirements; a federal court cannot rule on a controversy, no matter how live, if Congress has not given it authority to do so. The "in custody" requirement and mootness are "analytically distinct issues requiring different treatment." *Malloy v. Purvis*, 681 F.2d 736, 738 n.1 (11th Cir. 1982). While "the issue of mootness is often mistaken for a jurisdictional

question…jurisdiction is a matter of satisfying the statutory 'in custody' requirement, whereas mootness is a question of whether there is any relief the court can grant once it has determined that it indeed has jurisdiction." *Harrison v. Indiana*, 597 F.2d 115, 117–18 (7th Cir. 1979). This Court ruled that the case was not moot, but it did not rule on subject matter jurisdiction—an issue never raised or briefed by the parties.

This Court dismissed Petitioner's mootness argument in a single, terse sentence: "We disagree with May that this appeal is moot." *May v. Ryan*, 807 Fed. Appx. 632, 636 n.4 (9th Cir. 2020). That memorandum disposition does not include any discussion of the issues, does not explain its holding, and certainly does not invoke, discuss, or decide the issue of subject-matter jurisdiction or the "in custody" requirement of section 2254(a). These nine words in a single footnote in an unpublished disposition cannot be read as indicating the Court has considered its own subject-matter jurisdiction. Even if so read, such a holding would not be binding on this or future proceedings because it was not properly raised and litigated before this Court. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37–38 (1952) (prior decision is not binding precedent on point neither raised by counsel nor discussed in the opinion of the court in that case).

And, if this Court had considered whether it had subject-matter jurisdiction in the 2020 memorandum disposition, it should now reconsider its ruling. *See Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) ("[I]t is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."). The disposition where this Court made its ruling is not published and is therefore not law of the circuit; at most, it is law of the case. *See Gonzalez v. Arizona,* 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (discussing the difference). The law-of-the-case doctrine is narrow; it applies only to issues explicitly decided by the prior ruling. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). This was not the case here, as this Court expressly ruled on mootness, and said nothing about subject-matter jurisdiction. Moreover, "[a]pplication of the doctrine is discretionary," and has several recognized exceptions: "(1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

At least two of these exceptions apply here: To the extent the panel ruled that it had subject matter jurisdiction pursuant to 28 U.S.C. § 2254(a), it was simply wrong. This is not surprising, since the issue was not raised by the parties, briefed, or argued. Nor was it decided by the kind of reasoned disposition that such a novel ruling would call for. Further, as argued in the motion—and recognized by Judge Friedland's

concurrence and Judge Block's dissent—Petitioner will likely spend his remaining days in prison based on exceedingly thin evidence. Such a harsh result ordered by a court without jurisdiction is a manifest injustice. And, while this case did not involve a remand, the third *Lummi* factor also applies by way of analogy because the facts and arguments now raised by Petitioner were not brought to the Court's attention. Revisiting the Court's ruling is therefore entirely justified; indeed, failure to do so would, according to *Lummi* and many other cases, be an abuse of discretion. *Id.* at 452-53.

III. THIS CASE PRESENTS EXTRAORDINARY CIRCUMSTANCES THAT WARRANT RECALLING THE MANDATE.

If this Court lacked jurisdiction to hear this appeal, this alone is sufficiently extraordinary to justify recalling the mandate. Judge Ikuta recognized in her concurrence that this Court's duty is to "uphold the fundamental principles of our legal system." 954 F.3d at 1208. No principle is more fundamental to our legal system than the jurisdictional limits Congress placed on it. "It is well settled that a judgment is void '*if the court that considered it lacked jurisdiction of the subject matter*…'" *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (quoting 11 Wright and Miller, *Federal Practice and Procedure* at 198, 200) (emphasis added by the court). "If jurisdiction was lacking, then the court's various orders…were nullities." *Morongo Band of Ind. v. Cal. St. Bd., Equal*, 858 F.2d 1376, 1381 (9th Cir. 1988). That neither party raised the jurisdictional question is of no consequence. "The parties have no power to confer jurisdiction on the district court by

agreement or consent." *Id.* at 1380. The simple fact remains that this Court acted without authority conferred on it by Congress. Having now been apprised of this, the Court must vacate its judgment, just as it vacated the district courts' judgments in *Watts* and *Morongo Band of Indians*.

