

23-6677

No. 24 -

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ISIDORO SANCHEZ,

Petitioner,

v.

RYAN THORNELL DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS;

KRISTIN K. MAYES, ARIZONA ATTORNEY GENERAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FILED

JAN 03 2024

ORIGINAL
OFFICE OF THE CLERK
SUPREME COURT

Michael Sanchez, # 290235

Petitioner, Pro-per

A.S.P.C. Kingman/Huachuca Unit

P.O. Box 6639

Kingman, AZ 86402

QUESTIONS PRESENTED FOR REVIEW

This case raises an issue of nationwide importance concerning the vital role that a court's "Anders review" per the "two interrelated tasks" plays in achieving the "obvious goal of Anders" which is to protect the Right to Counsel in the first appeal as "of-right" from being swallowed by the "Limited exception" to that Right.

This petition creates an opportunity for the Supreme Court to evaluate an "of-right" Post Conviction Relief (PCR) procedure for pleading defendants which completely departs from the "obvious goal of Anders" by depriving proper indigent defendants the equal protection of a court's "Anders review" and a merits brief for a non-frivolous appeal.

This case presents the following questions for review:

1. Did the Ninth Circuit err by following *Chavez v. Brnovich*, 42 F.4th 1091 (9th Cir. 2022) to decide that "the state appellate court could have reasonably determined" under 28 U.S.C. § 2254(d)(1) "that Arizona's of-right PCR procedure satisfied Anders and its progeny":

A) where Arizona Law does not require a court's "Anders review" and finding of whether the case is frivolous, at all, but only an adjudication of the claims raised in the proper petition for when counsel submits an "Anders brief" alleging "no colorable claims"; and

B) in a way that conflicts with *Lammie v. Barker*, 915 P.2d 662 (Ariz. 1996) on the question of whether "advisory counsel" is or is not required to brief "viable issues" found in the proper petition.

2. Did the Supreme Court depart from the "obvious goal of Anders" enunciated in *Smith v. Robbins*, 528 U.S. 259, 278 (2000) to permit state procedures that may except a court's "Anders review" and finding of whether the case is frivolous in any first appeal as of-right, on the basis that:

A) a single tier review of the appellate record for colorable claims, not merely arguable claims, is conducted by counsel; and

B) counsel does not withdraw after filing an "Anders brief," but remains as "advisory counsel" and available to brief "viable issues" found only in the proper petition.

C) the appeal is a PCR proceeding for pleading defendants as opposed to a direct appeal for trial defendants.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover page of this petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Michael Isidoro Sanchez, makes the following disclosure:

- 1) Mr. Sanchez is not a subsidiary or affiliate of a publicly owned corporation.
- 2) There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this case.

By: Michael Sanchez

Michael Sanchez, #290235

Petitioner, Pro-per.

A.S.P.C. Kingman / Huachuca Unit

P.O. Box 6639

Kingman, AZ 86402

STATEMENT OF RELATED PROCEEDINGS

Sanchez v. Shinn, Nos. 21-15632; 21-16940 (9th Cir.) (October 17, 2023 order denying rehearing; August 8, 2023 opinion reversing district court's conditional grant of habeas relief).

Sanchez v. Shinn, No. CV-17-00224-TUC-RM (D. Ariz.) (March 30, 2021 order granting conditional writ of habeas corpus).

State v. Sanchez, No. 2 CA-CR 2018-0224-PR (Ariz. Ct. App.) (October 12, 2018 order granting review but denying relief).

State v. Sanchez, No. CR 2013-00346 (Ariz. Sup. Ct. Cochise Cnty.) (July 2, 2018 order denying post-conviction relief).

State v. Sanchez, No. 2 CA-CR 2015-0359-PR (Ariz. Ct. App.) (December 22, 2015 order granting review but denying relief).

State v. Sanchez, No. CR 2013-00346 (Ariz. Sup. Ct. Cochise Cnty.) (August 18, 2015 order denying petition for post-conviction relief; March 6, 2014 judgment; April 3, 2014 sentence).

TABLE OF CONTENTS

Questions Presented for Review.....	i
Parties to the Proceeding.....	ii
Statement of Related Proceedings.....	iii
Table of Contents.....	iv
Appendix Table of Contents.....	vi
Table of Authorities.....	vii
Petition For a Writ of Certiorari.....	1
Opinions Below.....	1
Statement of Jurisdiction.....	1
Provisions of Law Involved.....	2
Statement of the Case.....	3
Reasons for Granting Review.....	8
 I. THE NINTH CIRCUIT'S RELIANCE ON CHAVEZ II WAS ERRONEOUS.....	 11
 A. Arizona's of-right PCR procedure cannot resolve an "of-right" appeal in a way that is related to its merit, nor achieve the "obvious goal of Anders," nor satisfy Anders and its progeny, without requiring, as a minimum safeguard, a court's "Anders review" per the Court's "two interrelated tasks".....	 11
 B. Arizona law permits the violation of the Douglas right to counsel in first "of-right" PCR appeals by not requiring, at all, a court's "Anders review" per the Court's "two interrelated tasks" for when counsel refuses to submit a merits brief.....	 16

- C. Contrary to the holding in *Chavez II*, under *Lammie v. Barker*, 915 P.2d 662, 663 (Ariz. 1996), "advisory counsel" is not required to step back into the role of an "active advocate" to brief "viable issues" found in the proper petition in an "of-right" PCR appeal, which results in the violation of the Douglas right "to receive a merits brief for a nonfrivolous appeal".....19

II. THE NINTH CIRCUIT'S DECISION IN *CHAVEZ II* PERMITS A DEPARTURE FROM THE "OBVIOUS GOAL OF *ANDERS*" ENUNCIATED IN *SMITH V. ROBBINS*, 528 U.S. 259, 278 (2000).....25

- A. *Chavez II* infers that a court's "Anders review" and finding of whether the appeal is frivolous, is not required in any first appeal as "of-right," so long as the procedure requires: (1) a single tier review of the appellate record by counsel for "colorable" claims, not merely arguable claims; and (2) that counsel, after submitting an "Anders brief," remain as an "advisory counsel" and available to brief "viable issues" found only in the proper petition.....25

- B. A state procedure that excepts a court's "Anders review" and finding of whether the appeal is frivolous on the basis that it requires: (1) a single tier review of the appellate record by counsel for "colorable" claims, not merely arguable claims; and (2) counsel, after filing an "Anders brief," to remain as an "advisory counsel" and available to brief "viable issues" found only in the proper petition, ... departs from the "obvious goal of *Anders*.".....27

- C. The differences between "of-right" PCR appeals taken by pleading defendants and "of-right" direct appeals taken by trial defendants does not justify a departure from the "obvious goal of *Anders*.".....30

