No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

LINO ALBERTO CHAVEZ,

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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Chavez's appointed counsel in an "of right" Rule 32 proceeding determined there were no arguable issues and filed a two-page notice with the court, which did not conduct an independent review of the record pursuant to *Anders v. California* because "no *Anders*-type review is required in Rule 32 proceedings."

The district court granted a conditional writ of habeas corpus because the state court misapplied clearly established federal law by holding that *Anders* does not apply to "of right" Rule 32 proceedings. The Ninth Circuit reversed, holding that the district court was required to presume that the state court applied the law correctly. The Ninth Circuit then ignored the holding from *Smith v. Robbins* that any state court procedure must be "superior to, or at least as good as" the procedures established in *Anders*, and instead held that "a fairminded jurist could conclude that Arizona's of-right PCR procedure reasonably ensures that the appeal will be resolved on the merits," despite the fact that Arizona's procedures very clearly follow certain procedures held unconstitutional by *Robbins*.

This Case presents the following two questions for review:

1. When a state court decision holds that "no *Anders*-type review is required" in an instance in which all parties concede that *Anders* applies, and no other language from the state court opinion indicates that it evaluated the case under *Anders* or applied the standard of *Anders* or its progeny, must the district court nonetheless apply an inference that the state court knows and applies the law in order to grant that decision AEDPA deference?

2. Did the court of appeals read *Anders* and *Smith v. Robbins* so narrowly as to effectively render it dead letter by:

   (A) requiring that state procedures need to be *exactly the same* as those already held unconstitutional by this court in order to be "contrary to" clearly established federal law under 28 U.S.C. § 2254(d)(1); and

   (B) ignoring the holding of *Robbins*, which requires that any state procedure for indigent appeals be "superior to, or at least as good as" those promulgated by this Court in *Anders*, and which clearly lays out certain procedures which do not satisfy this standard, and instead holding that "a fairminded jurist could conclude" a state procedure, which contains procedures that were held to be insufficient by *Robbins*, satisfies the requirements of *Anders* and *Robbins*, when evaluating whether a state procedure is "an unreasonable interpretation" of clearly established federal law under 28 U.S.C. § 2254(d)(2)?

PARTIES TO THE PROCEEDING

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

STATEMENT OF RELATED PROCEEDINGS

Chavez v. Brnovich, No. 21-15454 (9th Cir.) (October 7, 2022 order denying rehearing; August 1, 2022 opinion reversing district court's conditional grant of habeas corpus).

Chavez v. Shinn, No. CV-19-05424-PHX-DLR (D. Ariz.) (February 24, 2021 order granting conditional writ of habeas corpus).

State v. Chavez, No. CR-17-0582-PR (Ariz.) (July 24, 2018 order denying review).

State v. Chavez, No. 1 CA-CR 15-0482 PRPC (Ariz. Cr. App.) (November 16, 2017 order granting review but denying relief).

State v. Chavez, No. CR2012-005785-001 (Ariz. Sup. Cr. Maricopa Cnty.) (January 29, 2014 order denying petition for post-conviction relief; January 18, 2013 judgment and sentence).

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In Arizona, all criminal defendants – even those who have pled guilty – are entitled to an appeal. Instead of filing a traditional direct appeal under Arizona Rule of Criminal Procedure 31, defendants who have pled guilty may only file a petition for post-conviction relief under Arizona Rule of Criminal Procedure 32. Unlike most other Rule 32 petitions for post-conviction relief, this "of-right" Rule 32 petition is not discretionary – all pleading defendants are entitled to take one as of right. Because an "of-right" Rule 32 is a pleading defendant's only appeal as of right, he has a constitutional right to appointed counsel.

In 2012, Petitioner Lino Albert Chavez pled guilty to one count of second-degree murder. He filed a Notice of Post-Conviction Relief to initiate his "of-right" Rule 32 proceeding – the functional equivalent of his direct appeal. Mr. Chavez was appointed counsel who determined that there were no arguable issues. If counsel had made that determination in a traditional direct appeal, consistent with *Anders v. California* and *State v. Leon*, she would have had to file an *Anders* brief – a detailed factual and procedural history with citations to the record. The reviewing court would then perform its own independent review of the record for arguable issues. But because Arizona courts have determined that *Anders* and *Leon* do not apply in Rule 32 proceedings, Chavez received none of these procedural protections. Instead, his counsel filed a two-page "Notice of Completion" containing a bare allegation that there were no arguable issues. This brief did not contain any factual or procedural history of the case, nor did it contain citations to the record or list potentially arguable issues. Mr. Chavez was then left to file his own *pro se* PCR

without the assistance of counsel and without an independent review of the record by an appellate court. The Arizona Court of Appeals held that this procedure met the minimum constitutional standards.

