No. ________

In The
Supreme Court of the United States

ISRAEL WEINGARTEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

There are two related questions presented: (1) whether the *Smith v. Robbins*, 528 U.S. 259 (2000), test for determining whether appellate counsel provided deficient representation under the Sixth Amendment applies when assessing the performance of trial counsel; and (2) whether a criminal defendant who asserts that trial counsel's failure to raise a legal claim amounted to deficient performance must show that the claim was certain to succeed under "controlling authority," as the Second Circuit holds, or that the failure to raise the claim was contrary to "prevailing professional norms," as *Strickland v. Washington*, 466 U.S. 668 (1984), holds and as is supported by the case law of several other circuits.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

In *Strickland v. Washington*, 466 U.S. 668, 688, 690 (1984), the Court held that to decide whether a criminal defense attorney provided deficient representation under the Sixth Amendment a court must look to "prevailing professional norms" because "[n]o particular set of detailed rules . . . can satisfactorily take account of the variety of circumstances faced by defense counsel." In *Smith v. Robbins*, 528 U.S. 259, 287-88 (2000), the Court modified this test for a claim that appellate counsel was ineffective because he or she failed to raise an issue on appeal. In that context, *Smith* held, a court must compare the strength of the omitted issue against the issues that counsel raised in the appeal. Only if the omitted issue is substantially stronger than the issues raised can counsel's performance be found ineffective. The modification to the *Strickland* standard made by *Smith* was based on the recognition that appellate counsel will often winnow preserved issues to "maximize the likelihood of success on appeal," and such strategic choices deserve deference. *Id.*

In this case the Second Circuit imported *Smith*'s approach into the trial counsel ineffectiveness context, and held that to show trial counsel was ineffective for failing to raise two statute of limitations claims Petitioner was required to show that those claims were winners under "controlling authority" at the time counsel failed to raise them. *Weingarten v. United States*, 865 F.3d 48, 58 (2d Cir. 2017). This Court has never held that the *Smith* test applies to claims that trial counsel was ineffective, nor has any circuit other than the Second. And while other circuits have considered the quality of an omitted claim when considering whether trial counsel's failure to raise the claim amounted to deficient performance, none has gone so far as to hold that an attorney's failure to raise a claim only amounts to deficient performance if the claim was a winner under "controlling authority." Instead, those circuits have applied standards that are consistent with *Strickland*'s prevailing professional norms test, such as that the claim must have had a "solid foundation" or been "colorable."

OPINION AND ORDERS BELOW

On July 27, 2017, a Second Circuit panel filed an opinion affirming the district court's denial of Weingarten's 28 U.S.C. §2255 motion to vacate his convictions and sentence for violations of 18 U.S.C. §2423. The district court's two oral orders denying relief are found in transcripts that are included in the Appendix at pages 27-33 and 36-41. The Second Circuit's opinion is published at *Weingarten v. United States*, 865 F.3d 48 (2d Cir. 2017), and is included in the Appendix at pages 1-26.

JURISDICTION

The opinion appealed from was entered on July 27, 2017, and Weingarten filed a petition for panel rehearing or rehearing en banc that was denied on October

12, 2017. *See* App. 42-43. On January 4, 2018, this Court granted a request for an extension of time to file this Petition, until February 9, 2018. *See* No. 17A709. Accordingly, this Petition is timely and the Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Weingarten was convicted under the version of 18 U.S.C. §2423 in effect in 1997 (when Weingarten's alleged offense conduct occurred), which states, in relevant part:

> (a) Transportation with intent to engage in criminal sexual activity. A person who knowingly transports any individual under the age of 18 years in . . . foreign commerce . . . with intent that such individual engage . . . in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than ten years, or both.
>
> (b) Travel with intent to engage in sexual act with a juvenile. . . . [A] United States citizen . . . who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 10 years, or both.

The generally applicable statute of limitations in 1997, 2008 (when Weingarten was indicted), and today is found at 18 U.S.C. §3282(a), which states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

The specific limitations period in 18 U.S.C. §3283 in 1997, when Weingarten's alleged offense conduct occurred, stated:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution *before the child reaches the age of 25 years*.