Conclusion.....33

APPENDIX TABLE OF CONTENTS

Order Denying Rehearing, <i>Sanchez v. Shinn</i> , Nos. 21-15632; 21-16940 (9th Cir.) (Oct. 17, 2023); Opinion reversing district court's grant of habeas corpus (Aug. 8, 2023).....	001
Order Granting Motion for Appointment of CJA Appellate Counsel, <i>Sanchez v. Shinn</i> , No. CV-17-00224-TUC-RM (D. Ariz.) (Jul. 15, 2021).....	009
Order Granting Conditional Writ of Habeas Corpus, <i>Sanchez v. Shinn</i> , No. CV-17-00224-TUC-RM (D. Ariz.) (Mar. 30, 2021).....	011
Order Denying Petition for Review, <i>State v. Sanchez</i> , No. 2 CA-CR 2018-0224-PR (Ariz. Ct. App.) (Oct. 12, 2018).....	028
Order Denying Post-Conviction Relief, <i>State v. Sanchez</i> , No. CR 2013-00346 (Ariz. Sup. Ct. Cochise Cnty.) (Jul. 2, 2018).....	032
Summary of Changes to Rule 32, Order R-17-0002 (Ariz.) (Jan. 1, 2018).....	034
Order Denying Petition for Review, <i>State v. Sanchez</i> , No. 2 CA-CR 2017-0123-PR (Ariz. Ct. App.) (Jul. 14, 2017).....	036
Order Denying Post-Conviction Relief, <i>State v. Sanchez</i> , No. CR 2013-00346 (Ariz. Sup. Ct. Cochise Cnty.) (Jan. 10, 2017).....	041
Order Denying Petition for Review, <i>State v. Sanchez</i> , No. 2 CA-CR 2015-0359-PR (Ariz. Ct. App.) (Dec. 22, 2015).....	042
Order Denying Post-Conviction Relief, <i>State v. Sanchez</i> , No. CR 2013-00346 (Ariz. Sup. Ct. Cochise Cnty.) (Aug. 18, 2015).....	046
Order Setting Briefing Schedule, <i>State v. Sanchez</i> , No. CR 2013-00346 (Ariz. Sup. Ct. Cochise Cnty.) (Feb. 18, 2015).....	049
Notice of No Colorable Claim by Counsel with Letter (Feb. 12, 2015).....	050
Letter / Duties and Responsibilities of Advisory Counsel.....	055

TABLE OF AUTHORITIES

Cases

<i>Anders v. California</i> , 386 U.S. 738 (1967).....	passim
<i>Chavez v. Brnovich</i> , 42 F.4th 1091 (9th Cir. 2022) (<i>Chavez II</i>).....	passim
<i>Douglas v. California</i> , 372 U.S. 353 (1963).....	9, 16, 18
<i>Ellis v. United States</i> , 356 U.S. 674 (1958).....	12, 13, 16, 18
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	14
<i>Garza v. Idaho</i> , 139 S.Ct. 738 (2019).....	31, 32
<i>Giffin v. Illinois</i> , 351 U.S. 12 (1956).....	14, 32
<i>Halbert v. Michigan</i> , 545 U.S. 605 (2005).....	31
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004).....	31
<i>Lammie v. Barker</i> , 915 P.2d 662 (Ariz. 1996).....	passim
<i>McCoy v. Court of Appeals of Wisconsin</i> , 486 U.S. 429 (1988).....	passim
<i>Montgomery v. Sheldon</i> , 889 P.2d 614 (Ariz. 1995).....	16
<i>Montgomery v. Sheldon</i> , 893 P.2d 1281 (Ariz. 1995).....	30, 31
<i>Pacheco v. Ryan</i> , No. CV-15-02264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 12, 2016).....	30
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987).....	6, 19
<i>Penson v. Ohio</i> , 488 U.S. 75 (1988).....	passim
<i>People v. Wende</i> , 25 Cal.3d 436 (Cal. 1979).....	17, 28
<i>Rinaldi v. Yeager</i> , 384 U.S. 305 (1966).....	32
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000).....	31
<i>Smith v. Robbins</i> , 528 U.S. 259 (2000).....	passim
<i>Smith v. Stewart</i> , 536 U.S. 856 (2002).....	5
<i>State v. Bennett</i> , 146 P.2d 63 (Ariz. 2006).....	12

<i>State v. Chavez</i> , 407 P.3d 85 (Ariz. Ct. App. 2017) (<i>Chavez I</i>)	5, 6, 11, 18
<i>State v. Clark</i> , 2 P.3d 89 (Ariz. Ct. App. 1999)	17
<i>State v. Leon</i> , 451 P.2d 878 (1969)	11
<i>State v. Moody</i> , 986 P.2d 578 (Ariz. 1998)	5
<i>State v. Runningeagle</i> , 859 P.2d 169 (Ariz. 1993)	12
<i>State v. Smith</i> , 910 P.2d 1 (Ariz. 1996)	22
<i>Summers v. Schriro</i> , 481 F.3d 710 (9th Cir. 2007)	3
<i>Wilson v. Ellis</i> , 859 P.2d 744 (Ariz. 1993)	3, 11

Statutes

28 U.S.C. § 2254	2, 6, 19, 25
A.R.S. § 13-102	11
A.R.S. § 13-4033	11

Other Authorities

Ariz. Const. Art. II, § 24	3, 11
1992 Ariz. Sess. Laws, Ch. 184 § 1 (40th Leg., 2d Reg. Sess.)	11
Arizona Supreme Court Order, R-17-0002	6
Arizona Supreme Court Order, R-19-0012	6

Rules

Arizona Rule of Criminal Procedure 32	passim
Arizona Rule of Criminal Procedure 33	passim

PETITION FOR A WRIT OF CERTIORARI

Michael Isidoro Sanchez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 003) is unreported. The District Court's opinion granting Mr. Sanchez a conditional writ of habeas corpus (App. 011) is unreported, but it is available at 2021 WL 1192846. The Arizona Court of Appeals opinions denying relief (App. 042; 036; 028) are all unreported. The Arizona Superior Court decisions dismissing the first, second, and third post-conviction review proceedings (App. 046; 041; 032) are all unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion on August 8, 2023. Sanchez v. Shinn, Nos. 21-15632; 21-16940 (9th Cir. 2023), (App. 003). The Ninth Circuit denied a timely filed petition for rehearing on October 17, 2023, (App. 001). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The Fourteenth Amendment to the United States Constitution:

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.

28 U.S.C. § 2254(d)(1):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

1) In March 2014 Mr. Sanchez entered a guilty plea to one count of sexual conduct with a minor and one count of attempted sexual conduct with a minor. In April 2014 at sentencing the Superior Court advised Mr. Sanchez of his right to appeal. In Arizona, although Mr. Sanchez's plea agreement waived the right to a direct appeal, it did not waive the right to collateral review. The Arizona Constitution commands that "[i]n criminal prosecutions, the accused shall have the right ... to appeal in all cases." Ariz. Const. Art. II, § 24. See, *Wilson v. Ellis*, 859 P.2d 744, 746 (1993) ("Clearly, art. 2, § 24 guarantees some form of appellate relief. That right cannot be waived merely by a plea or admission.").

Accordingly, in May 2014 Mr. Sanchez filed a Notice of Post-Conviction Relief (PCR) to initiate his first appeal as of-right, pursuant to Rule 32.4(a) (Eff. Jan. 1, 2014)¹ ("In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence.") See, *Summers v. Schrico*, 481 F.3d 710, 715-16 (9th Cir 2007) ("Arizona courts have repeatedly characterized Rule 32 of-right proceedings as the functional equivalent of direct appeals....").