The affront to the integrity of the judicial process is compounded by the fact that this Court issued a published opinion which now stands as law of the circuit on the points covered therein.[2] Vacating an opinion issued without jurisdiction is not merely justified, it is necessary to preserve the integrity of the law of the circuit. It is difficult to imagine a situation where exercise of the authority to recall the mandate would be more appropriate.

Also making this case extraordinary are the compelling—and unique—facts of this case. Petitioner was convicted under a statute whose failure to provide constitutional due process was so obvious on its face that the state changed the law rather than defend it. And even under Arizona's then-expansive definition of molestation, Petitioner's case was truly extraordinary. Three of the four Article III judges who examined this case have cast votes to vacate the conviction. Even after voting to reinstate that conviction, Judge Friedland wrote that "this case, and in particular [Petitioner's] sentence, reflects poorly on our legal system." *May v. Shinn*, 954 F.3d 1194, 1209 (9th Cir.

[2] Although the footnote referencing mootness is in an unpublished memorandum disposition, *May v. Ryan*, 807 Fed. Appx. 632 (9th Cir. 2020), this Court also issued a published opinion, *May v. Shinn*, 954 F.3d 1194 (9th Cir. 2020), resolving other issues raised by Petitioner.

2020). It would reflect even worse on our legal system if this Court let stand an opinion ordering Petitioner to be re-incarcerated, effectively for life, when it had no jurisdiction to rule on the case in the first place.

CONCLUSION

That this Court issued a published opinion in a case over which it had no jurisdiction is a truly extraordinary circumstance that warrants recalling the mandate, vacating this Court's 2020 dispositions, and reinstating the district court's unconditional writ.

Dated: March 17, 2022

LAW OFFICE OF RANDAL B. MCDONALD

/s/ Randal McDonald
Randal McDonald

Attorney for Petitioner-Appellee
Stephen Edward May

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CR2006-030290-001

[Filed: September 7, 2011]

STATE OF ARIZONA	)
	)
vs.	)
	)
STEPHEN EDWARD MAY (001)	)
	)

Phoenix, Arizona
September 7, 2011

BEFORE THE HONORABLE KRISTIN HOFFMAN
REPORTER'S TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING ON DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF

PREPARED FOR:
Counsel
(Copy)

PREPARED BY:
Rochelle L. Dobbins, RPR
AZ, Certified Court Reporter #50721

APPEARANCES

For the State:
Gerald Grant, Esquire
John Beatty, Esquire

For the Defendant:
Herald Price Fahringer, Esquire
Erica Dubno, Esquire
JoAnn Falgout, Esquire

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Honor.

THE COURT: All right. Mr. Piccarreta, you've heard the Rule for years, I know. It's been invoked, so you need to wait outside.

MR. PICCARRETA: Yes, your Honor.

THE COURT: Okay. Are you going to call Mr. Thompson at this time?

MR. FAHRINGER: Yes

JOEL ERIK THOMPSON,

Called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FAHRINGER:

Q Mr. Thompson, would you identify yourself, please.

A I'm Joel Erik Thompson.

Q What is your profession?

A I'm a practicing lawyer in the State of Arizona.

Q May I ask you when you were admitted?

A In Arizona, in 1975.

Q Okay. And have you been practicing ever since that time?

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children, by way of example?

A Yeah. I recall telling them that we can't bring in witnesses to testify that he had 15 other opportunities to molest somebody and didn't.

Q The statute that were operating under, paraphrasing, shifts the burden of proof on -- let me start this over again. I'm sorry. That was rather poorly done.

