No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EMMONS STONE,
Movant

v.

STATE OF MARYLAND,
Respondent.

EMERGENCY APPLICATION FOR A STAY OF THE MANDATE OF THE MARYAND COURT OF SPECIAL APPEALS PENDING THE FILING OF A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS TO BE PRESENTED IN A PETITION FOR WRIT OF CERTIORARI

1. When an appellate court reverses a defendant's conviction based on trial error, should that court, before remanding for a retrial, address the merits of the claim that the defendant's trial counsel provided ineffective assistance by failing to move for a judgment of acquittal based on clearly insufficient evidence or, at least, remand for a hearing on the ineffectiveness claim to occur before a retrial commences?

2. In view of the requirements of the Fifth Amendment's Double Jeopardy Clause, must an appellate court on a defendant's direct appeal address the merits of a claim of insufficient evidence before reversing the defendant's conviction and remanding for a retrial based on a trial error? Several lower federal and state appellate courts are divided on this issue.

3. Did the Maryland Court of Special Appeals' refusal to provide judicial review of movant's ineffective-assistance-of-counsel and insufficient-evidence claims on direct appeal unconstitutionally deprive movant of his only opportunity for judicial review of those related federal constitutional claims? *See Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965) ("[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.").

TO CHIEF JUSTICE ROBERTS, CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

Pursuant to 28 U. S. C. § 2101(f) and Supreme Court Rule 23, the movant, David Emmons Stones, applies for a stay of the issuance of the mandate of the Maryland Court of Appeals pending his timely filing of a petition for writ of certiorari with this Court. Although the Court of Special Appeals' mandate has not yet issued, it will be issued in the immediate future without a stay from this Court. As explained below, if movant's case is remanded for a retrial, a retrial will both potentially moot the issues in this case and also constitute a violation of the Fifth Amendment's Double Jeopardy Clause. Therefore, movant seeks a stay so that he may file a timely petition for writ of certiorari with this Court.

In support of this motion, movant submits the following:

PROCEDURAL HISTORY

On February 28, 2019, in the Circuit Court for Cecil County, Maryland, a jury acquitted movant of multiple counts in the indictment, including Count 7 (theft by "unauthorized control"), but convicted him of Count 9 ("continuing course of conduct" theft), which concerned the same alleged stolen property as the property alleged in Count 7. On August 20, 2019, the trial court sentenced movant to eight years of imprisonment and

ordered him to pay restitution in the amount of $50,000 (T3.16).[1] Movant appealed to the Maryland Court of Special Appeals.

On February 11, 2021, the Court of Special Appeals reversed movant's conviction of Count 9 based on a trial error related to the trial court's submission of a lesser-included offense option in the verdict form and remanded for a retrial. However, the state appellate court refused movant's request to address the merits of movant's ineffective-assistance-of-counsel claim and a related insufficient-evidence claim. *David Emmons Stone v. State of Maryland*, No. 1192, 2021 WL 514287 (Md. Ct. Sp. App. Feb. 11, 2021) (attached as **Appendix A**). On March 1, 2021, the Maryland Court of Appeals denied movant's petition for writ of certiorari and motion to stay the mandate of the Maryland Court of Special Appeal (attached as **Appendix B**). As noted, although the mandate has not been issued, it will be issued in the immediate future without a stay.

STATEMENT OF RELEVANT FACTS

The evidence at trial permitted a rational jury to find that movant had possession of the complainant's property, a collection of sports memorabilia such as baseball cards, in movant's commercial storage unit. However, as

[1] As used in this motion, "T1" refers to the transcript of movant's jury trial on February 27, 2019; "T2" refers to the transcript of movant's jury trial on February 28, 2019; and "T3" refers to the transcript of the sentencing hearing, which occurred on August 20, 2019.

the prosecutor essentially conceded at trial and further discussed below, the evidence at trial did *not* permit a rational jury to find beyond a reasonable doubt that movant had taken that property in *multiple thefts* comprising more than one criminal transaction constituting a "continuing course of conduct."

