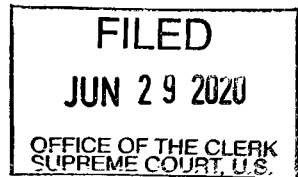


19-1478  
No. \_\_\_\_\_



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In The  
**Supreme Court of the United States**

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JOHN KRISTOFFER LARSGARD,

*Petitioner,*

vs.

STATE OF ARIZONA,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The Arizona Supreme Court**

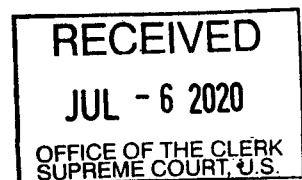
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**PETITION FOR WRIT OF CERTIORARI**

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JOHN KRISTOFFER LARSGARD  
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LA PALMA CORRECTIONAL CENTER  
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**QUESTION PRESENTED**

In *Smith v. Robbins*, 528 U.S. 259 (2000), this Court determined that, in order to ensure that defendants are provided an adequate opportunity to present their appellate claims, states must implement minimum proper safeguards sufficient to satisfy Due Process.

The question presented is:

whether the process of review implemented by Arizona in claims of ineffective assistance of counsel satisfy Fourteenth Amendment protections where the court fails to conduct a review of omitted issues against those raised in order to determine whether omitted issues were “clearly stronger” and to thereby ensure that a defendant was afforded an adequate and effective appeal in compliance with the Fourteenth Amendment.

## **PARTIES TO THE PROCEEDING**

John Kristoffer Larsgard, petitioner on review, was defendant-appellant below.

The State of Arizona, respondent on review, was the plaintiff-appellee below.

## **RELATED CASES**

- The decision by the Arizona Court of Appeals affirming Petitioner's conviction on direct appeal is reported as *State v. John Kristoffer Larsgard*, 1-CA-CR 12-0283, 2013 Ariz. App. Unpub. LEXIS 529 (Ct. App. May 7, 2013).
- The decision by the U.S. Supreme Court denying certiorari from direct appeal is reported as *Larsgard v. Arizona*, 572 U.S. 1050, 134 S.Ct. 1797, 188 L.Ed. 2d 764, 2014 U.S. LEXIS 2460 (Apr. 7, 2014).
- The Navajo Superior Court's Finding of Fact and Conclusions of Law in *State v. Larsgard*, Petition for Post-Conviction Relief, Case No. CR2011-00767 and CR2011-00780, entered May 24, 2018.
- The decision by the Arizona Court of Appeals granting review but denying relief is reported as *State v. Larsgard*, 2019 Ariz. App. Unpub. LEXIS 495, entered Apr. 25, 2019.
- The Arizona Supreme Court's denial of Mr. Larsgard's Amended Petition for Review on Post-Conviction Relief Case No. CR2011-00767 and CR2011-00780, entered February 12, 2020.

**RELATED CASES – Continued**

- The Report and Recommendation for Writ of Habeas Corpus is Reported as *Larsgard v. Ryan*, 2015 U.S. Dist. LEXIS 183251 (D. Ariz. Feb., 2015) entered February 24, 2015.
- The Denial of Writ of Habeas Corpus is Reported as *Larsgard v. Ryan*, 2015 U.S. Dist. LEXIS 183251 (D. Ariz. Feb., 2015); entered December 22, 2016.
- The Order on Writ of Habeas Corpus is Reported as *Larsgard v. Ryan*, 2015 U.S. Dist. LEXIS 183251 (D. Ariz. Feb., 2015) entered December 22, 2016.