Joel Larson of the Cochise County Legal Defender was appointed to represent Mr. Sanchez in his first appeal as of-right. Eight

¹ Unless otherwise noted, all citations to a rule are to the Arizona Rules of Criminal Procedure.

months later, Mr. Larson filed a "Notice of No Colorable Claim" in the Superior Court, (App. 050). That notice was a four page brief containing a bare allegation that there were no colorable claims and a summary of the case which recited the bare minimum of the factual and procedural history with no citations to the record. *Id.* Afterwards, Mr. Sanchez was left to file his own pro per PCR petition without an "Anders review"² by an appellate court. See, Order Setting Briefing Schedule, (App. 049). Mr. Larson provided no assistance in the preparation of the pro per petition.

Unsurprisingly, Mr. Sanchez's first of-right PCR petition was dismissed, (App. 046). Upon that final disposition the Superior Court did and was only required, under Arizona law, to determine whether Mr. Sanchez's pro per PCR petition contained any claim that "presents a material issue of fact or law which would entitle [him] to relief," *Id.* See, Rule 32.6(c) (Eff. Dec. 1, 2000) ("Summary Disposition"- which is a mere merits adjudication of only the claims raised in the pro per PCR petition.").

Ultimately, Mr. Larson did and was permitted to withdraw from the first appeal as of-right without an "Anders review" to determine whether he conducted a diligent search of

² An "Anders review" is prescribed by the "two interrelated tasks" which includes a court's independent review of the record and a finding as to whether the entire appeal is frivolous. See, *Penson v. Ohio*, 488 U.S. 75, 83 n.6 (1988); and *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988).

the record for arguable issues and whether the case was frivolous. *Id.* The Arizona Court of Appeals denied relief. (App. 042).

2) In December 2015 Mr. Sanchez initiated a second PCR proceeding by filing a Motion for DNA Testing under Rule 32.12 (EFF. Jan. 1, 2015). The Superior Court and subsequently the Arizona Court of Appeals denied relief. (App. 041 ; 036).

3) In August 2017 Mr. Sanchez initiated a third PCR proceeding by filing a second Notice of PCR. In that proceeding Mr. Sanchez claimed that he had been denied the procedural protections mandated by *Anders v. California*, 386 U.S. 738 (1967) in his first appeal as of-right. The Arizona Court of Appeals relying on *State v. Chavez*, 407 P.3d 85 (Ariz. Ct. App. 2017) (*Chavez I*), reached the merits of Mr. Sanchez's *Anders* claim, finding that "this court has determined *Anders* review is not required for pleading defendants." (App. 028). No procedural bar was asserted against the *Anders* claim. *Id.* An *Anders* claim is one that asserts the "constructive denial of counsel altogether" in the first appeal as of-right. See, *Penon*, 488 U.S. at 88. Such claim is of "sufficient constitutional magnitude" that requires "a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3)." See, *Smith v. Stewart*, 536 U.S. 856, 859 (2002); and *State v. Moody*, 986 P.2d 578 (1998) (The waiver of the right to counsel "must be knowing, intelligent and voluntary."). Moreover, since "the claim is that the obligation under *Anders* requires sua sponte review by the superior court" it is not waived "under Rule 32.2(a)(3) by

failing to raise [it] in the superior court." See, Chavez I, 407 P.3d at 87.

4) In June 2019 Mr. Sanchez filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Mr. Sanchez previously filed a habeas petition in May 2017 which was stayed until May 2019. In March 2021 the District Court of Arizona granted relief on the Anders claim in the form of a new of-right Rule 33³ proceeding. (App. 011). The District Court found that "the Arizona Court of Appeals' reliance on Chavez for the proposition that Anders safeguards were not required during Petitioner's of-right PCR proceeding was an unreasonable application of clearly established federal law" under Anders and Pennsylvania v. Finley, 481 U.S. 551, 554-55 (1987). Id.

5) Respondents filed a Notice of Appeal commencing proceedings in the Ninth Circuit Court of Appeals. The Ninth Circuit relied on Chavez v. Brnovich, 42 F.4th 1091 (9th Cir. 2022) (Chavez II) to reverse the District Courts grant of habeas relief. (App. 003). Although all parties and the Ninth Circuit agree that the protections of Anders and its progeny "apply to Arizona's of-right PCR proceedings" for pleading defendants due to the "previously established" federal constitutional right to counsel in such proceedings, and despite the fact that Arizona Law does not require PCR courts to conduct an "Anders review" at any time after counsel

³ Revisions to the Arizona Rules of Criminal Procedure took effect on Jan. 1, 2018 under Order R-17-0002 (App. 034); and again on Jan. 1, 2020 under Order R-19-0012. Under this last order the Arizona Supreme Court renumbered Rule 33 for pleading defendants to file their PCR petitions while reserving Rule 32 only for trial defendants to file PCR petitions following a direct appeal.

submits a "Notice of No Colorable Claims" in such proceedings, the Ninth Circuit still held that such proceedings "satisfied Anders and its progeny" and that such a determination by the Arizona Court of Appeals "would not be contrary to or an unreasonable application of clearly established federal law." See, *Chavez II*, 42 F.4th at 1098-99; and 1100-02; (App. 008).

Upon such reasoning the Ninth Circuit relied upon two assertions: A) that Arizona's of-right PCR procedure requires counsel to search the record for "colorable claims," rather than for claims that are "[l]ikely to prevail on appeal;" and B) that Arizona's of-right PCR procedure requires counsel to remain in an "advisory capacity" and "available to... brief viable issues" that may be found in the proper petition, rather than allowing counsel to immediately withdraw from the case. *Id.* That advisory counsel would be required "to brief viable issues" if found in the proper petition was not asserted by Respondents and no Arizona Law would support that assertion.

The Ninth Circuit conceded that "Arizona's procedure suffers from two of the deficiencies identified in [Robbins] - counsel files a 'bare conclusion,' and there is only one tier of review by counsel to identify any colorable claims." *Id.* at 1102. Oddly, this latter deficiency was identified as a plus. *Id.* at 1101-02.

6) Mr. Sanchez currently has an of-right Rule 33 petition that was submitted by an attorney on his behalf in the Cochise County Superior Court, which now awaits a decision from this Court.

REASONS FOR GRANTING REVIEW

The Court in *Smith v. Robbins*, 528 U.S. 259, 275 (2000) stated: "We should, and do, evaluate state procedures one at a time, as they come before us."

In *Robbins* the Court reversed the Ninth Circuit's decision and upheld California's new *Wende* procedure despite the fact that it departed from the specific procedure prescribed in *Anders v. California*, 386 U.S. 738, 744 (1967) by not requiring counsel's *Anders* brief to identify "anything in the record that might arguably support the appeal." The identification of such issues in the *Anders* brief was not part of the *Anders* holding, nor is it essential to the "obvious goal of *Anders*," *Robbins*, 528 U.S. at 278.