At the close of the evidence at trial, movant's trial counsel successfully moved for a judgment of acquittal on other counts in the indictment but *did not move for a judgment of acquittal on Counts 7 and 9* (T2.84-86, 88, 177.) In his closing argument, the prosecutor explained those two alternate theft charges to the jury:

> [T]he big difference in the last two theft charges, one is called theft by way of unauthorized control over somebody else's property. . . . So there's two different ways. I'm putting it up to you to decide what you believe happened here. One would be that *all in one shot* Mr. Stone found this storage locker, found what was inside, took everything that he thought was of value, and left and moved it elsewhere in his possession where somebody else wouldn't know about it.
>
> The other version of that would be that *over a course of time, meaning more than one day or more than one instance, that he removed some of this property over what is called a continuing course of conduct or scheme*. The evidence we have is that Mr. Cabahug [the complainant] checked on his unit in July [2018]. He doesn't come back until October 24 [2018]. So we have a little more than a month where Mr. Stone is at Whalen's [Storage Unit] at the end of August through the beginning of October. So there's two possibilities, okay? . . . .
>
> It's up to you to decide . . . whether you think it happened all at once or whether it happened over a period of time. *I can't tell you which one because no one knows which one, or at least no*

has told us which one that is. . . .

(T2.205-06, 208) (emphasis added).

The trial court instructed the jury consistent with the prosecutor's explanation of the two alternate theft charges:

> Then lastly there is a charge of theft, *two different versions*. The first version or definition is theft, unauthorized control. The defendant, Mr. Stone, is charged with the crime of theft. In order to convict the defendant of theft, the State must prove that the defendant willfully or knowingly obtained or exerted unauthorized control over the property of the owner, and that the defendant had the purpose of depriving the owner of the property, and the value of the property was over $100,000. . . . Mr. Stone is also charged with the crime of theft greater than $100,000 *pursuant to a continuing course of conduct*. In order to convict the defendant under this charge of theft pursuant to a continuing course of conduct, the State must prove all the elements of theft. *Course of conduct means a persistent pattern composed of a series of acts over time that shows a continuity of purpose.*

Stone v. State, 2021 WL 514287, at *2-*3 (quoting the trial court's jury instructions; emphasis added).

The jury returned its verdict acquitting movant of Count 7 (the unauthorized-control theft count) but convicting him of Count 9 (the continuing-course-of-conduct theft count) (T2.239-40).

On appeal to the Court of Special Appeals, movant contended that the trial court erred by submitting a lesser-included offense option on the verdict

form regarding the continuing-course-of-conduct theft charge[2] over both parties' objections, and the State on appeal conceded error on this point. *See* Appellant's Brief and Appendix, at 14-19; Brief of Appellee, at 16-22. In addition to that claim of trial error, movant also raised, among other additional claims, an ineffective assistance of counsel claim. *See* Appellant's Brief and Appendix, at 19-24. That claim contended that movant's trial counsel provided ineffective assistance by failing to move for a judgment of acquittal at trial on the continuing-course-of-conduct theft charge because the prosecution offered no evidence of multiple acts of theft.

Movant explained to the Court of Special Appeals that this ineffective-assistance-of-counsel claim ultimately concerned the insufficiency of the evidence supporting the sole count of conviction in this case. Citing this Court's decision in *Murray v. Carrier*, 477 U.S. 478 (1986), he contended that, if the state appellate court were to determine that movant's trial counsel provided ineffective assistance of counsel by failing to move for a judgment of acquittal on Count 9, that would permit the state appellate court to excuse the procedural default that occurred and address the merits of the movant's claim that there was insufficient evidence supporting

[2] Notably, the trial court submitted the lesser-included offense option – permitting the jury to convict movant of theft of property valued between $25,000 and $99,999 – only concerning Count 9 (but not also concerning Count 7). The trial court did so based on the jury's note about the $100,000 or more "value" element in Count 9. The jury did not ask the same question concerning Count 7.

the continuing-course-of-conduct theft conviction. *See* Appellant's Brief and Appendix, at 24 & n.11 (quoting *Murray*, 477 U.S. at 48 ("Ineffective assistance of counsel . . . is cause for procedural default.")).

