

No. **25 - 5528**

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IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR L. VITASEK,
Petitioner,

vs.

RYAN THORNELL, *et al,
Respondent(s)

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

PETITION FOR A WRIT OF CERTIORARI

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* David Shinn was replaced as Director of the Arizona Department of Corrections by Ryan Thornell.

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I. QUESTION PRESENTED

In Penson v. Ohio, 488 U.S. 75 (1988), this Court held that, for the purposes of Federal habeas relief, once "A Court" determines that the trial record supports arguable claims, ...the criminal defendant is entitled to representation. 109 S.Ct. at 351.

This case presents the following question:

Under Penson v. Ohio, 488 U.S. 75 (1988), whether the Magistrate, the District Court Judge, and the Ninth Circuit Court of Appeals lost jurisdiction to provide rulings on this case once the Magistrate determined an arguable issue existed without appointing counsel to represent the defendant on the arguable issue that the magistrate recognized.

II. PARTIES TO THE PROCEEDINGS

This Petition stems from a habeas corpus proceeding in which the Petitioner, Arthur L. Vitasek, was the Petitioner before the United States District Court for the District of Arizona and the Appellant before the United States Court of Appeals for the Ninth Circuit. Petitioner is a prisoner sentenced to life and in custody of Ryan Thornell, the Director of the Arizona Department of Corrections. The Director and his predecessors were the Respondents before the United States District Court for the District of Arizona and the Appellees before the United States Court of Appeals for the Ninth Circuit.

III. RULE 29.6 STATEMENT

The Petitioner, Arthur L. Vitasek, is not a corporate entity.

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V. PETITION FOR A WRIT OF CERTIORARI

Petitioner, Arthur L. Vitasek, respectfully petitions for a writ of Certiorari to review the Penson jurisdictional issues of the United State District Court, District of Arizona, and the United States Court of Appeals for the Ninth Circuit.

VI. OPINIONS BELOW

The 7-29-2025 ORDER from the United States Court of Appeals for the Ninth Circuit denying appeal and a COA is attached as Appendix A. The 4-25-2025 judgement by the District Court Judge is attached as Appendix B. Excerpt of the Magistrate's R and R showing he acknowledged an arguable issue was supported by the record is attached as Appendix C. The 05-23-2025 ORDER from the United States District Court denying a motion for a rehearing is attached as Appendix D.

VII. STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over the habeas cause under 28 U.S.C. §2241 and 2254. Under 28 U.S.C. §1291, the Ninth Circuit Court had jurisdiction over the habeas issues certified for the appeal. However, these Courts lost jurisdiction under Penson v. Ohio, 488 U.S. 75 (1988) once the Magistrate, (A Court), recognized an arguable issue was supported by the record without appointing new counsel to represent the Appellant on the arguable issue recognized by the Magistrate, "A Court." This Court has jurisdiction pursuant to 28 U.S.C. §2254(1) over the issues presented to the District Court and the Ninth Circuit Court of Appeals under the 6th and 14th Amendments, of the U.S. Constitution and Penson v. Ohio, 488 U.S. 75 (1988).

The Petitioner is appealing the 9th Circuit's denial of a COA. 25-3476 dated 7-29-25 and post-judgment motions, seeking review of these rulings.

Appendix "A"

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that: "In criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

The Equal Protection and Due Process clauses of the Fourteenth Amendment of the U.S. Constitution provides that: "indigent defendants have the right to counsel once right to appeal is granted."

IX. STATEMENT OF THE CASE

A) Pretrial Relevant Facts

The defendant catches Martin E. ("ME"), Brandon M. ("BM"), and Cody M. ("CM"), all swimming naked at the community pool where the boys live. ME and BM were engaged in a sex act together. BM is older than ME.¹ Because of the sexual abuse ME is no longer allowed to be around these boys. Fights ensue and CM calls ME "a fag" at school because of what he saw between his brother and ME. ME reports the name calling and CM is called into the principal's office to explain his conduct. To protect his brother and himself from trouble CM claims he saw the defendant molest ME not his brother. The police are called, and all three boys are taken into custody and interrogated by police with no parent present or called. ME strongly denies CM's claims. BM, at first, denies any abuse, but subjected to the police detective's interrogation tactics he changes his denial to a claim of sexual abuse. The police find other boys who were sexually involved with these boys and utilizing the same interrogation techniques to get the boys to accuse the defendant of a sex

¹ ME is the son of the defendant's girlfriend.

crime even though at first, they deny it.