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**PROCEEDINGS BELOW**

- The decision by the Arizona Court of Appeals affirming Petitioner's conviction on direct appeal is reported as *State v. John Kristoffer Larsgard*, 1-CA-CR 12-0283, 2013 Ariz. App. Unpub. LEXIS 529 (Ct. App. May 7, 2013); [Appendix D].
- The decision by the U.S. Supreme Court denying certiorari from direct appeal is reported as *Larsgard v. Arizona*, 572 U.S. 1050, 134 S.Ct. 1797, 188 L.Ed. 2d 764, 2014 U.S. LEXIS 2460 (Apr. 7, 2014).
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- The Report and Recommendation for Writ of Habeas Corpus is Reported as *Larsgard v. Ryan*, 2015 U.S. Dist. LEXIS 183251 (D. Ariz. Feb., 2015) entered February 24, 2015.
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## JURISDICTION

Mr. Larsgard's Amended Petition for Review was denied by the Arizona Supreme Court on February 12, 2020. Mr. Larsgard invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within the court's extended time to file a petition for writ of certiorari pursuant to Order List; 589 U.S. dated Thursday, March 19, 2020.

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## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment, as applied to the states through the Fourteenth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., amend. VI.

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

U.S. Const., amend. XIV [Appendix G].

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## STATEMENT OF THE CASE

### A. The Proceedings Below

On March 27, 2012, after a jury trial Petitioner, John Kristoffer Larsgard (hereinafter "Petitioner") was convicted on multiple counts of aggravated assault and one count of endangerment. On April 24, 2012, Petitioner was sentenced to concurrent terms of imprisonment in the Arizona Department of Corrections for a total of seven and a half (7.5) years.

On May 3, 2012, Petitioner timely filed his Notice of Appeal. Petitioner's appeal was filed on November 9, 2012. The appeal raised the following issues:

1. Whether the Petitioner's due process rights were violated when he wasn't granted medical relief which would have enabled him to assist in his defense?
2. Whether the Petitioner's due process rights were violated by the State's failure to timely disclose evidence?
3. Whether the trial court abused its discretion when it denied Petitioner's motion for a new trial?
4. Whether the trial court abused its discretion when it denied Petitioner's motion to depose Ms. Larsgard, resulting in a rushed trial schedule?

The Arizona Court of Appeals, Division One issued its ruling affirming Petitioner's conviction on May 7, 2013. Cert to the Arizona Supreme Court was denied.

Petitioner filed a *pro se* petition for post-conviction relief on December 17, 2015. The petition raised, in pertinent part, the following claims:

1. Whether Petitioner's sentence was in violation of the 8th Amendment?
2. Whether Petitioner's Sixth Amendment right to appellate counsel was obstructed by the State?
3. Whether Petitioner was actually innocent?
4. Whether Petitioner had ineffective assistance of trial counsel?

5. Whether Petitioner had ineffective assistance of appellate counsel? Some of the issues Petitioner believed should have been raised in his appeal include:
  - a. Prosecutorial misconduct;
  - b. Violation of due process right to a fair trial regarding the state's invocation of the Arizona Victim's Rights Act to allow all witnesses to be present during the entirety of Petitioner's trial;
  - c. Failure to include instructions on lesser-included offenses;
  - d. Conflict of interest between the state and the presiding judge;
  - e. Inadequate notice under Sixth Amendment of intent to argue transferred intent.

On March 20, 2018, the Navajo Superior Court only heard testimony related to two specific issues: (1) whether Petitioner's Sixth Amendment right to appellate counsel was violated, and (2) whether Petitioner's trial counsel should have submitted an instruction on endangerment as a lesser-included offense to the jury. It denied relief as to all other claims.

On May 24, 2018, the Navajo Superior Court denied Petitioner's claims as to all counts. Petitioner timely appealed.

On April 25, 2019, the Arizona Court of Appeals, Division One issued its ruling granting review but

denying relief. Petitioner filed a Petition for Review with the Arizona Supreme Court. On February 12, 2020, the Arizona Supreme Court denied Petitioner's Request. The Arizona Court of Appeals issued its Mandate on March 10, 2020. This Petition for a Writ of Certiorari follows.