Movant also pointed that, if the Court of Special Appeals reversed his conviction based on the State's concession of error about the trial error and remanded for a retrial without addressing the merits of movant's ineffectiveness claim, then movant would be deprived of judicial review of the ineffectiveness claim and the related insufficient-evidence claim. *See* Appellant's Reply Brief, at 11; Appellant's August 21, 2020 Letter Brief. As movant stated in his letter brief filed several weeks before the oral argument:

> [I]n view of the State's concession that Mr. Stone's sole conviction must be reversed for legal error in the jury's verdict form, this would not be an appropriate case to defer the ineffectiveness claim to post-conviction proceedings – for the simple reason that, if this Court agrees with the State's concession of error, *there will not be any post-conviction proceedings*. Thus, the only opportunity for a court to address Mr. Stone's claim of ineffective assistance of counsel would be at this juncture on direct appeal.
>
> There is an additional, compelling reason to address the ineffectiveness claim now. If this Court agrees that trial counsel was ineffective in failing to move for a judgment of acquittal on the "continuing course of conduct" theft charge, then this Court can and should reach the merits of the underlying issue of whether there was constitutionally insufficient evidence, as Mr. Stone requested in his opening brief. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("Ineffective assistance of counsel . . . is cause for a procedural default.").

> This Court also should reach the sufficiency issue (assuming the Court finds ineffectiveness) because, likewise, this would be the only opportunity for that issue to be addressed. "[W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with *Burks v. United States*, [437 U.S. 1 (1978)], ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 321-22 (1984) (Brennan, J., concurring) . . . .

Appellant's August 21, 2020 Letter Brief, at 1-2 (emphasis in original).

At oral argument on October 8, 2020, the members of the panel and counsel for the parties specifically discussed this very issue. Counsel for movant again stressed that, if movant's ineffectiveness claim were not addressed on direct appeal, that claim – and the related insufficient evidence claim – would be denied judicial review because there would be no other opportunity for judicial review of the claims.[3] In a post-argument letter brief filed immediately after the oral argument, movant further stated:

> [I]f this Court believes that additional factual development is necessary to resolve the ineffectiveness claim, then this Court should remand to the trial court to conduct a limited evidentiary hearing about why trial counsel did not move for a judgment of acquittal on the charge in Count 9 and then send the case back to this Court to rule on the issue. *See United States v. Mohammed*, 693 F.3d 192, 202, 205 (D.C. Cir. 2012) ("When

[3] The video recording of the oral argument is available at: https://www.courts.state.md.us/sites/default/files/import/cosappeals/media/20201008_1192.mp4. The discussion of the issue by counsel and the panel is evident at 10:00-11:03 and 21:40-45 on the recording.

> advancing an ineffective assistance argument on direct appeal, an appellant must present factual allegations that, if true, would establish a violation of his [S]ixth [A]mendment right to counsel. . . . Presented with a colorable claim, we remand for an evidentiary hearing unless the record alone conclusively shows that the defendant either is or is not entitled to relief.") (citations and internal quotation marks omitted). Mr. Stone has certainly raised a "colorable" ineffectiveness claim.

Appellant's October 8, 2020 Letter Brief, at 2.

The Court of Special Appeals reversed movant's convictions based on the trial court's error related to the verdict form but refused to address the merits of movant's ineffectiveness claim – instead relegating it to "post-conviction proceedings." As the court stated:

> Appellant asks us to find that trial counsel was ineffective. We decline to do so. . . . [D]irect appeals are rarely the appropriate venue to determine ineffective assistance of counsel claims. "Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). In *Mosley*, this [sic] court determined that "the adversarial process found in a post-conviction proceeding generally is the preferable method" when evaluating an ineffective assistance of counsel claim. *Id.* at 562. This [sic] court also acknowledged that there are limited circumstances in which this court will review a claim on direct review. *Id.* at 567 . . .
>
> For the reasons stated, by not [moving for a judgment of acquittal] as Appellant thinks his trial attorney should have, Appellant avoided the situation that would allow the jury to be able to split on which theory applies and still convict him. That

> is but one reason that this is not the "exceptional" case where post-conviction [sic][4] review would be appropriate because of a "blatant and egregious" performance by trial counsel. *Id*. at 562.

Stone v. State, 2021 WL 514287, at *8.

REASONS FOR STAYING THE MANDATE OF THE MARYLAND COURT OF SPECIAL APPEALS

I. Movant Has Satisfied the Standard for a Stay of the Mandate.

The Maryland Court of Appeals has refused to stay the issuance of the mandate of the Court of Special Appeals. To obtain a stay from this Court, movant must demonstrate "(1) 'a reasonable probability' that this Court will grant certiorari; (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

As explained below, movant has met all three requirements. First, the legal issues presented are cert-worthy. The Sixth Amendment right to the effective assistance of counsel is a "bedrock" constitutional guarantee. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The Court of Special Appeals' illogical refusal to provide judicial review of movant's ineffective-assistance-of-counsel claim – on the ground that movant can raise the claim

[4] The Court of Special Appeals clearly meant "direct" instead of "post-conviction."

in "post-conviction proceedings" – is so fundamentally wrong as to justify summary reversal by this Court.