(Emphasis added.)

The limitations period in §3283 following an amendment in 2003, which is the limitations provision that the government asserts applies to Weingarten's 1997 alleged conduct, stated:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution *during the life of the child*.

(Emphasis added.)

STATEMENT OF THE CASE

I. Initial District Court And Appellate Proceedings

In 2008 Weingarten was charged with offenses under 18 U.S.C. §2423, based on allegations that he sexually abused his daughter in 1997. The abuse claims were first made by Weingarten's daughter in 1997, but they were rejected by everyone, including Weingarten's then-wife. The claims were raised again by Weingarten's daughter and wife years later, in the midst of the couple's divorce and a custody battle over the six younger Weingarten children. The allegations were debunked after repeated investigations by Child Protective Services and a family court case, and Weingarten was given sole custody of the children. Weingarten's ex-wife then took the claims to the FBI and after several more years of delay an indictment was returned.

In pre-trial motions Weingarten's counsel erroneously conceded that his prosecution was not time-barred, asserting that the exception to 18 U.S.C. §3282's five-year limitations period that was found in the 2003 version of 18 U.S.C. §3283 applied to Weingarten. *See* App. 56-57; 18 U.S.C. §3283 (2003) ("No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual . . . abuse . . . of a child . . . shall preclude such prosecution during the life of the child"). Weingarten's counsel made this concession in the midst of arguing that the prosecution should nevertheless be barred under the Fifth

Amendment's due process clause, because of pre-trial delay. *See* App. 57; *Weingarten*, 865 F.3d at 51. But the due process motion could not succeed without a showing of prejudice from the delay, which counsel did not even attempt to show. *See* App. 57. Not surprisingly, the motion was denied.

Weingarten was convicted at trial and sentenced to thirty years custody. That sentence was vacated following Weingarten's first direct appeal but affirmed following his second direct appeal. *See United States v. Weingarten*, 713 F.3d 704 (2d Cir. 2013); *United States v. Weingarten*, 632 F.3d 60 (2d Cir. 2011).

II. District Court Proceedings On Weingarten's 28 U.S.C. §2255 Motion

A. Ineffective Assistance Of Counsel Claim Premised On Failure To Raise Statute Of Limitations Issues

In a subsequent motion to vacate his convictions and sentence filed under 28 U.S.C. §2255, Weingarten argued that counsel's concession with respect to the limitations period amounted to constitutionally ineffective assistance because Weingarten's prosecution was time-barred. Indeed, counsel's concession was doubly erroneous because: (1) section 3283's limitations period only applies to "offense[s] involving" sexual abuse of a minor, section 2423 offenses do not qualify because they do not categorically/necessarily involve sexual abuse of a minor, thus Weingarten's prosecution was time-barred under the generally applicable five-year limitations period in 18 U.S.C. §3282; and (2) even if §3283 applied to Weingarten's alleged conduct, non-retroactivity principles indicate that the version of §3283 in effect when Weingarten allegedly committed the offenses charged (1997) must be applied, and under that version of §3283 the charges were time-barred. Both claims are summarized in more detail below, beginning with the non-retroactivity claim.

1. The Non-Retroactivity Claim

The non-retroactivity issue boils down to whether the 2003 amendment to §3283 could be applied to Weingarten. That amendment extended §3283's limitations period for "offense[s] involving" the sexual abuse of a minor, from when the minor reached twenty-five until "during the life of" the minor. In his §2255 motion Weingarten argued that the 2003 amendment to §3283 could not be applied to conduct he allegedly committed in 1997, and under the 1997 version of §3283 his prosecution was time-barred because the indictment was returned when his daughter was twenty-seven years old. For this argument Weingarten relied on the presumption that statutes do not apply retroactively, "a legal doctrine centuries older than our Republic." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). That presumption can only be rebutted by a "clear statement" from Congress of retroactive effect, *see Johnson v. United States*, 529 U.S. 694, 701 (2000), and Congress never made any such statement with respect to the 2003 amendment to §3283. Weingarten also relied on the fact that when Congress has intended that a new limitations period apply retroactively it has said so explicitly. *See* 18 U.S.C. §3286(b), 2001 Stat. Notes (stating that new limitations period for "crimes of terrorism" applies retroactively); 18 U.S.C. §3293, 1989 & 1990 Stat. Notes (same for financial crimes). Thus, not only did the government fail to rebut the presumption against retroactivity with respect to the 2003 amendment to §3283, Weingarten's position is supported by the doctrine of negative implication. *See, e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 n.11 (1994).