Because the boys were involved in what the police believed to be abnormal sexual behavior, the police looked for an adult who they believed had influenced the boys into the abnormal sexual behavior. The police targeted the defendant due to his amicable relationship with the boys and their families.

With no on-going emergency, the police took into custody and interrogated the boys until they disclosed what the police believe had happened. Once the police coerced the boys into creating a sex abuse claim, the detective would then assist the boy on the elements of the created sex crime through numerous leading questions to ensure the created allegation was chargeable.² The prosecutor indicted the defendant on the tainted sex abuse allegations that the police assisted the boys to create.

B Trial Relevant Facts

During the trial the prosecutor knew she had a problem with the police's sexual questioning, so she came up with a scheme to eliminate the unchastity evidence from the interrogations and the defendant's defense. Using the Rape Shield Law combined with false statements to the Court, she influenced the Court to forego the unchastity hearing,³ and convinced the Court to allow her to redact the unchastity evidence from the interrogations without review from the Court or without the Court conducting an evidentiary hearing on the preclusion of this exculpatory unchastity evidence.⁴

Even though the reason the prosecutor was allowed to play the interrogations to the

² In an interview the defendant conducted with Detective Butch Gates he admitted he asked leading questions to ensure the allegations the boys disclosed were chargeable.

³ The prosecutor falsely instructed Judge Reinstein that the defendant never requested an unchastity hearing even though the hearing was requested in Judge Stephen's Court. RT 10-7-10 pp. 52-53 and p. 70

⁴ To ensure the prosecutor could ~~redact~~ sexual questioning from the interrogations, she falsely instructed Judge Reinstein that Judge Arellano gave her permission to redact all the unchastity evidence even though Judge Arellano never made such a ruling.

jury was to allow them to determine;

“What, if any, affect they (the police’s sexual questioning) had on the responses of the victims...and therefore the ‘credibility of those witnesses’.”
9-26-11 Motion p. 4 para. 1

The prosecutor redacted all the police sexual questioning which affected the boys’ responses before she ~~played the~~ interrogations to the jury. Because of the Redactions, the jury was unable to determine the affect the sexual questioning had on the boys’ allegations,⁵ even though this is what they were instructed to do.

Because of the violation of Rule 106,⁶ the defendant was unable to cross-examine the witnesses on their prior statement which showed motive and how the boys obtained the knowledge needed to create the allegations.

Because counsel was unable to cross-examine the state’s witnesses on their prior statements, the police assisted them in creating, Counsel wanted assurance from the Court the prosecutor could not use the tainted interrogations to prove the truth of the matter. The Court provided counsel with this assurance. RT 9-28-11 pp. 8-9.

After the trial was over, during final jury instruction arguments, the Court provided both sides with instruction number 40 which read, and was consistent with the law of the case, “These recordings were not presented for the truth of any statements made during the interview.” RT 10-27-11 p. 7, 22-23. The prosecutor argued that if the Court does not allow them to use the hearsay police interrogations to prove their case, the jury must acquit the defendant because no testimonial evidence existed to obtain a conviction. RT 10-27-11 p. 10, 12-17.

⁵ See: Dr. Phillip Esplin’s affidavit, Appendix “E”; Dr. Dean Tong’s affidavit, Appendix “F”; and Toxicologist Mark Stoltman’s affidavit, Appendix “G”, Appendix “D” BE’s redacted interrogation.

⁶ Rule 106 allows an adverse party to introduce any part of a recording that in fairness ought to be considered at the same time.

Even though the foundational requirements under the Rules of Evidence were not satisfied, the Court changed the jury instruction to satisfy the prosecutor's demands. The Courts new instruction instructed the jury to base their verdict on the recordings and not on the witness's trial testimony. The jury found the defendant guilty on all charges basing their verdict solely on the redacted, tainted, hearsay, interrogations of children, and not on the witness's trial testimony even though the trial testimony proved the defendant was innocent. See Counsel's Affidavit Appendix "H".

C) Appeal Direct Review

Even with these obvious appeal issues, counsel filed an Ander's Brief.⁷ In Arizona if you do not have the funds to obtain effective counsel, all you receive is an Ander's Brief.