## **B. Statement of Relevant Facts**

On September 24, 2011, Petitioner, a Norwegian citizen, and his mother, Liv Larsgard, also a Norwegian citizen, drove through Winslow, AZ on their way to a trial in which Petitioner was to testify. At the time, Petitioner's mother was driving. As Ms. Larsgard exited the off-ramp, the car hit some stones, causing a single car accident. Both Petitioner and his mother were injured. Petitioner's injury, a blow to his head, required a trip to the hospital.

After being released, Petitioner and his mother rented a car to return to Winslow to pick up their belongings, this time with Petitioner driving. In order to quickly get their things and leave, they used the rental car's GPS unit to direct them to the location of their car. However, the GPS led them in a circuitous route around Winslow and, finally, the wrong way down a one-way street. At the time, neither noticed they were going the wrong way. Petitioner's mother then noticed a woman waving at them. She got out to speak with her and to get directions. Petitioner continued driving slowly the wrong way down the street as his mother walked next to the car. At the time, he could not hear

the people yelling at him to turn around. When Ms. Larsgard returned to the car, Petitioner saw the group of people yelling at the car. However, he was unable to understand what they were saying. He assumed he was in the parade route or some other event. Because the crowd of yelling people was making both him and his mother nervous, he decided to find another place to park his car. He pulled into a driveway to turn around. As he was backing-up, cars started coming at him in both directions and Petitioner inadvertently hit the accelerator a little too hard to avoid a collision. This action propelled him up onto the sidewalk by a food stand. He did not hit anyone or anything other than the curb and was so focused on getting out of the line of traffic that he did not realize that there were children nearby. Petitioner continued on to try to find the Dalton Motors parking lot where their car had been stowed after the accident.

Petitioner's quick acceleration angered Ms. Gonzalez who believed Petitioner was trying to kill her and the kids who were sitting next to her at the food stand. Indeed, Ms. Gonzalez testified that prior to Petitioner's acceleration, she tried to tell Petitioner that he was going the wrong way and he responded by yelling "I'll show you the F-ing wrong way, I'm going to kill you." After which, Michael Mendoza, as well as a crowd of other people, followed Petitioner through the streets catching up with him at a nearby dirt parking lot. Mr. Mendoza punched Petitioner in the face so hard he broke his nose. Fearful, Petitioner again fled from the scene as quickly as he could.

As a result of nearly hitting the children and other by-standers with his car, Petitioner was charged with 35 different counts including child abuse and attempted murder. Petitioner chose to proceed to a jury trial where he was represented by Criss Candelaria. Throughout the trial, Petitioner was required to wear a stun belt and was denied access to the pain medications that he had been prescribed.

The trial lasted several days. On March 27, 2012, Petitioner was convicted on multiple counts of aggravated assault and one count of endangerment. On April 24, 2012, he was sentenced to concurrent terms of imprisonment in the Arizona Department of Corrections for 7.5 years. Petitioner timely filed his Notice of Appeal on May 2, 2012. Criss Candelaria was appointed by the court to represent him on his appeal.

Despite the obvious conflict, Petitioner agreed to again work with Candelaria on his appeal provided that Candelaria would allow him to participate in its drafting and that he raised some of the issues Petitioner felt were vital to his case. Specifically, Petitioner conditioned his waiver on Candelaria raising the issue of Arizona's victim's rights protections. Petitioner believed that, in the context of his case, the prosecutor utilized the victim's rights provisions in a way that violated his right to a fair trial. Petitioner also wanted the issue raised on appeal so that he could preserve it for federal review. Candelaria, however, decided not to raise the issue because they "would have lost" and because it would detract from the other issues that he was raising. He also stated that he believed the issue



was frivolous. In addition to failing to raise the issue of victim's rights as requested, Candelaria failed to raise several issues of merit including the requirement that Petitioner wear a stun-belt during the proceedings, and the failure of either the court or counsel to determine if a lesser-included instruction was required.