Weingarten also relied on a closely analogous case, *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975). Richardson failed to register for the draft in 1968, when the limitations period was five years. Congress extended that period in 1971. The indictment against Richardson was filed in 1974, which was untimely under the 1968 statute, but timely under the 1971 version. The Third Circuit held that because statutory "law is presumed to operate prospectively in the absence of a clear expression to the contrary," and there was no such expression with respect to the 1971 amendment, the 1968 limitations period controlled. *Id.*

That logic applies here, a conclusion also supported by what occurred in *United States v. Schneider*, 2010 WL 3656027 (E.D. Penn. 2010). There the court addressed whether 18 U.S.C. §3299 applied retroactively to the defendant, who was charged with offenses under §2423. Section 3299 became effective in 2006 and abolished the limitations period for certain offenses against children. In light of *Richardson*, the government conceded that §3299 does not apply retroactively. *See Schneider*, 2010 WL 3656027, at *1 n.1. That is, the impact of *Richardson* was so obvious that the government in *Schneider* conceded the limitations retroactivity issue. It therefore seems impossible to conclude that Weingarten's counsel could reasonably choose not to raise the closely analogous issue with respect to §3283 just – as counsel would later claim – to avoid "clutter."

2. The Categorical Approach Claim

The second limitations issue boils down to whether §3283's "offense involving" language means that its exception to the general five-year limitations period applies only to statutory offenses that categorically, or necessarily, involve sexual abuse of a minor. The government conceded, and the Second Circuit panel tacitly acknowledged, that if the answer is yes then Weingarten's prosecution was time-barred because §2423 reaches more broadly, to purely intent offenses. *See Weingarten*, 865 F.3d at 58.

For this argument Weingarten relied primarily on *Bridges v. United States*, 346 U.S. 209 (1953). Bridges was charged with making a false statement in his naturalization petition. His prosecution was time-barred unless the Wartime Suspension of Limitations Act (WSLA) applied. *See* 18 U.S.C. §3287 (1948). The WSLA suspended limitations periods for "any offense (1) involving fraud or attempted fraud against the United States. . . ." *Id.* The Court said that it "already ha[d] interpreted the language" "offense involving" repeatedly, and that language indicates that §3287 "is limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient." *Id.* at 221 (citing *United States v. Scharton*, 285 U.S. 518, 520 & n.2 (1932) (evading income taxes); *United States v. McElvain*, 272 U.S. 633, 636-37, 639 (1926) (filing false tax returns); *United States v. Noveck*, 271 U.S. 201, 202-03 (1926) (perjury)). The Court then held that the WSLA was inapplicable to Bridges because "defrauding the United States" was not an "essential ingredient of the offense charged." *Id.* at 221. It reasoned that although making a false statement in a naturalization petition will often involve fraud, that offense can be shown without proof of fraud. *See id*. at 221-22. The Court emphasized that "[t]he insertion in the indictment of the words 'procured by fraud' does not change the offense charged. . . . It is the statutory definition of the offense that" controls.[1] *Id.* at 222-23.

The critical language in the WSLA/§3287 – "offense involving" – is the same as in §3283. And the holding in *Bridges* indicates that when Congress used that language again in §3283 it intended it to have the same meaning that this Court has attached to it previously. That conclusion is particularly strong considering that the statutes both deal with limitations

[1] This language, and the cases cited in *Bridges*, show that its "essential ingredient" test is akin to the present day "categorical approach," because the cases cited focused on the elements of the charged offenses. *See McElvain*, 272 U.S. at 638 ("the purpose stated was not an element of perjury"); *Noveck*, 271 U.S. at 203 ("the alleged purpose . . . is not an element of the crime").

periods and appear in the same chapter of Title 18. As a result, the limitations period in §3283 does not apply to §2423 offenses because such offenses do not categorically, or necessarily, involve sexual abuse of a minor.