The defendant filed a pro-se brief raising numerous. 6th and 14th Amendment violation claims. In the Appellate Courts 18-page ruling, the Court did not state that the issues raised were not arguable issues but incorrectly applied clearly established Federal law. In the Courts ruling on the Rape Shield Law, the Court placed the Rape Shield Law superior to the defendant's 6th Amendment rights to present a complete defense. In the Appellate Courts assessment on the Trial Courts ex-post facto ruling, (changing the law of the case after trial was over from disallowing the prosecutors to use the hearsay recordings to prove their case to allowing them to do so), the Appellate Court stated that because the witness's testified and were subjected to cross-examination there was no Confrontation Clause violation. However, the assessment failed to evaluate the ex-post facto violation and Rule 106 where the defendant had the right to notice on the States use of the hearsay recordings to prove their case prior to cross-examination and the right to cross-examine the witnesses on

⁷ Ander's v. California, 386 U.S. 738 (1967)

their prior statements to police including the redacted portions. This issue, which the Magistrate recognized as an arguable issue, required an attorney to submit a fully adversarial briefing⁸ before the District Court could obtain jurisdiction and adjudicate the issue. Id.

D) State Post-Conviction Proceedings

During post-conviction proceedings, the Petitioner raised a 6th and 14th Amendment denial of counsel on appeal. The PCR Court Judge stated he presumed the Appellate Court knew the law and the Court followed it, and stated the Court of Appeals judgment is not reviewed in PCR proceedings. The PCR Court has a constitutional duty to determine if the defendant 6th and 14th Amendment rights to counsel during appeal and effective assistance during trial were violated then make a ruling on the violations, not dismiss the violations claiming the PCR Court cannot review the violations if the Appellate Court fails to rule on it during direct appeal. Furthermore, these issues can only be raised during PCR proceedings making it a duty by the PCR Court to review if any arguable issue existed during appeal, then provide relief for the violation.

In Arizona, the Appellate Court will not adjudicate an Ander's violation on direct appeal and the PCR Court will not review the Appellate Courts absence of review of the Ander's Violation. As in this case, and may others in Arizona, the defendants are denied their 14th Amendment Due Process right to counsel and/or effective assistance during appeal and every Arizona Court fails to follow clearly established Federal law even though they are mandated to do so.

E) PCR Appeal Review

During appeal, the defendant raised his complete denial of counsel during appeal. The

⁸ Penson v. Ohio, 488 U.S. 75 (1988)

Court ruled the argument fails because the defendant did not argue "how he was prejudiced by counsel's ineffectiveness." This ruling acknowledged that appellate counsel was ineffective but the court failed to appoint new counsel claiming the defendant presented no evidence that the outcome would have been different had counsel raised the issues. Appendix "K".

The Arizona Courts either do not understand clearly established Federal law pursuant to Penson or the Courts purposely refuse to accept it. Penson, Ander's, Supra.

In Penson v. Ohio, 488 U.S. 75 (1988) the U.S. Supreme Court held that once "A" Court determines that the trial record supports arguable claims...the criminal appellant is entitled to representation. 109 S.Ct. at 351. Penson does not require evidence that the outcome would have been different had counsel raised the issues. The only requirement is that the "trial record supports arguable claims" for the appellant to receive counsel, which the Magistrate confirmed. Appendix "C".

Penson also made a decisive pronouncement that a showing of prejudice is not required when an appellate counsel files an Ander's Brief. Prejudice is only required when a claim involves ineffective assistance of trial counsel. Penson explained the whole point of Ander's was that claims of arguable merit cannot be decided without the "full benefit of an adversarial presentation by an attorney." 109 S.Ct. at 351. Something the Arizona Courts deprived the defendant of receiving.

F) Habeas Proceedings In District Court

During the proceedings, the Magistrate reviewed the issues then submitted a Report and Recommendation ("R&R") (Doc 42). In the Petitioner's habeas application, the Petitioner raised the issue of a 6th and 14th Amendment violation because of the failure to allow the defendant to present a complete defense. This was Ground 6. Appendix "I".

Within the Magistrates R&R, the Magistrate recognized Ground 6 as an arguable

issue. (Doc 42 p. 52, 13-16) ("The Court recognizes there is weight to both sides of the argument on this issue...") Appendix "C".