Now, the Ninth Circuit, in *Chavez v. Brnovich*, 42 F.4th 1091 (9th Cir. 2022) (*Chavez II*) and subsequently in *Sanchez v. Shinn*, Nos. 21-15632; 21-16940 (9th Cir.) (Aug. 8, 2023) (*Sanchez I*) has upheld Arizona's of-right PCR procedure, despite the fact that it departs from *Anders* and its progeny by not requiring, at all, a court to conduct an "Anders review" and reach a finding as to whether the case is frivolous, for when counsel submits an *Anders* brief instead of a merits brief; nor an advocates brief for when an arguable issue is discovered by the court's only required review, which under Arizona's of-right PCR procedure is only a mere merits adjudication of the claims raised in the *pro per* petition. But, a court's "Anders review" (see ante, FN-2) to determine whether the case is frivolous, and to receive a merits brief for an appeal that is not frivolous, have both been held to be required under *Anders* and its progeny, and both are essential to the "obvious

goal of Anders." Robbins, 528 U.S. at 278-80.

The situation that Arizona's of-right PCR procedure places indigent pleading defendants in is egregious. Once appointed counsel accuses the appeal to be without merit, the appeal will be deemed as such, unless the pro per defendant can show a "viable issue" not merely an arguable one, and even if successful in that endeavor, counsel is still not required to provide a merits brief. *Lammie v. Barker*, 915 P.2d 662, 663 (Ariz. 1996).

The Ninth Circuit mistakenly believes, that under Arizona's of-right PCR procedure, if a "viable issue" is discovered, that counsel is required to submit a merits brief thereafter. *Chavez II*, 42 F.4th at 1101-02. The Ninth Circuit also assumes, in error, that if counsel does not immediately withdraw but remains in an advisory capacity after submitting an Anders brief, claiming the appellate record supports "no colorable claims" not merely arguable claims, that no "Anders review" and finding of whether the case is frivolous by a court is required in order to satisfy Anders and its progeny, in any first appeal as of-right. *Id.*

The Ninth Circuit's holding in *Chavez II* and in *Sanchez I*, renders meaningless the protections afforded by *Douglas v. California*, 372 U.S. 353 (1963) and *Anders*, by reducing the Court's "standard" to: "reasonably ensure[] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal," Robbins, 528 U.S. at 278, to a single tier review of the appellate record by counsel for colorable claims - not merely arguable claims, where

if counsel refuses to submit a merits brief, the court only conducts a mere merits adjudication of the claims raised in the pro per petition. That is just like "the old California procedure [which] did not require either counsel or the court to determine that the appeal was frivolous." *Id.* at 279.

The Ninth Circuit overlooks that *Anders* and its progeny recognizes a "limited exception" to the Douglas right to counsel in the first appeal as of-right, and that the operation of that "limitation" must be "related to the merit of that appeal." *Id.* at 276-77. In other words, the Ninth Circuit fails to see that a court must first conduct an "Anders review" to determine whether "representation" was provided to the indigent defendant in the form of a diligent search of the record for arguable issues; and whether the entire appellate record supports no non-frivolous issues, as counsel claims, before ultimately excusing counsel from the duty of providing an advocates brief. *Id.* at 277-78.

The Court should reject the Ninth Circuit's gross departure from the "minimum requirements" of *Anders* and its progeny, and affirm that an indigent defendant's federal constitutional right to counsel must be protected from being "swallow[ed]" by the "limitation" to that right, in any first appeal as of-right, and affirm that a court's "Anders review" is essential to "ensur[ing] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 273, 278.

I. THE NINTH CIRCUIT'S RELIANCE ON CHAVEZ II WAS ERRONEOUS.

- A. Arizona's of-right PCR procedure cannot resolve an "of-right" appeal in a way that is related to its merit, nor achieve the "obvious goal of Anders," nor satisfy Anders and its progeny, without requiring, as a minimum safeguard, a court's "Anders review" per the Court's "two interrelated tasks."

Of course "states [have] wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Id.* at 273. But Arizona Law⁴ has, for a very long time,⁵ abused that discretion by failing to provide "a valid state procedure for determining whether the defendant's appeal is frivolous" for pleading defendants in their first appeal as of-right for when counsel refuses to provide a merits brief. *Id.* at 284, 286; *State v. Chavez*, 407 P.3d 85, 91 (Ariz. Ct. App. 2017) (*Chavez I*) (Held: "the superior courts are not required to conduct Anders review in a Rule 32 of-right petition"); *Wilson v. Ellis*, 859 P.2d 744, 747 (Ariz. 1993) ("[W]e are not commanding, nor do we want, trial courts to conduct Anders-type reviews in PCRs"). Arizona law only requires counsel to search the appellate record for "colorable claims," not merely arguable claims. Rule 32.4(c)(2)

⁴ "Arizona Law" includes Arizona Case Law and the Arizona Rules of Criminal Procedure. See, A.R.S. § 13-102(A).

⁵ Prior to 1992, pleading defendants in Arizona could file a direct appeal under Rule 31 where a court's "Anders review" was required. See, *State v. Leon*, 451 P.2d 878 (1969). In 1992, Arizona amended appellate statute, A.R.S. § 13-4033, to except pleading defendants from filing a direct appeal in the court of appeals. See, 1992 Ariz. Sess. Laws Ch. 184 § 1 (40th Leg., 2d Reg. Sess.) But being "cognizant of the higher command" of Ariz. Const. Art. II, § 24, the Arizona Supreme Court held that this statutory change still permitted a first appeal as of-right by "PCR in lieu of direct appeal" for pleading defendants. See, *Wilson*, 859 P.2d at 746. See, Rule 32.4(c) (Dec. 1, 1992) (Requiring appointment of counsel in "Rule 32 of-right" proceeding.).

(Jan. 1, 2014); Rule 32.4(d)(2)(A) (Jan. 1, 2018); and Rule 33.6(a) (Jan. 1, 2020).

"A colorable claim is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Bennett*, 146 P.2d 63 (Ariz. 2006) (citing, *State v. Runnigeagle*, 859 P.2d 169, 173 (1993)). An "arguable claim" is one that is "not frivolous." *Robbins*, 528 U.S. at 282-83. "Frivolous" is defined as "having no sound basis (as in fact or law)." *Merriam Webster's Collegiate Dictionary* (11th Edition). Claims that may appear to not change the outcome of a case may still have a reasoned basis in fact or law. To use a standard that demands more than frivolity and to not verify counsel's evaluation of the appellate record, practically guarantees that any non-frivolous claims will be left behind without any judicial consideration.

This Court has continued to repeat the minimum requirement of a court's "Anders review" for determining whether an appeal is frivolous, before excusing counsel from the duty of providing an advocates brief on behalf of the indigent defendant in the first appeal as of-right. In *Robbins*, 528 U.S. at 272, the Court disagreed with the Ninth Circuit that the "final section of Anders" outlining a specific procedure "was obligatory on the states." *Id.* However, right before noting that "final section" the Court pointed to a passage in *Ellis v. United States*, 356 U.S. 674, 675 (1958), a case that Anders "relied in particular on" in its holding:

"If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied."