The Arizona Court of Appeals decision denying Mr. Chavez the procedural protections required by *Anders* is both contrary to *and* an unreasonably application of clearly established federal law. The district court recognized this when it granted Chavez's habeas petition and issued a conditional writ of habeas corpus requiring the state to release him within 90 days unless he were permitted to file a new "of-right" PCR *with* all the same procedural protections to which a non-pleading defendant would otherwise be entitled. The government appealed, and the court of appeals reversed.

This case presents the opportunity for the Court to determine whether federal courts sitting in habeas jurisdiction must apply a presumption that state courts know and apply the law even in the face of language which clearly indicates that they did not. It also presents this Court the opportunity to clarify what rule from *Smith v. Robbins* is "clearly established" – is it the holding that procedures for ensuring indigent defendants get fair representation on appeal must be "superior to, or at least as good as" those promulgated by this Court in *Anders*, and clearly delineating certain procedures which *do not* meet that standard? Or is it the court of appeals' new standard, which simply permits any "fairminded jurist" to determine "that the appeal will be resolved on the merits" without any standards at all?

OPINIONS BELOW

The court of appeals' opinion is reported at 42 F.4th 1091 (9th Cir. 2022). The district court's order granting Mr. Chavez a conditional writ of habeas corpus (App.002) is unreported. The Arizona Superior Court decision dismissing the petition for post-conviction relief is unpublished (App.064). The Arizona Court of Appeals decision denying relied is published at 407 P.3d 85 (Ariz. Ct. App. 2017). The Arizona Supreme Court's order denying review is unpublished. (App.061).

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on August 1, 2022. *Chavez v. Brnovich*, 42 F.4th 1091 (9th Cir. 2022). The court of appeals denied a timely filed petition for rehearing on October 7, 2022. (App.001). On December 21, 2022, Justice Kagan granted Petitioner's timely filed motion to extend the filing deadline until March 6, 2023. *See* Supreme Court Order dated December 21, 2022.

PROVISIONS OF LAW INVOLVED

The Fourteenth Amendment to the U.S. 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

I. LEGAL FRAMEWORK

A. All criminal defendants – including pleading defendants – in Arizona are entitled to a criminal appeal.

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. The right to appellate review of a criminal conviction applies in all criminal cases – including those cases where a defendant enters a guilty plea. *Wilson v. Ellis*, 176 Ariz. 121, 123, 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."). Although entering into a guilty plea "forecloses a defendant from raising nonjurisdictional defects" in the proceedings that precede the plea, *State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984), a defendant who has pled guilty may nonetheless appeal the "voluntary, knowing and intelligent" nature of a guilty plea, *State v. Zunino*, 133 Ariz. 117, 118, 649 P.2d 996, 997 (Ct. App. 1982), and "the validity of the sentence imposed" by the trial court after entry of the plea, *State v. Phillips*, 139 Ariz. 327, 329, 678 P.2d 512, 514 (Ct. App. 1983).

For many years, defendants who pled guilty filed direct appeals in the relevant appellate court under Arizona Rule of Criminal Procedure 31 just as they would have if they went to trial. *See, e.g. Zunino*, 133 Ariz. at 118, 649 P.2d at 997; *Phillips*, 139 Ariz. at 329, 678 P.2d at 514. But in the 1980s, the Arizona Supreme

Court began to urge that appellate review of these proceedings should proceed via the same avenue as post-conviction relief proceedings – Arizona Rule of Criminal Procedure 32. *See, e.g. State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987); *State v. Anderson*, 160 Ariz. 412, 773 P.2d 971 (1989). In 1992, the Arizona Legislature amended the appeal statute, A.R.S.§ 13-4033, to clarify that a pleading defendant may not file a direct appeal in the court of appeals. 1992 Ariz. Sess. Laws Ch. 184 § 1 (40th Leg., 2d Reg. Sess.). But the Arizona Supreme Court held that this statutory change still permitted "of-right" petitions for post-conviction relief "in lieu of direct appeal." *Wilson*, 176 Ariz. at 123, 859 P.2d at 746. The Supreme Court also amended the Rules of Criminal Procedure to require appointment of counsel in "of-right" petitions for post-conviction relief. Ariz. R. Crim. P. 32.4(c) (Dec. 1, 1992).