Rather than raise issues Petitioner requested, Candelaria raised issues the Appellate Court determined were moot, abandoned, and lacked specificity. Specifically, Candelaria argued that the trial court abused its discretion by denying his request to depose Petitioner's mother before a trial date was set. However, because Petitioner's mother was present at trial, the appellate court determined the issue was moot and would not address it. Candelaria also alleged that Petitioner's due process rights were violated when he was denied access to legal materials. However, he failed to present a single argument to support this claim and the court deemed it abandoned. Candelaria further argued that Petitioner's due process rights were violated because he was not provided with proper medication prior to trial. However, he failed to state with any specificity which medications were needed and why. Again, the argument was found to lack merit.

Throughout the appellate process Petitioner and Counsel had difficulty communicating. Their issues with communication began as early as July of 2012 and Candelaria's office had to send letters to Petitioner informing him that they were having difficulties contacting him. During the appellate process the Arizona Department of Corrections denied Petitioner access to

pen and paper. In addition, they diverted all of his mail, including his legal mail, to a storage system. Further, he wasn't allowed contact with anyone. At one point, Petitioner was refused a scheduled call with his attorney and at another, DOC actively listened in on his conversations with counsel. DOC's denial of Petitioner's right to counsel was so flagrant and persistent that Petitioner filed a civil suit against DOC, which is currently on appeal.

On November 9, 2012, Candelaria filed Petitioner's opening brief. On May 7, 2013, the Appellate Court denied Petitioner's request for relief. Petitioner then timely filed his Petition for Post-Conviction Relief pursuant to Arizona Rules of Criminal Procedure, Rule 32. He was appointed counsel who filed a Notice of No Claim. Petitioner then filed his own petition raising several issues of merit, only two of which were granted an evidentiary hearing.

At Petitioner's evidentiary hearing the issues related to ineffective assistance of counsel (discussed above) and failure to provide instruction on the lesser-included offenses were presented. Regarding the issue of the lesser-included instruction of endangerment, Candelaria initially testified that he normally discusses lesser-included instructions with his clients and believed he did so with Petitioner, but could not recall the specifics of that conversation. Candelaria also did not recall if the judge ever asked Petitioner if he wanted the lesser-included instruction. However, Candelaria later contradicted himself and argued that he did discuss the lesser-included instruction

with Petitioner and that Petitioner did not want the instruction. Petitioner testified that he never discussed the lesser-included offenses with Candelaria in the context of the jury instructions. Rather, the issue came up in the context of plea negotiations, a substantively different context.

Despite showing by a preponderance of the evidence that he was entitled to relief, the trial court denied all of petitioner's claims. The appellate court followed suit.

This Writ follows.

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### REASONS THIS COURT SHOULD GRANT REVIEW

To avoid erroneous deprivations of the right to the effective assistance of appellate counsel, this Court should clarify the merits review process state courts are required to engage in to assess claims of ineffective assistance of counsel where counsel filed some claims but may have omitted issues that were "clearly stronger." See *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (Souter, J., Stevens, J., Ginsburg, J. Breyer, J., *dissenting*);(referring to *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985)).

In *Strickland v. Washington*, this court set out a two-prong test to evaluate whether the assistance of counsel was effective. *Strickland v. Washington*, 466

U.S. 668 (1984). According to this test, counsel is ineffective where (1) “representation fell below an objective standard of reasonableness”; and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. at 669. *Strickland* further clarified that in certain cases, prejudice is presumed. *Strickland v. Washington*, 466 U.S. at 692. Such cases include an actual conflict of interest and when the state interferes with counsel’s assistance. *Id.*

In terms of the performance of appellate counsel, however, ineffectiveness can be more difficult to demonstrate where counsel raised colorable issues. In *Smith v. Robbins*, this Court stated that that difficulty can be overcome by showing that counsel ignored issues that were “clearly stronger” than those presented. *Smith v. Robbins*, 528 U.S. at 288 (referring to *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985)). This Court has further stated that it is the duty of the reviewing court to review the performance of appellate counsel with two distinct questions in mind: “whether the lawyer really did function as a committed advocate, and whether he misjudged the legitimate appealability of any issue.” *Smith v. Robbins*, 528 U.S. at 295. In reviewing the advocate’s work, the court is responsible for assuring that counsel has gone as far as advocacy will take him with the best issues undiscounted. *Id.*