In a case involving child abuse or molestation, the section -- the statute you were operating under places the burden on the defendant to indicate he had no sexual intention, sexual motivation in touching, that the touching, in fact, was innocent. Do you remember that?

A I do, indeed.

Q All right. And did you question the constitutionality of that statute and that requirement of shifting the burden to the defendant in substantiating that element?

A I did, yes.

Q Was there a motion?

A I don't know that there was a motion specifically. I know there was a discussion, I know, in terms of the jury instructions to be given at the end of the case.

Q But no motion was made to have the statute declared unconstitutional or pretrial to in any way challenge that aspect of the statute?

A I did not.

Q When the trial commenced and the jury began its deliberations, do you recall the Court after several days declaring a mistrial?

A Yes.

Q And after she had declared a mistrial, did it come to your attention that the jury has reassembled and were back deliberating?

A Yes.

Q All right. And were you notified of that by the Court calling the lawyers up and saying, the jury is back deliberating?

A No. What we -- we were called up to the bench and told that the Court had been advised through the Court's bailiff, I believe, that the jury wanted to continue to deliberate.

Q And this was after they had been discharged, correct?

A Yes.

Q And did you object to that?

A No.

Q And did you discuss it at all with your client?

A Very, very briefly.

Q All right. Was it 20 seconds? 30 seconds, I believe has been reported.

A I believe that would be appropriate.

Q And, again, ultimately, you did not object to the jury going back to its deliberations?

A Yes.

Q Mr. Thompson, while you were working at Phillips and had your own offices as well, was there an awful lot of cases or a number of cases that were being turned over to you to handle at the same time the May case was being handled?

A I probably in my -- in those years at Phillips, I probably had from Phillips anywhere from 25 to 35 cases that were active at one time.

THE COURT: At any one time?

A At any one time.

Q And given your best judgment right now, if -- looking back on the May trial, if you had not been in that situation with that number of cases, is it your view that you would have done some of these things differently?

A No, I don't think it was a time issue. I wasn't overwhelmed with the numbers, although I had no control of the number of cases they assigned to me. No.

Q You would have done everything the same today as you did back then?

A Oh, I would do it very differently today if it was my case today.

Q Now, you said if it was my case, meaning that actually, the case was Phillips' case?

A That was -- that was something of a factor. They made some decisions for me.

Q Like, for instance, the funds for expert witnesses. Can you think of any other decision they made for you?

A Well, they provided services of an investigator. They had a staff -- several people on staff as investigators that did investigating on the case. I believe they also did the pretrial interviews of witnesses. That was their protocol. That was their way of kind of maximizing my time so that I was available for the courtroom aspects of things by providing investigators and paralegal staff and that sort of back-up to do other things that sometimes lawyers do.

Q Had you had an experience where you had tried a case, another case, and there had been a mistrial and you had to retry the case without any additional funding or financing?

A I've done that several times in the cases I had from Phillips. I had one case that we tried three times.

Q And you would not be paid for the additional trials, if I understand?

A I would not be paid separately for that, but with the exception of one case, I was being paid a monthly retainer, so whether I was in trial or not in trial would not affect my income. Whether I was in trial with one case or another case would not affect my income.

Q In this instance, when it came time for the discharge -- when the jury was discharged and the question was whether you were going on, were there any considerations on your part in terms of having to retry the case again and not being compensated for it?

A I would not have been compensated for a second trial, but I can tell you honestly it was not something that I gave any thought to at the time.

MR. FAHRINGER: All right. I think that's all I questions I have, your Honor.

THE COURT: Cross-examination.

MR. BEATTY: Thank you, Judge. The State moves to admit Exhibit 1.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CR2006-030290-001 SE

[Filed: September 8, 2011]

STATE OF ARIZONA	)
	)
Plaintiff,	)
	)
vs.	)
	)
STEPHEN EDWARD MAY,	)
Defendant.	)
	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING

BEFORE: The Honorable Kristin Hoffman
Judge of the Superior Court

Phoenix, Arizona
September 8, 2011

Gail E. Freguson
Certified Court Reporter
(AZ 50797)

APPEARANCES:

On behalf of the State:
John F. Beatty
Gerald Grant
Deputy County Attorneys

On behalf of the Defendant:
Harold Price Fahringer
Erica T. Dubno
Joann Falbout
Attorneys at Law

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P R O C E E D I N G S

THE COURT: Please be seated.