A related issue – whether the Court of Special Appeals at least should have remanded movant's case for an evidentiary hearing on his ineffectiveness claim before the trial court commences a retrial – likewise warrants review by this Court. Several other lower courts routinely remand for evidentiary hearings when a criminal defendant on direct appeal has raised a "colorable" ineffectiveness claim requiring further factual development. Movant certainly has at least raised a "colorable" claim.

In addition, as discussed below, the subsidiary issue of whether an appellate court in a criminal case must address an insufficient-evidence claim before reversing and remanding for a retrial based on a trial error has divided the lower courts. This Court should resolve that widespread division among the lower courts on an important double jeopardy issue.

Based on the egregious nature of the Court of Special Appeals' flawed disposition of movant's ineffectiveness and insufficient-evidence claims, movant also has demonstrated a "fair prospect" that this Court will, at the very least, grant certiorari and remand for an evidentiary hearing on movant's ineffectiveness claim before the retrial commences.

Finally, movant clearly faces irreparable harm without a stay. If his case is remanded for a retrial, his ineffectiveness and insufficient-evidence claims will become moot if he is convicted at a retrial. *See, e.g.*, *People v. Chipman*, 370 P.3d 330, 336-37 (Colo. App. 2015) (holding that an error occurring at the original trial cannot be challenged at a retrial; noting several cases from other courts so holding); *see also North Carolina v. Pearce*, 395 U.S. 711, 721 (1969) (stating that if an appellate court reverses a conviction and remands the case for a new trial, "the original conviction has . . . been wholly nullified and the slate wiped clean"), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

Furthermore, because there was insufficient evidence of the charge in Count 9 at trial, it would violate the Double Jeopardy Clause to remand for a retrial on that charge. *Burks v. United States*, 437 U.S. 1, 18 (1978).

II. The Maryland Court of Special Appeals Deprived Movant of His Only Opportunity for Judicial Review of His Compelling Ineffective Assistance of Counsel Claim and Related Insufficient-Evidence Claim.

The Court of Special Appeals refused to review the merits of movant's ineffectiveness claim because it did not believe the record was sufficiently developed to permit such review. Instead of remanding for an evidentiary hearing, as movant had requested, the court relegated movant to

raising the ineffectiveness claim (and related insufficient-evidence claim) in "post-conviction proceedings." *Stone v. State*, 2021 WL 514287, at *8.

The Court of Special Appeals' fundamental error of logic is simple and obvious. Now that movant's sole conviction has been reversed, there is no way – legally or practically – that he could raise his ineffectiveness claim in a "post-conviction" proceeding under MD Code, Criminal Procedure, § 7-101. Based on the state appellate court's reversal of his sole conviction, movant's case is now in a "*pre*-conviction" posture. If he tried to file a post-conviction motion, it surely would be dismissed on the ground that there is no conviction or sentence for movant to challenge.

Movant clearly and repeatedly made that point to the Court of Special Appeals before it rendered its decision, but that court simply ignored it – and, in so doing, effectively denied movant of judicial review of his ineffectiveness claim and related insufficient-evidence claim.

It bears repeating that this is not merely an "ineffectiveness" issue. Ultimately, it concerns the fundamental issue of whether there is constitutionally sufficient evidence supporting movant's sole conviction at trial. *See Monroe v. State*, 191 So. 3d 395, 403 (Fla. 2016) ("[T]he failure to move for a judgment of acquittal when there are serious concerns pertaining

to the sufficiency of the evidence presented by the prosecution may constitute ineffective assistance reviewable on direct appeal.").

If movant's trial counsel was ineffective by failing to move for a judgment of acquittal, then the state appellate court should address the merits of that insufficiency claim. *Murray*, 477 U.S. at 488 ("Ineffective assistance of counsel . . . is cause for procedural default."). As discussed below, there is clearly insufficient evidence supporting that conviction, and Double Jeopardy thus prevents a retrial. *Burks v. United States*, 437 U.S. 1, 18 (1978).