From the analysis in *Robbins*, it is clear that this court not only adopted the “clearly stronger” standard, but concomitant with that standard is the requirement

that courts conduct a merits review weighing the omitted issues against the raised issues to determine if appellate counsel really did “function as a committed advocate”. See *State v. Stark*, 349 Wis. 2d 274, 306 (Wis. 2013) (referring to *Smith v. Robbins*, 528 U.S. 259, 288 (2000)); *Smith v. Robbins*, 528 U.S. at 295.

The 2nd and 7th Circuits were the earliest advocates of this position.

“When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.”

*Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985); See also *Mayo v. Henderson*, 13 F.3d 528 (2nd Cir. 1994) (citing to *Greer*).

Likewise in the 10th Circuit, which found that “[t]he very focus of a *Strickland* inquiry regarding performance of appellate counsel is upon the merits of omitted issues, and no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law.” *Milton v. Miller*, 744 F.3d 660, 669 (10th Cir. 2014) (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1205 (10th Cir. 2003)).

The State courts of Tennessee and Georgia generally follow the framework setup by *Strickland*, but take the analysis one step further. Both states declined to adopt the position that the “*only* way to show deficient performance of appellate counsel . . . [was] to establish that the omitted issue was clearly stronger than the issues that counsel did present.” *Carpenter v. State*, 126 S.W. 879, 886, 888 (Tenn. 2004). Rather, both states adopted the following test from the Supreme Court of Georgia, which holds that:

Situations may arise when every error enumerated by appellate counsel on appeal presented a strong, nonfrivolous issue but counsel’s performance was nonetheless deficient because counsel’s tactical decision not to enumerate one rejected error “was an unreasonable one which only an incompetent attorney would adopt.”

*Carpenter v. State*, 126 S.W. at 886, 888 (citing *Shorter v. Waters*, 571 S.E.2d 373, 376 (Ga. 2002) (citation omitted)). The Tennessee court further found that where a claim of ineffective assistance of appellate counsel was raised based on the failure to raise a particular issue on appeal, then the reviewing court must determine the merits of the issue. *Carpenter v. State*, 126 S.W. at 887 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)).

Based on the analysis in this court and that of the circuit courts, it is clear that in order to ensure that a petitioner’s constitutional right to effective counsel was satisfied, a reviewing court *must* review omitted

issues for merit before it can dismiss an ineffectiveness of appellate counsel claim in post-conviction relief. In the present case, however, Arizona simply relied on this Court's assessment in *Jones v. Barnes* which asserted that appellate counsel is effective after making "strategic decision[s] to 'winnow[] out weaker arguments on appeal and focus[] on' those more likely to prevail." *State v. Febles*, 210 Ariz. 589, 596 (Ariz. Ct. App. 2005) (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)); See also, *State v. Neal*, I.D. No. 0812021569 (Del. Super. Ct. May 1, 2013) (citing to *Smith v. Robbins*, 528 U.S. 259 (2000) and *Jones v. Barnes*, 463 U.S. 745 (1983)).

Seemingly, Arizona Courts of Appeal merely repeat the "winnowing out" argument to avoid actually assessing the omitted issues based on their merits. Such a posture clearly denies a petitioner adequate redress and compounds the failure of appellate counsel's errors by yet again denying access to legitimate review. Further, the *Jones v. Barnes* analysis is distinguishable from the issue at bar. In *Jones*, this court declined to adopt the lower court's *per se* rule when it came to advancing every colorable issue pressed by the client on appeal. *Jones v. Barnes*, 463 U.S. at 750. Rather, this court stated that by requiring counsel to press every colorable issue possible the effectiveness of the actual appeal declined. *Jones v. Barnes*, 463 U.S. at 752. Importantly, the issue in *Barnes* turned upon whether the appellate attorney was ineffective for failing to advance additional colorable claims per the client's wishes and not that he advanced meritless claims over more colorable claims, as is the case here. *Jones v.*