Once "A" Court recognized Ground 6 as an arguable issue, everything after this acknowledgement of an arguable issue is irrelevant. Penson held "Once A Court determines that the trial record supports arguable claims...the criminal appellant is entitled to representation." 109 S.Ct at 351. Once the Magistrate recognized an arguable issue every Court lost jurisdiction until the Penson law is satisfied. i.e. "the criminal appellant is entitled to representation." Id.

The Magistrate also agreed with the Arizona Courts that the defendant must show prejudice to succeed on the ineffective assistance claim⁹. As explained, prejudice is not a requirement to succeed on a claim of ineffective assistance during appeal when counsel files an Ander's Brief. Penson, 109 S.Ct at 351.

Here again another court either does not understand clearly established Federal law pursuant to Penson or the court refuses to comply with the law.

In the District Court Judge's judgement, he also did not have jurisdiction to render this judgement until the Penson law was satisfied. He states the defendant failed to raise a claim that had merit. This directly conflicts with the Magistrate who "recognized there is weight to both sides of the argument on this issue." Doc 42 p. 52, 13-16

Because these two judges disagreed with each other another court needed to settle the disagreement. The Petitioner appealed to the Ninth Circuit Court of Appeals.

G) Federal Habeas Proceedings In The Ninth Circuit

After the District Court returned its judgement on 4-25-2025, the Petitioner submitted a notice of appeal and an application for Certificate of Appealability to the Ninth

⁹ (Doc 42 pp. 48-49) Appendix C

Circuit Court.

Because the State Courts and the District Courts conflicted with each other on the Penson and Ander's requirements and whether the Petitioner submitted an arguable issue that required a fully adversarial briefing before the Court could adjudicate the petition, the Ninth Circuit Court of Appeals had a duty to resolve these inconsistencies. The Ninth Circuit Court denied the appeal merely stating "the appellant has not shown that jurists of reason would find it debatable whether the Petitioner states a valid claim of the denial of a constitutional right..." This was unreasonable because the Magistrate recognized a valid denial of the 6th and 14th Amendment Constitutional rights. Appendix "C"

The Ninth Circuit Court went on to say... "and that," "Jurists of reason would find it debatable whether the district court was correct on its procedural ruling." This was also unreasonable. Penson held the Courts procedural ruling was incorrect unless the Court remanded the case back to the State Court to reinstate the appeal and have counsel brief the Court on all issues within the Petitioners pro-se brief.

Therefore, once the Magistrate, "A Court" recognized that Ground 6 was an arguable issue, the Ninth Circuit Court lost jurisdiction to issue anything except an order remanding the case back to the District Court to resolve the jurisdictional issues.

These are the facts of this case. The facts are supported by the record, and the facts are undisputed.

X. REASONS FOR GRANTING RELIEF

Penson v. Ohio, 488 U.S. 75 (1988) created a distinct mandate to the lower courts that when an appellate attorney files an Ander's Brief, the Appellant does not have to show prejudice to the court during his appeal. The only requirements to show the Ander's Brief was inadequate is when "A Court" recognizes an arguable issue is

supported by the record. Once the court recognizes an arguable issue is supported by the record, the court is then required to appoint an attorney so the attorney could submit a fully adversarial briefing on the arguable issue before the court could adjudicate the issue. In other words, for the court to retain jurisdiction over the petitioner's case the court must first obtain a fully adversarial briefing from an attorney on the arguable issue recognized by the court. Penson 109 S.Ct. at 351.

This Petitioner seeks review of A Court's jurisdiction over the habeas cause when an appellate attorney files Ander's Brief, and the court recognizes an arguable issue is supported by the record.

1. For Penson and Ander's conflict in the Ninth Circuit, the court's jurisdiction cannot be obtained until an attorney files a ~~Fu~~ll adversarial briefing with the court on the arguable issue recognized by the court.

This petition identifies the constitutional amendments and Supreme Court cases from which this Ander's and Penson jurisdiction claim derives, describes the specific legal protections owed to the defendant under the constitutional amendments, and provides the facts and documents that show the defendant was deprived of those protections.

In order for the Federal courts to obtain jurisdiction over the Petitioner's request for a writ of habeas corpus he must first exhaust the remedies available in the courts of the State. 28 U.S.C.S. §2254(b)(1)(A). Furthermore, the Ninth Circuit Court of Appeals has held that when a claim is made under the United States Constitution, the Petitioner must give the state courts a fair opportunity to act on the Federal claim. Castillo v. McFadden, 399 F.3d 993, 998-999 (9th Cir 2005).