B. Defense Counsel's Declaration Regarding Failure To Raise Limitations Issues

In response to Weingarten's claims in the §2255 proceedings, the government submitted a declaration from Weingarten's former counsel, Barry Rhodes. In that declaration Rhodes did not explicitly say that he had spotted the two limitations issues, much less explain the research he'd done and his decision-making process when failing to raise them. Instead Rhodes made the following somewhat inscrutable statement:

> What the petitioner contends was an improper "concession," is better labeled a technique of writing and of *appellate strategy*. . . . I always go for what I believe is the strong point and let the weaker possibilities languish. I would not clutter a legal submission with arguments as seemingly tenuous as those proposed by petitioner's latest advocates.

App. 53 (emphasis added). Of course, Rhodes was not handling the case on appeal and thus there was no concern with winnowing issues for an opening brief. And as the Second Circuit's later opinion demonstrates, the limitations claims are far from weak or tenuous.

C. District Court's Denial Of Relief, Remand, And Second Denial

The district court orally denied relief and denied a certificate of appealability (COA) on January 30, 2015. *See* App. 38, 40. When Weingarten sought a COA from the Second Circuit that court *sua sponte* remanded and ordered the district court to give reasons for its denial of relief. *See* App. 34-35. Eight months later the district court judge entered another short oral order and did not say much more than in its first summary denial. *See* App. 29-30.

III. Second Circuit Published Opinion Relating To §2255 Motion

Although Weingarten requested that the case again be summarily remanded for further proceedings, the Second Circuit granted the COA on five issues and the appeal proceeded. The Second Circuit subsequently issued a published opinion affirming the denial of relief on the limitations/ineffectiveness claim, and an unpublished opinion affirming the denial of relief on the other claims raised by Weingarten. The published opinion is the focus of this Petition.

In that opinion the Second Circuit spent several pages addressing the merits of the limitations issues. *See Weingarten*, 865 F.3d at 54-60. Although the panel acknowledged that the arguments that the prosecution was time-barred are strong, it substantially downplayed that strength.[2] But that is not the focus of this Petition because the panel declined to rule on whether either argument was a winner, which was necessary to decide whether Weingarten satisfied the prejudice prong of the two-part test for ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). *See Weingarten*, 865 F.3d at 58 ("[t]he underlying merits question remains for another day, another case"). Instead, the panel held that Weingarten could not satisfy *Strickland*'s deficient performance prong. Its reasoning was as follows.

The panel began by construing the language quoted above from attorney Barry Rhodes's declaration to mean that Rhodes (1) spotted the limitations issues, but (2) chose not to raise them because they would "clutter" the pre-trial motions. *See Weingarten*, 865 F.3d at 53. The panel held that this does not amount to constitutionally deficient performance under the first prong of the *Strickland* test because the limitations issues were not "so obvious that it was unreasonable for Weingarten's counsel to forgo" them. *Id.* at 53. The panel clarified that by "obvious" it meant that there must have been "controlling authority" directly on

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[2] With respect to the non-retroactivity issue the panel: (1) failed to address the Third Circuit's *Richardson* case, though that case was central to Weingarten's argument; and (2) placed great reliance on *United States v. Leo Sure Chief*, 438 F.3d 920, 923-24 (9th Cir. 2006), though that case did not address the issue presented. *See Weingarten*, 865 F.3d at 58. With respect to the categorical issue, the panel ignored the controlling impact of *Bridges* by solely discussing, in a footnote, alternative reasoning in that case on which Weingarten did not rely. *See id.* at 59 n.10.

point with respect to the issues, otherwise Rhodes's decision to not raise the issues could not be considered constitutionally deficient. *Id.* at 58. In arriving at this holding the panel said nothing about *Strickland*'s "prevailing professional norms" test for assessing attorney performance, nor the unrebutted evidence that was submitted by Weingarten that shows Rhodes's performance fell well below that standard. *See* App. 44-50 (declaration of attorney David V. Kirby). Instead the panel relied on the test for ineffective assistance of *appellate* counsel that was approved in *Smith v. Robbins*, 528 U.S. 259, 287-88 (2000), and modified that test to hold that trial counsel's failure to raise a legal claim cannot amount to deficient performance unless that claim was a clear winner under "controlling authority" at the time counsel failed to raise it.