See, *Robbins*, 528 U.S. at 270 (quoting, *Ellis*, 356 U.S. at 675; and citing, *Anders*, 386 U.S. at 741-42). That passage in *Ellis* was the first to highlight the role of appellate courts in evaluating an "Anders brief" from counsel who is refusing to submit a merits brief on the belief that the appellate record supports no arguable issues. That role was noted as the "two interrelated tasks" as discussed in *Penson v. Ohio*, 488 U.S. 75, 83-84 (1988) (quoting, *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); and citing, *Ellis*, 356 U.S. at 675; *Anders*, 386 U.S. at 744):

"This requirement was plainly stated in *Ellis*... it was repeated in *Anders*... and it was reiterated last Term in *McCoy*... As we explained in *McCoy*: 'To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.'"

And now see, *Robbins*, 528 U.S. at 278 (citing, in particular, *Penson*, 488 U.S. at 83-84; and *McCoy*, 486 U.S. at 444):

"Once the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied and the case may be disposed of in accordance with state law." See, *McCoy*, 486 U.S. at 444.

Notably, the Court pointed directly to these passages, noted above, right after explaining how "a particular state procedure satisfies" the "standard" - to "reasonably ensure[] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." Leading to the "obvious goal of *Anders*." *Robbins*, 528 U.S. at 276-78.

Because "Anders, in essence, recognizes a limited exception to the requirement articulated in Douglas that indigent defendants receive representation on their first appeal as of-right," *Person* 488 U.S. at 83-84, the Douglas right to counsel must be protected from being swallowed by that "limitation." *Robbins*, 528 U.S. at 278.

The Douglas right to counsel in the first appeal as of-right is "among those safeguards," *Evitts v. Lucey*, 469 U.S. 387, 392 (1985), required "to make that appeal adequate and effective." *Robbins*, 528 U.S. at 276. Combined, the Equal Protection and Due Process clauses of the Fourteenth Amendment require "that a states procedure afford adequate and effective appellate review" by ensuring that the appeal is "resolved in a way that is related to the merit of that appeal," *Id.* at 276-77 (citing, *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956)). To achieve that "standard" the Court explained, "it is important to focus on the underlying goals that the procedure should serve." *Robbins*, 528 U.S. at 276-77. Those goals are two adversarial goals that oppose one another, *Id.* The former protects the Douglas right to have "counsel and [a] merits brief" for an appeal that is "not frivolous," *Id.* The latter, a "limitation" to that right, protects the state from wasting "public moneys" on appeals that are "frivolous," *Id.* Clearly, to determine which "underlying goal" should prevail turns on whether the appeal is "frivolous" or "not frivolous," *Id.* And such a finding bears the only "rational relationship" to "the merit of that appeal" upon deciding whether to except the Douglas right to counsel, *Id.*

It is the right to counsel and the provision thereof, in the first instance, that affords "a fair opportunity to obtain an adjudication on the merits of [the] appeal." *Id.* So when "an indigent defendant who has his appeal dismissed because it is frivolous [he] has not been deprived of 'a fair opportunity' to bring his appeal for fairness does not require either counsel or a full appeal once it is properly determined that an appeal is frivolous," *Id.* at 277-78. Upon such reasoning the Court concluded that the "obvious goal of Anders was to prevent this limitation on the right to appellate counsel from swallowing the right itself, and we do not retreat from that goal today," *Id.* at 278 (citing, *Penon*, 488 U.S. at 83-84; *McCoy*, 486 U.S. at 444).

Accordingly, when counsel stands upon the "limitation" goal of the two "underlying goals" thereby exercising the duty to not put forth a frivolous appeal by submitting an "Anders brief," the appellate court then has a duty under the "obvious goal of Anders" to conduct an "Anders review" to decide which "underlying goal" should prevail. *Robbins*, 528 U.S. at 277-78. Only when a court finds the appeal to be frivolous based upon an "Anders review" can the exception to the Douglas right to counsel be said to be "related to the merit of that appeal" and thereby achieve the "obvious goal of Anders." *Id.* Indeed, if after counsel files an "Anders brief" and no court is required to conduct an "Anders review," then there can be no finding, nor an "adjudication on the merits of [the] appeal," at all, as to whether

it is "frivolous" or "not frivolous" by a judicial officer. *Id.* And most importantly the court may not fairly determine whether counsel provided "representation in the role of an active advocate" by a diligent search of the whole appellate record for any arguable issues. *Id.* See also, *Douglas*, 372 U.S. at 357; *Ellis*, 356 U.S. at 675.

B. Arizona law permits the violation of the *Douglas* right to counsel in first "of-right" PCR appeals by not requiring, at all, a court's "Anders review" per the Court's "two interrelated tasks" for when counsel refuses to submit a merits brief.

The only required review by the court under Arizona's of-right PCR procedure is a mere merits adjudication of only the timely and non precluded claims raised in the petition. See, Rule 32.6(c) (Dec. 1, 2000); Rule 32.6(d)(1) (Jan. 1, 2018); and Rule 33.11(a) (Jan. 1, 2020), hereinafter "Summary Disposition". Claims not raised in the petition will be overlooked and deemed precluded thereafter, see Rule 32.2(a) (Dec. 1, 2000); Rule 32.2(a) (Jan. 1, 2018); and Rule 32.2(a) (Jan. 1, 2020), except those "of sufficient constitutional magnitude" that require a waiver to be made "knowingly, voluntarily, and intelligently." Rule 32.2(a)(3) (Dec. 1, 2000) (comment). If counsel submits an "Anders brief" upon the theory that there are "no colorable claims" counsel will remain as an "advisory counsel"⁶ and if no proper petition is submitted, then

⁶ Arizona's "advisory counsel" is not an "active advocate" *Anders*, 386 U.S. at 743; and compare to *Montgomery v. Sheldon*, 889 P.2d 614, 618-19 n.7 (Ariz. 1995) (counsel's "representation ended" upon refusing to submit a PCR petition). See role of "advisory counsel" who is only required to answer specific legal questions. (App. 057).

no review of any kind by the court is required and the proceeding will be dismissed. Rule 32.4(c)(2)(Jan. 1, 2014); Rule 32.4(d)(2)(A)(Jan. 1, 2018); and Rule 33.6(d),(e)(Jan. 1, 2020). See also, "Summary Disposition."

Accordingly, under Arizona's of-right PCR procedure, noted above, when counsel submits an "Anders brief" the court's mere merits adjudication of only the claims raised in the pro per petition does not afford "a fair opportunity to obtain an adjudication on the merits of [the] appeal," Robbins, 528 U.S. at 277-78, because it cannot ensure the court, per the Court's "two interrelated tasks" (see ante, FN-2), that a full examination of the record and identification of any arguable issues for appeal was conducted by an "active advocate," and whether counsel's evaluation of the case was correct. See, Penson, 488 U.S. at 83 n.6:

"Obviously, a court cannot determine whether counsel is in fact correct in concluding that an appeal is frivolous without itself examining the record for arguable appellate issues."