During the Petitioner's direct appeal, counsel filed an Ander's Brief. Ander's v.

California, 386 U.S. 738 (1967). The Petitioner filed a pro-se appeal brief where he raised numerous 6th and 14th Amendment claims which the Appellate Court denied. During the Petitioner's post-conviction relief proceedings, the Petitioner raised ineffective assistance during his appeal because numerous 6th and 14th Amendment issues existed where counsel merely filed an Ander's Brief. The PCR Court denied the claims stating the PCR Court cannot review the violations because he assumed the Appellate Court knows the law and followed it.¹⁰ Upon review in the Court of Appeals the court stated the argument on counsel failed because the defendant did not argue "how he was prejudiced by counsels' ineffectiveness."¹¹ However, the defendant raised the issues under the 6th and 14th Amendments which gave the state courts their fair opportunity to act upon the Federal claims. Castillo, Supra

During habeas proceedings the Petitioner raised a 6th and 14th Amendment violation. Appendix "I". In the Magistrate's R&R he "recognized there is weight to both sides of the argument" on Ground 6. Since the Magistrate is considered "A Court", Rule 72(a), once he recognized that the trial records supported an arguable claim, the criminal defendant was "entitled to representation." Penson 109 S.Ct. at 351.

In Penson, the Supreme court held that when counsel files an Ander's Brief, and the court recognizes an arguable issue, then the Petitioner's appeal "never took place." Penson, 109 S.Ct. at 353-355.

Since the Court recognized the trial record supported an arguable claim, which voided the defendant's appeal, the District Court and the Ninth Circuit Court lost jurisdiction over the habeas proceedings to adjudicate Ground 6 of the habeas petition,

¹⁰ See: Appendix "J", p. 3 para 7; p. 4 para 2-3

¹¹ See: Appendix "K", p. 3 at ¶8

(The ground the Magistrate recognized as an arguable issue), until the Court appointed new counsel to submit a fully adversarial briefing on the arguable issue recognized by the Magistrate. McGrath v. Kristensen, 340 U.S. 162, 71 S.Ct. 224, 95 L.E.D. 173 (1950). (...jurisdictional questions are of primary consideration and can be raised at any time...) Mitchell v. Maurer, 293 U.S. 237, 55 S.Ct. 162, 79 L.E.D. 338 (1934). (A Court lacking jurisdiction cannot render judgement but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking). Mithcell also held that the Appellate Federal Court must not only determine its own jurisdiction but also that of the lower courts as well in the cause under review. Id.

Penson also made a decisive pronouncement that a showing of prejudice is not required when an appellate attorney files an Ander's Brief. Prejudice is only a required showing to succeed on ineffective assistance of trial counsel. Penson rejected the Strickland v. Washington, 466 U.S. 668 (1984) prejudice standard in cases involving Ander's violations. Penson explained the whole point of Ander's is that cases involving any claim of arguable merit "cannot be decided" without the "Full Benefit of An Adversarial Presentation by An Attorney." Penson, 109 S.Ct. at 351:

"It is important to emphasize that the denial of counsel in this case left Petitioner completely without representation... this is quite different from a case which it is claimed counsels' performance was ineffective... it is therefore inappropriate to apply either the prejudice requirement of Strickland or harmless error analysis." Penson, 109 S.Ct at 353-354.

Therefore, because a jurisdictional question has been raised concerning jurisdiction of the District and Ninth Circuit Courts, which those courts failed to address, this Court should remand this case back to those courts with instructions and further proceedings. Turnstall v. Brotherhood of Locomotive, Fireman, and Engineer, 323 U.S. 20, 65 S.Ct. 235 (1944).

2. The District Court's interpretation of a Penson and Ander's violation is inconsistent with the Eighth Circuit Courts which requires the Supreme Court to resolve the issue.

In Evans v. Clarke, 868 F.2d 267 (8th Circuit 1989) the Eighth Circuit Court of Appeals revisited Ander's v. California, 386 U.S. 738 (1967). The Eighth Circuit Court stated Ander's lays down the duties of an appointed counsel and an appellate court when counsel concludes that a direct criminal appeal is frivolous and moves to withdraw.

The Eighth Circuit Court reviewed the Evans case with fresh guidance from the Supreme Court in the form of Penson v. Ohio, 488 U.S. 75 (1988), which the Court held "proves the Courts continued dedication to the vigorous enforcement of Ander's."