REASONS FOR ALLOWANCE OF THE WRIT

I. Introduction

The Second Circuit's importation of *Smith*'s appellate counsel ineffectiveness test into the trial counsel context is unsupportable, and the test crafted by the Second Circuit is contrary to *Strickland*'s prevailing professional norms test. The Second Circuit's holding is also contrary to the law of several other circuits. While other circuits have applied a quality-of-omitted-claim test when assessing the performance of trial counsel, none has gone so far as to hold that an attorney's failure to raise a legal claim amounts to deficient performance only if the claim was a clear winner under "controlling authority." Instead, the other circuits have held that to render adequate performance an attorney must raise a claim that is "colorable," has a "solid foundation," or is "obvious." All of these tests are consistent with *Strickland*'s prevailing professional norms test, in that they recognize that more is expected of competent counsel than that he or she raise claims that are clear winners. On the other hand, the case law in this area is confusing and, to a degree, in conflict. Accordingly, the Court should grant the writ to clarify whether *Smith*'s test applies to trial counsel ineffectiveness claims, and to eliminate conflict and confusion among the circuits' case law. *See* S. Ct. R. 10(a) & (c).

II. The Second Circuit's Holding Is Contrary To *Strickland*'s "Prevailing Professional Norms" Test, And Erroneously Relies On *Smith*'s Ineffectiveness Test For Appellate Counsel

The bright-line rule that the Second Circuit announced in this case conflicts with *Strickland*. In *Strickland* this Court pointed out that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel," 466 U.S. at 690, nor does the Sixth Amendment "specify[ ] particular requirements for effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* at 688. Thus the Court said that "[t]he proper measure of attorney performance" is "simply reasonableness under prevailing professional norms." *Id.* at 690. The Court has since emphasized that the "prevailing norms" standard "is necessarily linked to the practice and expectations of the legal community. . . ." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). The Court has also indicated that *Strickland*'s prevailing norms standard applies where, as here, counsel failed to raise a legal issue in the trial court. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (holding that courts apply prevailing professional norms standard to assess counsel's failure to raise a potentially case-determinative suppression motion).

The Second Circuit's clear winner under "controlling authority" test conflicts with *Strickland* because it is un-moored from prevailing professional norms – indeed, the opinion says nothing about the prevailing professional norms test. And un-rebutted evidence shows that counsel's performance did not pass muster under the prevailing norms standard. Weingarten submitted a declaration from David Kirby, a former (1) United States Attorney for the District of Vermont and (2) Chief of General Crimes and Appeals in the United States Attorney's Office for the Eastern District of New York. *See* App. 48-50. After providing a foundation for his "understanding of the practices and expectations of the legal community, and its professional norms and standards, with respect to defending a criminal case," Kirby opined:

11. It was unreasonable for defense counsel to not raise either of th[e limitations] issues. Unlike some issues of deficient performance, this is not an issue that involves multiple potential variables that can make counsel's decision hard to assess in hindsight. Here, the prosecution was either time barred or it was not. Given the substantiality of the two issues, the potential impact for the defense if either issue was successful, and the lack of any real cost for raising the issues, there could have been no sound strategic reason for defense counsel not to raise either issue.

12. Sometimes on appeal an attorney may choose not to raise an issue because the attorney does not want to distract from more promising issues, or because of word-limits for briefs. It is hard for me to imagine any circumstances in which those types of considerations would justify not raising, in the district court or on appeal, the statute of limitations issues involved here. Again, that is because the issues are substantial, and if successful they completely bar the prosecution.