Just as counsel's "Anders brief" is not a substitute for an advocates brief on the merits" Arizona's "Summary Disposition" "is not a substitute for" a court's "Anders review" of the entire appellate record for arguable issues. McCoy, 486 U.S. at 444. Indeed, the "Anders review" is a search of the whole record for "unmentioned issues." Robbins, 528 U.S. at 284; People v. Wende, 25 Cal.3d 436, 440-41 (1979) (discussing, "a review of the entire record"); and State v. Clark, 2 P.3d 89 (Ariz. Ct. App. 1999).

Because Arizona's of-right PCR procedure does not afford "an adjudication on merits of [the entire] appeal," Robbins, 528 U.S. at 277, **by a court**, but a mere merits adjudication of only the claims raised in the pro per petition for when counsel submits an "Anders brief," it creates an exception to the Douglas right to counsel on the basis that the claims raised in the pro per petition lacked merit, rather than on the basis that the entire appellate record supported no arguable claims, i.e. frivolity. In other words, under Arizona's of-right PCR procedure, where no "Anders review" is required, Chavez I, 407 P.3d at 91, the exception to the Douglas right to counsel is related to the merit of the pro per petition, rather than to the merit of the appeal, Robbins, 528 U.S. at 277-78. And, although counsel remains in an "advisory capacity" until the trial court's "Summary Disposition," counsel may still withdraw, just at a later point in time, without a court's finding as to whether the entire appeal is frivolous, which results in the violation "of the Douglas right to have counsel until a case is determined to be frivolous" by a judicial officer. Id. at 280. Whether appointed counsel provided "representation in the role of an active advocate" by a diligent search of the record for any arguable issues, Douglas, 372 U.S. at 357; Ellis, 356 U.S. at 675, will then remain a mystery "render[ing] meaningless the protections afforded by Douglas and Anders." Penson, 488 U.S. at 86.

Neither Respondents nor the Ninth Circuit can explain

how Arizona's of-right PCR procedure "vindicate[s] the constitutional right to appellate counsel announced in Douglas" without requiring a court's "Anders review" in the first appeal as of-right for pleading defendants. See, *Robbins*, 528 U.S. at 273 (citing, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

C. Contrary to the holding in *Chavez II*, under *Lammie v. Barker*, 915 P.2d 662, 663 (Ariz. 1996), "advisory counsel" is not required to step back into the role of an "active advocate" to brief "viable issues" found in the proper petition in an "of-right" PCR appeal, which results in the violation of the Douglas right "to receive a merits brief for a nonfrivolous appeal."

In *Chavez II*, the Ninth Circuit asserted that under Arizona's of-right PCR procedure, after counsel submits an "Anders brief," that counsel is required to "remain available to brief any viable issues" found in the proper petition. *Chavez II*, 42 F.4th at 1101-02 (citing, *Lammie*, 912 P.2d at 663). That assertion was not argued by Respondents in either *Chavez II* or *Sanchez I*. That assertion was essential to the Ninth Circuit's holding because it was used to claim, under 28 U.S.C. § 2254(d)(1), that *Chavez I* was "not [i]t is] contrary to or an unreasonable application of" *Anders* and its progeny. *Chavez II*, 42 F.4th at 1100-02. For whatever reason, where the relevant paragraph in *Lammie* is quoted, the Ninth Circuit omitted the top half as well as the first word of the bottom half. *Id.* at 1095, 1100-02.

In context, the whole paragraph in *Lammie* makes clear that there is no requirement or allowance for "advisory counsel"

to step back into the role of an "active advocate" (see ante, FN-6) to provide a merits brief, even if a "viable issue" is discovered in the pro per petition. *Lammie*, 915 P.2d at 663.

Since the bottom half of the relevant paragraph in *Lammie* starts with the word "rather" it is the top half that informs what action overall to the contrary is being asserted. *Id.* (citing, *Anders*, 386 U.S. 738):

"Unlike counsel's role under *Anders*, the purpose of having counsel remain on the case in Rule 32 proceedings after the defendant has elected to proceed pro per is not to file a PCR petition or petition for review, even though counsel believes there is no tenable basis for it, on behalf of the pro per defendant."

Clearly, this top half of the relevant paragraph in *Lammie*, expressly rejects counsel's role under *Anders* without regard to the specific type of issue, a non-frivolous issue, that *Anders* and its progeny requires briefing for. *Lammie*, 915 P.2d at 663.

Under *Anders*, the reason why counsel remains available, after filing an "Anders brief," is to step back into the role of an "active advocate" to provide a merits brief on the condition an arguable issue is found by the court during its "Anders review," as explained in *Anders*, 386 U.S. at 744:

"... A copy of counsel's [*Anders*] brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds... to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw... On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." See also, *Penson*, 488 U.S. at 84; and *McCoy*, 486 U.S. at 444.

Indeed, counsel's "request to withdraw" will be denied if an arguable issue is found by the reviewing court. *Anders*, 386 U.S. at 744. This requirement is vital to avoid violating the second aspect of the "Douglas right," which is "to receive a merits brief for a nonfrivolous appeal." *Robbins*, 528 U.S. at 280.

Since the top half of the relevant paragraph in *Lammie* expressly rejects the sole reason, under *Anders* and its progeny, for counsel to remain available, then that leaves only one other logical reason under *Lammie* for "advisory counsel" to remain, as the bottom half states:

"Rather, counsel's only function at this point is to assist the proper defendant should that defendant or the trial court discover a viable issue that counsel had not previously discovered." *Lammie*, 915 P.2d at 663.

As the relevant paragraph in *Lammie* reads from top to bottom, neither counsel's advisory role/function, nor the defendant's pro per status changes at the "point" a "viable issue" is found. *Id.* Indeed, the word "should" as used in the bottom half gives no exception to allow "advisory counsel" to step back into the role of an "active advocate" to provide a merits brief for a nonfrivolous appeal, *Id.* Instead, it merely expresses the condition - "[if] that defendant or the trial court discover[s] a viable issue" - upon which advisory counsel "is to assist the

⁷ All "viable issues" are "arguable issues" but not all "arguable issues" are "viable issues" and all issues are "arguable issues" unless determined to be "frivolous" by a court. Thus, if a "viable issue" is found by the court then the appeal must be deemed as "nonfrivolous."

pro per defendant "as opposed to counsel [filling] a per petition... on behalf of the pro per defendant." Id.

The remaining language in the bottom half of the relevant paragraph in *Lammie* is discretionary, not mandatory language: "or when, in the interest of justice appointment of counsel seems necessary." Id. Such language merely applies to appoint counsel for "an issue [deemed] appropriate for submission to the court of appeals" where there is no federal constitutional right to appointed counsel... beyond the trial court's mandatory consideration and disposition of the PCR. Id. (Citing, *State v. Smith*, 910 P.2d 1, 4 n.2 (Ariz. 1996)). But, even if that remaining language also applied to the PCR proceeding at the trial court level, it would still remain that advisory counsel's role / function upon discovery of a "viable issue" is only to provide mere assistance (see ante, FN-6) and not "a PCR petition," because the purpose of the "appointment of counsel" in that instance would be to have that newly appointed counsel, not advisory counsel, provide an advocates brief. *Lammie*, 915 P.2d at 663. And because that remaining language is discretionary, the trial court would not be required to appoint counsel... and direct that counsel to prepare an advocates brief" as required under *Anders* and its progeny. *Anders*, 386 U.S. at 744; *McCoy*, 486 U.S. at 444; *Penson*, 488 U.S. at 84; and *Robbins*, 528 U.S. at 280.