In Evans' habeas proceedings, his petition was first referred to a magistrate. The Magistrate considered what degree of prejudice a Petitioner must show to succeed on a claim of ineffective assistance of appellate counsel or considered if it was sufficient that the Petitioner showed a claim of at least arguable merit. The Magistrate thought the later standard should be used and that Evans had met the standard. Evans, 868 F.2d at 268.

In the Petitioners case the Magistrate simply agreed with the State Appellate Court that the claim failed because the Petitioner did not argue how he was prejudiced by counsels' ineffectiveness, Appendix "C" p. 48, even though the Petitioner showed a claim of at least arguable merit. Id at p. 52, 13-16. A definite conflict between the two magistrates.

On appeal, the Eighth Circuit Court of Appeals evaluated the issue using Penson v. Ohio, 488 U.S. 75 (1988). The Eighth Circuit Court held that Evans was entitled to relief because as Penson noted where issues of arguable merit are present, Penson holds that appellate review cannot take place without a fully adversarial briefing by counsel. Evans, 868 F.2d at 269.

In the Petitioner's case the District Court failed to follow Penson. Even though the Magistrate recognized Ground 6 as an arguable issue, the District Court judge stated the Petitioner failed to identify any. The District Court judge also states the Petitioner failed to show that the Arizona Court of Appeals rejection of the ineffectiveness claim "pursuant to Penson" was contrary or an unreasonable application of Penson v. Ohio (Federal law). Appendix "B" p. 29 A Conflict with the District Courts own ruling and contrary to the Eighth Circuit Courts findings.

During direct appeal the Arizona Court of Appeals stated the defendant "raised the issues himself in multiple supplemental briefs and presented no evidence that the outcome would have been different had counsel raised the issued." Appendix "K" p. 3 18.

In Evans the Eighth Circuit Court held that "No more can we now try to decide whether Evans could have won his appeal. He is entitled to a valid determination by the State Appellate Court, and here, because of the Ander's violation, he did not get it on his direct appeal." Evans, 868 F.2d at 269-270.

The Arizona Court determined the Petitioner had to prove to the Court how the outcome would have been different had counsel raised the issues, where the Eighth

Circuit Court determined that they cannot decide whether the petitioner's outcome would have been different had counsel raised the issues. The only determination was whether there was an arguable issue and whether a fully adversarial briefing by an attorney was submitted. If the fully adversarial briefing was not present, appellate review cannot take place. Evans, 868 F.2d at 269-270. These two Courts have different opinions on whether the Petitioner had to prove the outcome of the appeal would have been different had counsel raised the issues.

The Evans court concluded that under Penson since arguable issues were present within the record, the Petitioner must be released unless the state court reinstates his appeal and appoints counsel to brief all points of arguable merit. Evans, 868 F.2d at 270.

The rulings by the Arizona Courts, the Magistrate and the District Court should have been consistent with the Eighth Circuit Court of Appeals. However, the Arizona and District Courts not only conflicted with the Eighth Circuit Court, but they conflicted with each other, requiring the U.S. Supreme Court to intervene and provide instructions to these Courts on the proper way to adjudicate an Ander's and Penson violation.

3. This Court should grant review to resolve Penson and Ander's jurisdictional issues and Court inconsistencies.

The Arizona PCR Court denied the Petitioners denial of assistance of counsel during appeal claim using the Strickland standard of prejudice and requiring the defendant to prove to the court how the proceedings would have been different had an

attorney raised the issues. Appendix "J". The PCR Court also refused to adjudicate the denial of assistance claim because the judge assumed the Court of Appeals knew the law and followed it. Id. However, the Arizona Court of Appeals does not review a denial of assistance claims during direct review. Martinez v. Ryan, 566 U.S. 1, 13 (2012). This Court should grant review because the PCR Courts' conclusions are inconsistent with Penson, Ander's, and the Eighth Circuit Court of Appeals.

During direct review the Arizona Court of Appeals determined the denial of assistance of appellate counsel failed because the defendant did not "argue how he was prejudiced by counsel's ineffectiveness." Appendix "K". The Court's statement acknowledged counsel was ineffective but refused to adjudicate the issue because the court required the defendant to provide evidence to show how "the outcome would have been different had counsel raised the issues." Id. This Court should grant review because the Arizona Court of Appeals conclusions are inconsistent with Penson, Ander's, and the Eighth Circuit Court of Appeals.