App. 46-47; *see also Mayo v. Henderson*, 13 F.3d 528, 532 (2d Cir. 1994) (relying on expert testimony to determine prevailing norms); *United States v. Askew*, 88 F.3d 1065, 1071 (D.C. Cir. 1996) (finding that petitioner failed to provide evidence as to what was required under prevailing professional norms). The government offered no rebuttal evidence and Kirby's conclusions are so firmly rooted in common sense that they are irrefutable.

Kirby's testimony also highlights the error in the Second Circuit's focus on the strength of the claim omitted versus the more broad-based prevailing professional norms test. The former is the type of test eschewed by the Court in *Strickland* when assessing the performance of trial counsel, because it cannot account for the range of factors that might arise when defending a case in the trial court. On the other hand, the prevailing professional norms test allows for consideration of factors evident in this case in addition to the strength of the claims. Specifically, if either of the limitations claims were successful that would have completely barred Weingarten's prosecution, and there was no cost to raising them. *Compare Premo v. Moore*, 562 U.S. 115, 123-27 (2011) (holding that attorney's decision to forego suppression motion in favor of quick guilty plea was reasonable because that course came with substantial benefits, and avoided potential risks). Given these circumstances no reasonably competent counsel would forego raising the limitations claims, particularly because those claims were well-supported in longstanding Supreme Court case law.

The root of the Second Circuit's failure to apply the appropriate test under *Strickland* is its reliance on case law that addresses ineffective assistance of *appellate* counsel, especially its opinion in *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994). In *Mayo* the court held that when deciding whether an appellate attorney performed deficiently a court must consider whether "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Id.* at 533. In arriving at this holding the Second Circuit relied on the Seventh Circuit's opinion in *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985), which stated that "[g]enerally, only when ignored issues are clearly stronger than those presented [on appeal], will the presumption against ineffective assistance of counsel be overcome." This Court subsequently adopted *Greer*'s test for assessing deficient performance of appellate counsel in *Smith v. Robbins*, 528 U.S. 259, 287-88 (2000), finding that the test was appropriate because it took into account that appellate counsel will often winnow issues raised in the trial court to maximize the chance of success on appeal. *See also Bourne v. Curtin*, 666 F.3d 411, 414 (6th Cir. 2012); *Malicoat v. Mullin*, 426 F.3d 1241, 1249 (10th Cir. 2005). In sum, the panel in this case effectively applied the issue-comparison approach approved by this Court in *Smith*, but did so in the context of assessing the performance of trial, not appellate, counsel.

The panel in *Weingarten* also twisted the "significant and obvious" language in *Mayo*, and the logic behind this Court's holding in *Smith*, to arrive at its clear winner under "controlling authority" test. *See Weingarten*, 865 F.3d at 53, 58 ("given the lack of controlling authority on this difficult issue, Weingarten's retroactivity argument was not so obvious that it was objectively unreasonable for his trial counsel to forgo it in favor of others"). Not only did this over-state the holding of *Smith* and *Mayo*, it ignored that the test set out in those cases applies to claims that *appellate* counsel provided deficient performance. That test does not apply to trial court counsel for the obvious reason that counsel in the trial court may, and usually should, raise all potentially viable issues to preserve them, and leave it for appellate counsel to winnow the issues later if appropriate. *See, e.g.*, *Lynch v. Dolce*, 789 F.3d 303, 311, 314 (2d Cir. 2015) (making clear that it is "[i]n [the appellate] context [that] counsel has no duty to raise every non-frivolous issue that could be raised," and finding deficient performance because "[c]ounsel did not face a choice between the two arguments; they could have been presented as alternative grounds"). Weingarten's counsel failed to do that and went so far as to affirmatively waive the limitations issues by conceding that the 2003 version of §3283 applied to Weingarten.

It is evident that the Second Circuit panel applied, and crafted, the wrong test in Weingarten's case, which led to the wrong conclusion. The appropriate test is whether counsel's performance lived up to prevailing professional norms. The Second Circuit's test renders trial counsel a constitutional nullity in the context of raising legal issues because it requires less of counsel than is expected of the district court under the plain error standard. *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003).