The language of Arizona's of-right PCR procedure remained

silent on this matter until Rule 32.4(d)(2)(A) (Jan. 1, 2018) added: "unless the court orders otherwise" to the rule, which was -21- years after Lammie was decided and -2- years after Mr. Sanchez's first appeal as of-right was decided. (App. 046). See, Summary of Changes to Rule 32. (App. 034). Rule 32.4(d)(2)(A) (Jan. 1, 2018) states:

"After counsel files a [no merit] notice, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the Rule 32 proceeding unless the court orders otherwise." See also, Rule 33.6(e) (Jan. 1, 2020). Compare to Rule 32.4(c)(2) (Jan. 1, 2014).

That language is also discretionary, but it is also vague and ambiguous. On one hand it appears that the court may allow counsel to withdraw, and on the other, giving the benefit of the doubt here, it appears to express an exception for an "advisory counsel" to step back into the role of an "active advocate," apparently, to provide a merits brief. *Id.*

Accordingly, there is no language in Arizona's of-right PCR procedure, nor in Lammie, that requires an "advisory counsel" to step back into the role of an "active advocate" to brief "arguable issues," not even "viable issues," found in the proper petition on the indigent defendant's behalf. Indeed, Lammie contains language that expressly rejects counsel's role under Anders. Lammie, 915 P.2d 663.

Thus, the Ninth Circuit's erroneous assertion that counsel "remain[s] available to brief any viable issues," Chavez II, 42 F.4th at 1101-02, conflicts with Lammie, which holds otherwise.

Notably, Chavez II relied upon that assertion to decide that "Arizona's of-right PCR procedure satisfied Anders and its progeny." Id. at 1100-03. And Sanchez I relied upon Chavez II.

Now, under Anders and its progeny when an arguable issue is found by the court, the defendant is entitled to "representation" in the form of a merits brief prepared by an "active advocate," not mere assistance from "advisory counsel" as the pro per defendant prepares a pro per petition. See, Penson, 488 U.S. at 83-84, where the Court stated:

"...once a court determines that the trial record supports arguable claims, there is no basis for the exception and, as provided in Douglas, the criminal appellant is entitled to representation." See also, McCoy, 486 U.S. at 444.

Because Arizona's of-right PCR procedure and Lammie does not require counsel to prepare an advocates brief for when an "arguable issue" or even a "viable issue" is discovered by the court, it permits the violation "of the Douglas right... to receive a merits brief for a nonfrivolous appeal" just like the Penson procedure did. Robbins, 528 U.S. at 273, 280 (noting, that the Penson procedure "clearly failed under Douglas" and "permitted a basic violation of the Douglas right,").

Based on the foregoing arguments, no fairminded jurist can conclude that Arizona's of-right PCR procedure satisfies Anders and its progeny.

II. THE NINTH CIRCUIT'S DECISION IN CHAVEZ II PERMITS A DEPARTURE FROM THE "OBVIOUS GOAL OF ANDERS" ENUNCIATED IN SMITH V. ROBBINS, 528 U.S. 259, 278 (2000).

A. **Chavez II** infers that a court's "Anders review" and finding of whether the appeal is frivolous, is not required in any first appeal as "of-right," so long as the procedure requires: (1) a single tier review of the appellate record by counsel for "colorable" claims, not merely arguable claims; and (2) that counsel, after submitting an "Anders brief," remain as an "advisory counsel" and available to brief "viable issues" found only in the proper petition.

In section III(C)(2) of **Chavez II** is where the Ninth Circuit explained its reasons for upholding Arizona's of-right PCR procedure, which expressly excepts a court's Anders review and finding of whether the appeal is frivolous. **Chavez II**, 42 F.4th at 1101-03.

In doing so the Ninth Circuit relied upon two things:

- (1) that "Arizona requires counsel to identify any valid claims" in the appellate record; and
- (2) that "counsel [after submitting an Anders brief] may not withdraw but must remain available to brief any viable issues" found only in the proper petition.

Both of these assertions were relied upon, under 28 U.S.C. § 2254(d)(1), to hold that Arizona's of-right PCR procedure "satisfied Anders and its progeny" and that such a determination "would not be contrary to or an unreasonable application of clearly established federal law." *Id.*

Now, at the start of section III(C)(2), the Ninth Circuit did not make any distinction between first of-right PCR appeals and first of-right direct appeals, to infer that no "Anders review" and finding of whether the appeal is frivolous by a court is

required in First of-right PCR appeals. *Id.* at 1100-02. However, such a distinction was made at the end of section III(C)(2) where it was claimed that Arizona's of-right PCR procedure is "sufficient given the differences between of-right PCR proceedings and appeals from trials" and that "of-right PCR proceedings present circumstances which could reasonably justify a departure from the procedures found adequate by the court." *Id.* But such "differences" and "departure" were only asserted after concluding that Arizona's of-right PCR procedure "ensure[s] that an appeal will be resolved on the merits" and then only as additional reasons to reach that conclusion. *Id.*

Because the Ninth Circuit first drew the noted distinction after and then only in support of that conclusion, and all at the end of section III(C)(2), it shows that up until that point in evaluating Arizona's of-right PCR procedure, that they applied *Anders* and its progeny to the same extent and in the same way as they would in evaluating a procedure for of-right direct appeals. *Id.*

Thus, any court may draw as a conclusion, that *Chavez II* is not necessarily exclusive to of-right PCR appeals and that a court's "*Anders* review" and finding of whether a first appeal as of-right is frivolous, is not required, in of-right PCR appeals and direct appeals alike, so long as the procedure requires: (1) a single tier review of the appellate

record by counsel for "colorable" claims, not merely arguable claims; and (2) that counsel, after submitting an "Anders brief," remain as an "advisory counsel" and available to brief "viable issues" found only in the proper petition.

B. A state procedure that excepts a court's "Anders review" and finding of whether the appeal is frivolous on the basis that it requires: (1) a single tier review of the appellate record by counsel for "colorable" claims, not merely arguable claims; and (2) counsel, after filing an "Anders brief," to remain as an "advisory counsel" and available to brief "viable issues" found only in the proper petition, ... departs from the "obvious goal of Anders."

First, the criterion to excuse counsel from the duty of providing an advocates brief was set at "frivolous" the lowest common denominator of all claims. *Robbins*, 528 U.S. at 277-83. "[F]or fairness does not require either counsel or a full appeal once it is properly determined that an appeal is frivolous," *Id.* at 278. Whether the appeal is "frivolous" or "not frivolous" is the only question that the Supreme Court has approved for determining which of the two "underlying goals" of the "obvious goal of Anders" should prevail. *Id.* (citing, *Penson*, 488 U.S. at 83-84; *McCoy*, 486 U.S. at 444.).