*Barnes*, 463 U.S. at 754. Indeed, the court specifically noted that the appellate attorney “support[ed] his client’s appeal to the best of his ability.” *Jones v. Barnes*, 463 U.S. at 754 (citing *Anders v. California*, 386 U.S. 738, 744 (1967)). The same cannot be said of appellate counsel in the present case. Here, appellate counsel ignored more clearly colorable issues in favor of advancing issues that were moot, abandoned or lacked sufficient support.

When Petitioner raised the issue of ineffective assistance of appellate counsel in his post-conviction relief proceedings, the Arizona Appellate Court failed to review Petitioner’s omitted claims for merit and simply repeated the dicta in *Barnes* that counsel can “winnow out weaker arguments.” [Memorandum Decision ¶ 14]. Such a stance is inconsistent with *Strickland* and *Robins*. In both cases, this Court required a merit review of the omitted claims. Only after reviewing the claims for merit can the reviewing court move to the second prong of *Strickland* to determine whether counsel’s failure to present the claims caused prejudice to the petitioner. *Strickland*, 466 U.S. at 669.

Here, Petitioner identified a number of issues that were clearly stronger than those presented on appeal. Yet, the appellate court failed to address the merits of the omitted issues and balance them against those that were raised. This is especially concerning in light of the fact that its ruling on direct appeal had deemed many of the raised issues as either moot, abandoned, or lacking in specificity. See *State v. Larsgard*, 2013 Ariz. App. Unpub. LEXIS 529 n. 1-5. Not only did the



court fail to conduct a merit analysis of the claims Petitioner wished to have been raised, but the court also failed to clarify how raising moot, abandoned, and non-specific claims constitutes legitimate strategy and not ineffective assistance of counsel. *Id.*

The court's ultimate denial of relief on Petitioner's ineffective assistance of appellate counsel claim is likewise inconsistent with its own discussion within its ruling. Specifically, the court found that because Petitioner failed to raise the constitutionality of his sentence in regards to his pre-existing medical condition on direct appeal, that argument was now waived, and because Petitioner also failed to raise the trial court's failure to include an instruction on a lesser-included, that issue was now precluded. [Appendix B; Ruling pg. 4 ¶¶ 9, 11]. The failure of appellate counsel to raise these issues supported Petitioner's ineffective assistance of counsel claim, yet the court still denied Petitioner relief. These facts alone should have merited a substantive review. However, the court also dismissed the fact that appellate counsel had an actual conflict and was impeded by the state in his attempts to contact Petitioner throughout the appellate process, facts which are presumed to cause prejudice pursuant to *Strickland*. See *Strickland v. Washington*, 466 U.S. at 692.

Further, Petitioner identified several substantive issues that were substantially stronger than the issues appellate counsel raised. These issues include:

- (1) the failure of appellate counsel to argue the trial court erred in denying a motion to preclude the state from using A.R.S. § 13-203 in violation of Petitioner's Sixth Amendment rights;
- (2) the failure of appellate counsel to preserve issues related to Arizona's victim's rights statutes for federal appeal;
- (3) the failure of appellate counsel to raise issues related to the stun-belt Petitioner was forced to wear;
- (4) the failure of appellate counsel to raise the issue of a lesser-included instruction to the jury.

These failures combined with the errors where Petitioner could show actual prejudice should have merited an evidentiary hearing, but the trial court abused its discretion by failing to provide the proper procedural safeguards. The appellate court compounded that failure by affirming the lower court's ruling without conducting a merit review of the omitted issues or the prejudice Petitioner suffered. Petitioner provided both the trial and appellate court with substantive case law showing that the arguments not raised on appeal were actionable, as well as case law finding these errors reversible. Further, the appellate court's own findings on direct appeal should have triggered a merit review, yet none was conducted.