The appropriate remedy from this Court would be a ruling that the Court of Special Appeals' refusal to address both movant's ineffectiveness claim and the ultimate insufficient-evidence claim was not based on an "independent and adequate state law ground" because it deprived movant of his only opportunity for judicial review of those related federal constitutional claims. *See Henry v. Mississippi*, 379 U.S. 443, 447 (1965) ("A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal

question."). The Court of Special Appeals' refusal to provide meaningful judicial review of movant's Sixth Amendment ineffectiveness claim and his related due process insufficient-evidence claim was not based on a "legitimate state interest." *Id.* at 447-48 ("[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.").

III. Movant's Trial Counsel Was Ineffective by Failing to Move for a Judgment of Acquittal on the Continuous-Course-of-Conduct Theft Charge.

The *only* evidence of movant's commission of a theft offense was:

(1) The complainant's identification of baseball cards and comic books that the police seized from movant's storage unit at Cecil Mini-Storage and inside movant's "abandoned" storage unit (#15) at Whalen's Storage (T1.77, 104; T2.20);

(2) A witness's testimony that, on a single occasion, he helped movant move boxes and plastic totes containing baseball cards from movant's own storage unit to a vehicle on an unspecified date (T2.66-68, 70);

(3) A police officer's testimony that he saw movant with an album of baseball cards at Cecil Mini-Storage on October 15, 2018 (T1.86-88, 90); and

(4) Another police officer's testimony that movant had stated that he saw abandoned boxes of baseball cards that he took when he moved from Whalen's Storage to Cecil Mini-Storage (T1.113).

None of this evidence showed how many acts of alleged theft movant engaged in – *which the prosecutor at trial acknowledged in his closing argument*: "It's up to you to decide . . . whether you think it happened all at once or whether it happened over a period of time**.** *I can't tell you which one because no one knows which one, or at least no has told us which one that is*." (T2.208) (emphasis added).

Movant's trial counsel moved for a judgment of acquittal on certain counts in the indictment but did *not* move for a judgment of acquittal on the two alternate theft charges (T2.84-86, 88). Subsequently, after the jury was deliberating, trial counsel for the first time stated, "I don't even think there is any evidence of continuing theft in this case. . . . For it [be] a continuing theft, you have to show incident after incident after incident." (T2.230.). Counsel was correct. Under Maryland law, the offense of continuing-course-of-conduct theft has, *as an element*, the commission of multiple discrete acts of thefts as part of a scheme and continuous course of conduct. *Dyson v. State*, 878 A.2d 711, 723 (Md. Ct. Sp. App. 2005); *State v. Hunt,* 432 A.2d 479, 482-83 (Md. Ct. Sp. App. 1981). As the prosecutor admitted

at trial, there was no evidence supporting the prosecution's theory of a continuing-course-of-conduct theft. The evidence solely supported a conviction of "unauthorized control" theft – *yet the jury acquitted movant of that version of the theft offense*.

The record is clear that movant's defense counsel at trial came to realize that there was insufficient evidence that movant had committed a continuing-course-of-conduct theft – but only *after* the time for moving for a judgment of acquittal had passed. *See Graham v. State*, 601 A.2d 131, 140 (1992) (failure to move for a judgment of acquittal at the close of the evidence waives a claim of insufficient evidence).

A criminal defendant possesses the right to the effective assistance of counsel at a felony trial. Movant's trial counsel clearly was ineffective in failing to move for a judgment of acquittal on the charge in Count 9. *See Strickland v. Washington*, 466 U.S. 668 (1984) (to prevail on an ineffectiveness claim, a defendant must show that trial counsel's "deficient performance" caused "prejudice" to the defendant). Showing both *Strickland* prongs – deficiency and prejudice – is straightforward in this case based on the existing record. The record clearly demonstrates that trial counsel did not engage in any "strategy" in failing to move for a judgment of

acquittal on Count 9.[5] Rather, he simply came to the realization that there was insufficient evidence of a "continuing course of conduct" too late to properly move for a judgment of acquittal.

Perhaps a jury rationally could have concluded that movant stole the complainant's property in a single episode, yet movant's actual jury acquitted him of that theory of the prosecution. The jury's conviction based on a finding of a "continuing course of conduct" – meaning multiple, distinct thefts in separate episodes – was based on sheer speculation. Because "no rational trier of fact could find guilt beyond a reasonable doubt" that movant committed a continuing-course-of-conduct theft, he is entitled to a judgment of acquittal. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979).