And the record will reflect the presence of counsel and the defendant.

The defense can call its next witness.

MR. FAHRINGER: Thank you, Your Honor. At this time, Your Honor, the defense will call Dr. Phillip Esplin.

THE COURT: Okay.

(Whereupon the witness enters the courtroom.)

THE CLERK: Would you spell your first and last name.

THE WITNESS: Phillip, P-h-i-l-l-i-p, Esplin, E-s-p-l-i-n.

PHILLIP ESPLIN,
having been first duly sworn, was examined and testified as follows:

THE COURT: Please have a seat, sir.

Go ahead, counsel.

MR. FAHRINGER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. FAHRINGER:

Q Good afternoon, Dr. Esplin.

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have an opinion in a case of this kind, again referring to our case, whether or not it would be valuable at least to consult an expert to determine whether or not other experts ought to be called in to testify?

A Given the nature and complexity of this case, I think it would have been very important to try to obtain a pretrial consulting expert. There was a lot of information that potentially might have been considered to be introduced to the triers of fact relative to other children that were questioned and so on. And I can't -- in my 30 years, I've not seen a case like this where there wasn't some level of consultation, given the complexity.

MR. FAHRINGER: Thank you very much.

THE COURT: All right. May the witness be excused?

MR. BEATTY: Yes, Judge.

THE COURT: All right. Okay.

And do you have anything with a green tag on it? I see a couple things.

THE WITNESS: I'll give that back.

THE COURT: All right. You're free to go, sir. Thank you very much.

THE WITNESS: Thank you, Your Honor.

(Whereupon the witness is excused.)

THE COURT: Are there any other witnesses today?

MR. FAHRINGER: Yes, Your Honor. We have one other.

Declaration of Joel Erik Thompson

I, Joel Erik Thompson declare as follows:

1. I am an attorney. I represented Stephen E. May in State v. May, Maricopa County Superior Court case number CR2006-030290.

2. At the time of the May case, I was associated with the firm of Phillips & Associates. I was at that time Chief Trial Attorney for that firm.

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

4. Upon learning of the facts of Mr. May's case, I thought it would be a difficult case to successfully defend in light of society's overall tendency to want to protect children above all else. In other words, as a defendant facing charges of sexually abusing children, Mr. May was already tacking into the social wind of early 21st century America and Arizona.

5. From the outset of the case, I decided not to engage an expert of any kind, consulting or testifying, on any subject quite simply, I did not feel there was an expert to bring in because Mr. May denied touching the children intentionally and/or with sexual intent

6. Under those circumstances, I just did not feel it was a case that lent itself to expert witness testimony.

7. The only expert I even considered was an expert to evaluate Mr. May's risk factors for aberrant sexual behavior. That said, if a defense expert somehow found or felt that Mr. May did show an attraction to children, that could become a bad fact for his defense, while

evidence that he was not attracted to children (a pedophile) would have been irrelevant, hence inadmissible.

8. I never considered hiring a consulting expert to assist me in analyzing the investigative tactics, interrogation techniques, and procedures of the police.

9. I never considered hiring a consulting expert to assist me in understanding the science behind childhood memories of sexual abuse, false recollections, "piecemeal disclosure" or the like.

10. The lead detective on the May case, Detective Verdugo, testified about "piecemeal disclosure" of sexual abuse by children who had suffered such abuse.

11. "Piecemeal disclosure," as I understand it is the tendency of some children to put out only a small bit of information to adults at any one time about sexual abuse, possibly to see if that small piece of information will lead to trouble for them before disclosing more information.