In *Smith v. Robbins*, this Court discussed the minimum procedures a reviewing court must adopt when reviewing ineffective assistance of counsel claims.

*Smith v. Robbins*, 528 U.S. at 264. However, the issue before the *Robbins* Court was what procedure was proper in light of appellate counsel's conclusion that an appeal would be frivolous and no-merits brief was filed. In a 5-4 split, the *Robbins* majority held that the *Wende* procedure set out by California met constitutional muster. *Smith v. Robbins*, 528 U.S. at 273, 288; *People v. Wende*, 25 Cal. 3d 436 (1979). The *Wende* procedure provides that, in the event counsel can find no colorable issues, counsel was to file a brief with the appellate court that summarized the procedures used, the factual history of the case and an attestation that counsel had reviewed the case, explained his findings to his client and provided the client with a copy of the brief. *Smith v. Robbins*, 528 U.S. at 265. The client then has the opportunity to file a *pro se* supplemental brief with the court. The court is then tasked with conducting an independent review of the record to ascertain if there are any arguable issues. *Id.* However, the *Wende* framework was only one such procedure for ensuring that appellate counsel was effective. The various states were free to adopt whatever prophylactic frameworks they chose, so long as the procedures adopted ensured that a defendant's right to appellate counsel was adequately safeguarded. *Smith v. Robbins*, 528 U.S. at 273, 288. Notably, in the *Wende* procedure, the defendant is afforded several opportunities to ensure that an appeal on the merits is filed, if any such issues exist. If there are no meritorious issues, the court is still tasked with conducting a final review. See *Smith v. Robbins*, 528 U.S. at 265.

There is no such framework in place in Arizona for assessing the merit of an ineffective assistance of counsel claim on post-conviction relief. Rather, in cases such as the present one, the court is seemingly not required to conduct an independent review of the record to ensure the raised issues were clearly stronger than those omitted. As a result, meritorious claims that were omitted and which could have provided relief are easily overlooked. Such a result is inconsistent with Fourteenth Amendment protections and this Court's admonition that counsel "function as a committed advocate". *Smith v. Robbins*, 528 U.S. at 295 (2000). The mere fact that appellate counsel raised issues rather than file a no-merits brief does not ensure a defendant is protected against an ineffective advocate.

This case presents the Court with an opportunity to clarify whether the procedure adopted by Arizona meets the minimum protections a state should engage in when reviewing ineffective assistance of counsel claims where a merits brief was filed, but there were other arguably stronger issues that should have been raised. Clarification on this issue is necessary because, unlike the procedures implemented in *Wende* and *Anders*, and suggested by this court, the Arizona appellate court never conducted a review of the omitted issues. See *People v. Wende*, 25 Cal. 3d 436 (1979); *Anders v. California*, 386 U.S. 738 (1967). Rather, it simply assumed that because appellate counsel filed a merits brief, the omitted issues were left out due to a "strategic decision." *State v. Febles*, 210 Ariz. 589, 596 (Ariz. Ct. App. 2005) (citing *Jones v. Barnes*, 463 U.S.

745, 751-52 (1983)). Without a proper review of the record, it is impossible to ascertain if the issues raised were genuinely superior or simply raised due to poor advocacy and a lack of proper review. Accordingly, it is necessary to ascertain if Arizona's procedures in reviewing ineffective assistance of appellate counsel claims genuinely "afford adequate and effective appellate review to indigent defendants" such that the framework of protections guaranteed by the Fourteenth Amendment are satisfied. *Smith v. Robbins*, 528 U.S. at 577 (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)).

Absent intervention by this court, appellants will continue to be denied adequate redress for claims of ineffective assistance of appellate counsel.

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### CONCLUSION

For the foregoing reasons, it is respectfully requested that this court issue a writ of certiorari to review the judgment of the Arizona Court of Appeals.

DATED this 29th day of June, 2020.

Respectfully submitted,  
JOHN KRISTOFFER LARSGARD  
Petitioner