During habeas proceedings the Magistrate denied the denial of assistance of appellate counsel claim utilizing the Strickland Prejudice Standard and requiring the defendant to prove to the court how the outcome of the proceedings would have been different but for counsel's unprofessional errors. Appendix "C" p. 48.

The Magistrate then acknowledged Ground 6 was an arguable issue, Id at p. 52, but instead of following the Penson requirements of remanding the case back to the State Court to have an attorney submit a fully adversarial briefing on Ground 6, the Magistrate violated the defendant's Due Process rights pursuant to Penson and Ander's

by failing to ORDER the remand. Furthermore, once the Magistrate recognized an arguable issue was supported by the record, the Magistrate, the District Court, and the Ninth Circuit Court of Appeals lost jurisdiction over the proceedings until the Penson and Ander's requirements were satisfied. Penson, Ander's, Supra. This Court should grant review because the Magistrate's conclusions are inconsistent with Penson, Ander's, and the Eighth Circuit Court of Appeals.

In the District Courts judgement, the judge acknowledged the Petitioner raised the argument on how he did not have to show prejudice but denied the claim stating the defendant failed to show the Arizona Court of Appeals' rejection of the ineffectiveness claim was contrary to or an unreasonable application of Federal law. Appendix "B" p. 29. In every court proceeding the defendant cited the Penson and Ander's Federal law, and it was therefore unreasonable for the Arizona Courts not to comply with it.

Furthermore, once the court recognized an arguable issue was supported by the record, the courts lost jurisdiction to proceed any further until Penson and Ander's requirements were satisfied. Evans 868 F.2d at 269.

The District Court judge stated the Petitioner failed to establish that any appellate claim he identified and raised on appeal had merit. Appendix "B" p. 29. However, the Magistrate clearly identified that Ground 6 was an arguable issue. Appendix "C" p. 52.

The District Court stated the Petitioner "cites no authority" for not having to prove what an experienced attorney would have submitted. However, Penson, which is the authority the Petitioner cited, clearly states the Petitioner does not have to show how the outcome of the proceedings would have been different had counsel raised the issues.

The Petitioner's only requirement to satisfy Penson and Ander's is that "A Court" determined that the trial record supports arguable claims. Penson, 109 S.Ct. at 351, Evans, 868 F.2d at 269-270.

Furthermore, once the Magistrate confirmed the trial record supported an arguable issue, the District Court lost jurisdiction to enter a judgement unless the Penson and Ander's requirements were satisfied. Id.

This Court should grant review because the District Courts' judgement is inconsistent with the Magistrates R&R, Penson, Ander's, and the Eighth Circuit Court of Appeals.

Finally, even though the Ninth Circuit Court of Appeals denied the Petitioner's appeal, the Ninth Circuit Court failed to determine jurisdiction before issuing their ORDER to deny the appeal. Pursuant to clearly established Federal law, once the Magistrate recognized the record supported an arguable issue the only ruling the Ninth Circuit Court could make would be determining jurisdiction. McGrath v. Kristensen; Mitchel v. Maurer, Supra.

XI. CONCLUSION AND PRAYER FOR RELIEF

This case is a strong vehicle for considering whether "A Court" can obtain jurisdiction over a habeas cause when another court recognizes the record supports an arguable issue when appellate counsel files an Ander's Brief. The issue represents the precise point of disagreement between Penson and the Magistrate, the District Court and the Federal Court of Appeals, illustrating the effects of these courts failure to require the Court to obtain a *fully* adversarial briefing from an attorney on an issue recognized by "A Court" as an arguable issue supported by the record.

The Penson and Ander's violations have escalated to the point where it has become a constitutional crisis. The Penson and Ander's Constitutional requirements have diminished where the courts no longer honor Penson's constitutional requirements but instead demand criminal defendants to show prejudice and provide the Court with "evidence" how the proceedings would have been different had counsel raised the issues. This constitutional crisis requires the U.S. Supreme Court to intervene and require the Courts to abide by this Courts prior established law pursuant to Penson v. Ohio, 488 U.S. 75 (1988). For the foregoing reasons, Mr. Vitasek prays that this Court grant a Writ of Certiorari to resolve the jurisdictional and ineffective assistance questions presented.

RESPECTFULLY SUBMITTED this 8th day of August, 2025

By Arthur L. Vitasek
Arthur L. Vitasek
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