12. Based on my prior experience in this area, I consider myself well-versed and current on literature concerning children's testimony in child sexual abuse cases, with sufficient recognized expertise that I had presented a 1992 CLE seminar for the State Bar of Arizona, entitled "The Child Witness."

13. I felt that any deficiencies in the techniques of the forensic interviews conducted in the May case (e.g., leading the children or implanting memories that did not happen) could be better pointed out by me in later argument based upon simply cross-examining the

police officer who testified about forensic interviewing (Phoenix Police Department Detective Phil Shores) rather than an outside expert.

14. My theory of Mr. May's defense was that Stephen May was a nice guy at the swimming pool at the apartment complex and that moms and dads would drop their kids off with him and walk away. We planned to, and did argue, that Mr. May had not touched the children's private areas, and that if there had been contact, it was inadvertent in the context of boisterousness during activities at the Gentry's Walk swimming pool.

15. From the beginning of the representation, I received regular emails from Mr. May and his parents, Terry and Pat Borden.

16. Among the many things raised in those emails was the fact that Stephen had, since birth, been afflicted with a neurological disorder that affected his coordination and movement.

17. During the preparation of the case, Stephen and his parents questioned me about retaining an expert to testify about the neurological disorder, but I did not do so because it was so distant in time, going back to his infancy.

18. They also queried me, including several times by email, about introducing Stephen's medical records, which document the condition as dating from his early childhood. I did not do that, in part because it would have been difficult to document records from a long-deceased physician.

19. On November 21, 2006, I explained via email to Stephen and his parents that "I [was] not planning to introduce Stephen's neurological condition because it does not create a defense."

20. I understand that Stephen's neurological condition can lead to clumsiness or lack of coordination and might explain why Mr. May did not always have precise control of his movements. We argued at trial that his clumsiness could have led to inadvertent contact with the children's private parts.

21. Early in the case, we filed motion under Criminal Rule 12.9 seeking to remand the case to the grand jury because of the State's failure to advise the grand jury that Stephen wanted to testify. That motion was granted.

22. When the case was eventually re-indicted, a day or two later, Mr. May was indicted on four additional charges that were not a part of the first indictment. Despite that fact, I gave no thought to the notion that we should object to those new charges on the ground of prosecutorial vindictiveness.

23. At that time, I was focused on a motion to sever the counts in the supervening indictment. These counts alleged sexual abuse of children in three different, isolated, and separate venues over time: (1) the Gentry Walk apartment swimming pool complex (for victims Taylor S., Danielle A., and Sheldon H.), (2) Tavan Elementary school's computer area (Luis A.), and (3) the Children's World day care center (Nicholas M.).

24. As we neared trial, we were hanging in between defenses. Overall we focused on arguing that Stephen

May simply did not touch the victims' genitals. Second, we argued that there was a "lack of sexual intent" in any possible touching of any children – that any touching, that might have occurred, was fleeting, inadvertent and by mistake.

25. In addition to discussing the issue of the neurological disorder with me, Mr. May and his parents also asked me if we could call witnesses as to Stephen's good character and good conduct with children. These witnesses would have included relatives, co-workers, and others who had observed Stephen around children.

26. I informed Stephen that much of what they considered "good character" evidence would be generally inadmissible at trial; beyond his reputation for truthfulness. On November 21, 2006, in a written response to an email on this subject, I explained to Stephen that "we cannot call a witness to testify about Stephen's failure to molest a child" on other occasions. **(Ex. A.)**

27. At trial, the State introduced, without objection, the videotape of Stephen May's interrogation. I had watched the entire interrogation tape well before trial, and I knew the interviewing detective made references during the interview to an incident involving Mr. May in the State of New York in the mid-1990s.

28. Throughout the case, I believed that the State had the burden of proving the sexual nature of the crime with which Mr. May was charged. I was also aware that the statute under which he was charged had been recently amended and the State was arguing

the statute as amended created a purported shifting in the burden of proof to the defense to disprove a presumption of sexual motivation.