Second, there must be "at least two tiers of review" to ensure advocacy was provided. *Id.* at 281. Nevertheless, it is a judicial officer who must ultimately decide whether the appeal is frivolous. *Id.* at 280 ("[R]eading Anders as finding old California procedure deficient largely because the court itself did not make an express finding that

the appeal was frivolous," citing, *Wende*, 25 Cal.3d at 441). Indeed, the Court's "two interrelated tasks," a "requirement [which] was plainly stated in *Ellis*... repeated in *Anders*... and reiterated... in *McCoy*," cannot be met without a court's independent review of the entire appellate record and finding of whether the appeal is frivolous. *Person*, 488 U.S. at 83-84; *McCoy*, 486 U.S. at 444.

Third, the distinction between counsel who immediately withdraws from the case and counsel who remains in an "advisory" capacity after filing an "Anders brief," is without a difference when it comes to a court's duty to conduct an "Anders review" and find whether the appeal is frivolous. Either way, counsel is refusing to provide the indigent defendant a merits brief, the main task for which counsel was appointed to complete. The only significant difference is that counsel, who remains in an "advisory" capacity after filing an "Anders brief," withdraws just at a later point in time. So before the Douglas right to have counsel provide an advocates brief gets the axe, whether sooner or later in the proceeding, counsel's search of the record for arguable claims and evaluation of the case, must be examined by a court in order to determine "the merit of that appeal," *Robbins*, 528 U.S. at 277-78, and to "satisfy federal constitutional concerns," *Person*, 488 U.S. at 83-84, per the Court's "two interrelated tasks." *Id.*

Indeed, the specific Anders procedure outlined in Anders and the Weende procedure upheld in Robbins, merely delays the courts "Anders review" where counsel remains on the case after filing an "Anders brief." Robbins, 528 U.S. at 271, 280-81.

Thus, what triggers the courts duty to conduct an "Anders review" and find whether the case is frivolous, is not the sudden withdrawal of counsel, but instead, it is when counsel exercises the duty to not put forth a frivolous appeal by submitting an "Anders brief." Robbins, 528 U.S. at 277-78. It is counsel's "Anders brief" that triggers the "Limitation" goal of the two "underlying goals" which then triggers the courts duty under the "obvious goal of Anders" to decide which "underlying goal" should prevail based upon "the merit of that appeal" - whether it is "frivolous" or "not frivolous," Id.

Accordingly, a courts "Anders review" and finding of whether the case is frivolous, is essential to resolving the appeal "in a way that is related to the merit of that appeal" which is essential to the "obvious goal of Anders." Id. Thus, a procedure that does not require, at all, a courts "Anders review" for when counsel submits an "Anders brief," departs from the "obvious goal of Anders." Id. This is so, even where the procedure provides a single tier review for only "colorable" claims by counsel, and requires that counsel, after submitting an "Anders brief," to remain

on the case to brief "viable issues" that may be found in the proper petition by the court.

- C. The differences between "of-right" PCR appeals taken by pleading defendants and "of-right" direct appeals taken by trial defendants does not justify a departure from the "obvious goal of Anders."

The Ninth Circuit pointed to "the differences between of-right PCR proceedings and appeals from trials" noting that in the "non-capital plea cases": (1) the "short and uncomplicated record; (2) "a less likelihood of error;" and (3) the "waived" claims - all to suggest that "a departure from the procedures found adequate by the Court" is warranted. *Chavez II*, 42 F.4th at 1102-03.

First, the "short and uncomplicated" appellate record. See, *Pacheco v. Ryan*, No. CV-15-02264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 12, 2016) at 9: "As Judge Metcalf observed, [t]he smaller record makes the burden of Anders lighter, and the absence of a trial arguably heightens the need for competent review..."

Second, "a less likelihood of error:" The question in any appeal is not whether it is likely or less likely any errors occurred, but whether any errors occurred. And the footnote the Ninth Circuit cited, see *Chavez II*, 42 F.4th at 1102, leans toward caution rather than carelessness when it comes to error in guilty pleas. See, *Montgomery v. Sheldon*, 893 P.2d 1281, 1282 n.1 (Ariz. 1995) ("... Absent a meaningful form of appeal,

possible errors in the guilt determination of even pleading defendants would stand unchecked. Although there is less likelihood of error when a defendant voluntarily pleads guilty, experience shows that, as in all human endeavors, mistakes occur in plea proceedings.") See, Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (Listing cases in which persons later proven innocent falsely pleaded guilty or confessed to crimes); see generally Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989). Based on the recognition of such mistakes, the Montgomery court explained that there are "good reasons" as to why a "guilty plea cannot waive the right to appellate review," *Montgomery*, 893 P.2d at 1282.

Third, the "waived" claims. A plea agreement does not waive all claims. "Appeals by defendants convicted on their pleas may involve 'myriad and often complicated' substantive issues, and may be no less complex than other appeals'..." *Halbert v. Michigan*, 545 U.S. 605, 621-22 (2005) (citing, *Kowalski v. Tesmer*, 543 U.S. 125, 145 (2004)).

In *Flores-Ortega* the Court rejected the idea that the presumption of prejudice should not apply merely because "a guilty plea reduces the scope of potentially appealable issues." *Garza v. Idaho*, 139 S.Ct. 738, 747 (2019) (discussing, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). The Court in *Garza* noted that "Flores

- Ortega ... prescribed a presumption of prejudice regardless of how many appellate claims were foreclosed." *Id.* Thus, it stands to reason that a court's "Anders review" and finding of whether the case is frivolous, should in like manner apply to Arizona's of-right PCR procedure for pleading defendants, regardless of how many appellate claims are waived.

Thus, the Ninth Circuit's reasons for departure, noted above, "bears no rational relationship" to "the merit of th[e] appeal," they "have no relation to a rational policy of criminal appeal," and they present "unreasoned distinctions," *Robbins*, 528 U.S. at 277 (citing, *Griffin*, 351 U.S. at 17-18; 21-22; and *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). Instead, those reasons would resolve the appeal in a way that is related to its "scope" and "classification" as a PCR proceeding. That is not the "standard" prescribed in *Robbins*. *Robbins*, 528 U.S. at 277.

Pleading defendants' right to counsel in a first of-right PCR appeal ought to be afforded the same Anders protections that are afforded to trial defendant's right to counsel in their first of-right direct appeals. This is necessary in order to avoid the violation of rights established under settled law.

CONCLUSION

For the foregoing reasons, this Supreme Court should grant the petition for writ of certiorari.

Respectfully submitted this 3rd day of January 2024.

Michael Sanchez

Michael Sanchez, #290235

Petitioner, Pro-per

A.S.P.C. Kingman / Huachuca Unit

P.O. Box 6639

Kingman, AZ 86402

Respectfully resubmitted this 1st day of February 2024.

Michael Sanchez

Michael Sanchez, #290235

Petitioner, Pro-per

A.S.P.C. Kingman / Huachuca Unit

P.O. Box 6639

Kingman, AZ 86402