For that reason, trial counsel's deficiency in failing to move for a judgment of acquittal prejudiced movant. There is at least a reasonable probability that the trial court would have granted such a motion if it had been made in a timely manner. And, even if the trial court had erroneously denied it, at least trial counsel would have properly preserved the

[5] The Court of Special Appeals' hypothesizing that trial counsel may have had a "strategic" reason for failing to move for a judgment of acquittal – "by not objecting as Appellant thinks his trial attorney should have, Appellant avoided the situation that would allow the jury to be able to split on which theory applies and still convict him," Appendix 30 – is illogical. If the trial court had granted a judgment of acquittal on the continuing-course-of-conduct theft, the jury would have had but one theft offense to consider (*the very charge of which they acquitted movant*). There was no conceivable benefit in not moving for judgment of acquittal on Count Nine. In any event, such hypothesizing merely was done to avoid reaching the merits of movant' claim.

insufficient-evidence issue for appeal.

IV. At the Very Least, Because the Record Supports a "Colorable" Claim of Ineffective Assistance of Counsel, Movant's Case Should Be Remanded to the Trial Court to Conduct an Evidentiary Hearing on That Claim Before Commencing a Retrial.

Alternatively, assuming that the Court of Special Appeals was correct that the current record is not sufficiently developed to permit an appellate court to meaningfully address the merits of the ineffectiveness claim, movant's case should be remanded to the trial court to conduct an evidentiary hearing on the issue. Notably, even in cases in which a defendant does have the opportunity to raise an ineffectiveness claim on post-conviction review, several other appellate courts regularly remand on direct appeal when a defendant has raised a "colorable" ineffectiveness claim requiring further evidentiary development. *See, e.g.*, *United States v. Knight*, 824 F.3d 1105, 1112 (D.C. Cir. 2016) (Kavanaugh, J.) ("This Court's typical practice on direct appeal . . . is to remand 'colorable' claims of ineffective assistance to the district court."); *United States v. Ortiz-Vega*, 860 F.3d 20, 28-29 (1st Cir. 2017) (where the record on direct appeal contains "sufficient indicia of ineffectiveness . . . , we may remand the case for proceedings on the ineffective assistance claim without requiring the

defendant to bring a separate collateral attack"). At the very least, movant has established a "colorable" or "prima facie" ineffectiveness claim.

As it currently stands, movant's case will be remanded to the trial court for further proceedings (a retrial). The additional judicial resources required for a brief evidentiary hearing on a discrete claim ineffectiveness will hardly be an inefficient expenditure of such resources.

V. There is a Widespread Division Among the Lower Courts on the Subsidiary Insufficient-Evidence Issue Raised in this Case.

There is a widespread division among the lower federal and state appellate courts concerning the issue of whether, under the Double Jeopardy Clause, an appellate court must address a claim of insufficient evidence before reversing and remanding for a new trial based on a trial error. *See State v. Noll*, 527 N.W.2d 644, 648 (Neb. App. 1995) ("Several courts have . . . held that where an appellate court is presented with both a trial error and a claim of insufficiency of the evidence, the court must address the insufficiency claim [first]. . . . We recognize that opinions from various other courts have held that an appellate court is not required to examine a claim of insufficient evidence where it has reversed for trial error.") (collecting cases), *overruled on other grounds by State v. Anderson*, 605 N.W.2d 124, 136 (Neb. 2000). The court in *Noll* noted that the division has

arisen based on differing interpretations of this Court's decision in *Richardson v. United States*, 468 U.S. 317 (1984). *Noll*, 527 N.W.2d at 648. That question is cert-worthy.

CONCLUSION

Movant respectfully requests that the mandate of the Court of Special Appeals be stayed pending movant's timely filing of a petition for writ of certiorari. Movant has demonstrated that there is a reasonable probability of a grant of certiorari and a fair prospect that this Court will reverse the judgment of the Court of Special Appeals. Movant also has shown irreparable harm will occur without a stay because he will be denied meaningful judicial review of his ineffective assistance of counsel claim and also face a retrial that violates double jeopardy (based on the insufficient evidence of the continuous-course-of-conduct theft offense at his first trial).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brent E. Newton, a member of the Bar of the Supreme Court of the United States, certify that, on this 2nd of March, 2021, a copy of this motion and the accompanying motion for leave to proceed *in forma pauperis* were delivered via email to counsel for respondent:

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