29. While I believed such a shift was fundamentally wrong I did not cite any specific authority to support that belief, because the recently amended statute had not yet been the subject of any interpretive appellate opinion of which I was aware. Accordingly, I never wrote any motion or memorandum for the court on this specific issue, though I submitted a requested jury instruction involving the issue.

30. Beyond my fundamental belief that this shift in the burden of proof was fundamentally wrong, I was not aware of any supporting legal authorities, other than the Constitution, that might have been used in written briefing on the issue.

31. During the trial, Luis A., the first child witness, was originally unable to identify Mr. May in court and was unable to remember Mr. May touching him inappropriately.

32. After a recess, which included the taking of testimony from another out-of-order witness, Luis resumed the stand and suddenly was able to identify Mr. May. His memory of the incident had also greatly improved.

33. I thought this curious, though I did not inquire further about this change while cross-examining Luis.

34. The jury had spent several full days deliberating before the judge declared a mistrial. Prior to the

mistrial, the judge had given one "impasse instruction" to the jury.

35. Judge Stephens' declaration of a mistrial on the record, then her subsequent decision to allow the jury to resume deliberating, caught everyone in the case by surprise.

36. I do not precisely recall all details after three years, but a few minutes after the judge had excused the jury and declared the mistrial, the bailiff returned to the courtroom and whispered to Judge Stephens. I do not recall being aware of any written communication on this subject from the jury to the judge or from the judge back to the jury, nor do I recall being given the opportunity to see any note from the jury to the judge or having any discussion of any written response being sent back to the jury.

37. At the moment Judge Stephens informed the courtroom of the jury' s desire to continue deliberating, I was standing at counsel table, where Mr. May was sitting.

38. While l do not recall precisely how long it lasted, in a very brief conversation, I spoke with Mr. May about the situation. Essentially, our discussion related to the options of allowing the jury to resume deliberating, or to go through another complete trial with the prosecution then in possession of a complete transcript of his testimony from the mistried case.

39. Caught in the moment by a circumstance I had never before encountered in almost 300 previous felony jury trial, I did not consider what had caused the jury to change their minds, whether we should inquire as to

what had happened, or whether the jury – having been discharged and released from their oath and admonitions – could even be reconstituted.

40. I also did not consider the fact that the jurors were no longer under oath, having been released from all admonitions and their oaths by the judge upon discharging them, though I do not recall the jury being re-admonished or re-sworn.

41. I was advised, in late 2009, that the jurors conducted experiments in the jury room using a stuffed animal brought into the jury room by the jury foreman. I had no knowledge of that fact at or near the time of trial.

42. No stuffed animal was ever offered as a trial exhibit.

43. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 23rd day of March, 2010.

s/_____
Joel Erik Thompson

SUPERIOR COURT — MARICOPA COUNTY

No. CR2006-030290-001 SE

[Filed: January 12, 2007]

STATE OF ARIZONA	)
	)
vs.	)
	)
STEPHEN EDWARD MAY	)
	)

TO: JUDGE STEPHENS

DATE: 1-12-07 JUROR QUESTION

MESSAGE: [handwritten] We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is.

* * *

SUPERIOR COURT — MARICOPA COUNTY

No. CR2006-030290-001 SE

[Filed: January 12, 2007]

STATE OF ARIZONA	)
	)
vs.	)
	)
STEPHEN EDWARD MAY	)
	)

TO: JUDGE STEPHENS

DATE: 1-12-07 JUROR QUESTION

MESSAGE: [handwritten] Part of the jury believes they have heard sufficient evidence and the evidence is of sufficient quantity to resolve reasonable doubt. Part of the jury believes the quantity and quality of the evidence is not sufficient to resolve reasonable doubt.

We do not have significant dispute over the facts or the elements of law, or [illegible] to apply the law to the facts. We feel we need some guidance to "proof beyond reasonable doubt."

* * *