III. The Second Circuit's Holding Is Contrary To Case Law From Several Other Circuits

Although *Smith*'s comparative approach in the appellate context does not fit the trial level context, there is, of course, utility in considering the strength of an omitted issue when assessing trial counsel's performance. That utility is somewhat tempered given that the strength of the claim question is dealt with under *Strickland*'s prejudice prong. Nonetheless, at least eight other circuits have considered the strength of an omitted claim when assessing whether an attorney's failure to raise it amounted to deficient performance. But none of them have adopted anything close to the Second Circuit's clear winner under "controlling authority" test. Instead, those circuits have held that to render constitutionally adequate performance counsel must raise issues that are "colorable," "obvious," "compelling," "would likely have been meritorious," *et cetera*. These tests are consistent with *Strickland*'s prevailing professional norms test because they recognize that reasonably competent counsel will raise issues beyond those that are clear winners. But, as the review below shows, the case law in this context conflicts to a degree and is confusing.

The Tenth Circuit has held that to render adequate performance under the Sixth Amendment counsel in the trial court must raise any issue that has a "solid foundation." *See United States v. Anderson*, 483 Fed. App'x 462, 466 (10th Cir. 2012) (unpublished opinion); *Coleman v. Brown*, 802 F.3d 1227, 1234 (10th Cir. 1986); *United States v. Snyder*, 787 F.2d 1429, 1432-33 n.1 (10th Cir. 1986); *United States v. Afferbach*, 754 F.2d 866, 870 (10th Cir. 1985).

The Eighth and Ninth Circuits have held that competent counsel should raise issues that are "obvious" from the record. *See United States v. Liu*, 731 F.3d 982, 997 (9th Cir. 2013) (counsel failed to raise limitations defense); *United States v. Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011) (same). This is arguably commensurate with the Tenth Circuit's "solid foundation" test because if an issue is obvious in the record presumably it has a solid foundation.

Similar to the "obvious" test is the Sixth Circuit's holding in *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), in which the court assessed whether defense counsel provided deficient performance when he failed to object to evidence about the defendant's pre-arrest silence. The court held that counsel "should have realized that the use of Combs's prearrest silence against him was at least constitutionally suspect, and should have lodged an objection on that basis." *Id.* at 286.

In *McGraw v. United States*, 106 F.3d 391, 1997 WL 34431 (4th Cir. 1997) (unpublished opinion), the Fourth Circuit held that trial counsel should have raised a limitations issues because it was "at least . . . colorable."

In *United States v. Headley*, 923 F.2d 1079 (3d Cir. 1991), the Third Circuit held that trial counsel provided deficient performance because he failed to ask for a mitigating role adjustment under Sentencing

Guidelines §3B1.2. In doing so, the court noted that it was "not suggest[ing] that an adjustment for role in the offense was required," it was only holding that competent counsel would have sought such an adjustment because the district court might have applied that adjustment if he had. *See id.*

In *United States v. Freeman*, 818 F.3d 175, 178 (5th Cir. 2016), the Fifth Circuit held that counsel provided deficient performance because he failed to raise "a compelling argument" that the prosecution was barred by the statute of limitations. *See id.* at 178. This could be considered a more stringent standard than those tests discussed above, but arguably not much more so.

Finally, in *United States v. Mercedes-De La Cruz*, 787 F.3d 61, 67 (1st Cir. 2015), the First Circuit found counsel provided deficient performance because she "fail[ed] to file a timely motion to suppress Mercedes's statements" based on an unlawful arrest. The court stated that this amounted to deficient performance because a "motion to suppress Mercedes's statements would likely have been meritorious and without repercussion to other defense strategies. . . ." *Id.* at 68. While this test is closer to the Second Circuit's clear winner standard than are the other tests discussed above, it is still much less stringent.

In sum, the Second Circuit's clear winner under "controlling authority" test conflicts with the case law of every circuit that has looked to the quality of an omitted issue when assessing whether counsel's failure to raise the issue amounted to deficient performance.

But there is longstanding and widespread confusion in this area, a factor that strongly supports allowing the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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