At the time Petitioner initiated his state post-conviction proceeding, "a Rule 32 proceeding [was] the *only* means available for exercising the constitutional right to appellate review" for pleading defendants. *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616 (1995) (emphasis added).[1] "[A] Rule 32 petition for post-conviction relief in the trial court is analogous to a direct appeal for a pleading

[1] After Petitioner's state court proceeding was completed, and after he filed his habeas petition in the District Court, the Arizona Supreme Court added Rule 33 to the Arizona Rules of Criminal Procedure. *See* Section III. A defendant files a petition for post-conviction relief under Rule 33 "if the defendant pled guilty or no contest to a criminal offense." Ariz. R. Crim. P. 33.1. Rule 32 is now reserved only for defendants "convicted and sentenced for a criminal offense after a trial or a contested probation violation hearing, or in any case in which the defendant was sentenced to death." Ariz. R. Crim. P. 32.1.

defendant." *State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996) (internal citations omitted).

B. Arizona has adopted procedures to comply with *Anders v. California*, but those procedures do not apply to "of-right" Rule 32 petitions.

In *Anders v. California*, the United States Supreme Court held that when a state guarantees the right to appeal in a criminal case, an appellate court must conduct an independent review of the record when appointed counsel finds no meritorious issues on appeal. 386 U.S. 738, 744 (1967). "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* at 744.

Arizona adopted the procedures required by *Anders* in *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). In Arizona, "when appointed counsel determines that a defendant's case discloses no arguable issues for appeal, counsel files an *Anders* brief. The brief contains a detailed factual and procedural history of the case, with citations to the record." *State v. Clark*, 196 Ariz. 530, 537, 2 P.3d 89, 96 (Ct. App. 1999). A copy of the *Anders* brief is provided to the defendant, who has the option to file pro se supplemental briefing. *Anders*, 386 U.S. at 744, *Clark*, 196 Ariz. at 537, 3 P.3d at 96. After receiving the *Anders* brief, "the court reviews the entire record for reversible error. If any arguable issue presents itself, the court directs appointed counsel to brief the issue. Only after the court has ascertained that counsel has conscientiously performed his or her duty to review the record, and has itself

reviewed the record for reversible error and found none, will the court allow counsel to withdraw." *Clark*, 196 Ariz. at 537, 3 P.3d at 96.

The framework outlined in *Leon* and *Clark* applies to a defendant who exercises his right to trial. *See State v. Thompson*, 229 Ariz. 43, 45, 270 P.3d 870, 872 (Ct. App. 2012). But a defendant who pleads guilty is denied the same protections. Defendants who plead guilty are entitled to appointed counsel in their "of-right" Rule 32 petitions. *Smith*, 184 Ariz. at 458, 910 P.2d at 3 (1996). But if appointed counsel in a Rule 32 "of-right" proceeding concludes that an appeal "has no merit," she may refuse to proceed, in which case the defendant's *only* recourse is to file a *pro se* petition. *Montgomery*, 181 Ariz. at 260, 889 P.2d 614, 618. The Arizona Supreme Court has specifically held that the protections of *Anders* do not apply to "of-right" Rule 32 proceedings. *Id.* ("That is not to say, however, that an *Anders*-like review for fundamental error is required whenever a defendant exercises the right to file [an 'of-right'] PCR petition. We reject that idea, as we have before."); *Wilson*, 176 Ariz. at 124, 859 P.2d at 747 ("[We] are not commanding, nor do we want, trial courts to conduct *Anders*-type reviews in ['of-right'] PCRs."); *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984) (noting that *Anders* does not require fundamental error review at every level of the appellate process).

II. PROCEDURAL HISTORY

A. Mr. Chavez's PCR counsel files a two-page "Notice of Completion" and effectively withdraws, leaving Mr. Chavez to file a PCR petition *pro se*.

In January 2012, a grand jury in Maricopa County, Arizona indicted Mr. Chavez on one count of first-degree murder, one count of robbery, and one count of

trafficking in stolen property. *State v. Chavez*, 243 Ariz. 313, 314, 407 P.3d 85, 86 (Ct. App. 2017). Mr. Chavez entered into a plea agreement whereby he agreed to plead guilty to one count of second-degree murder and the State agreed to dismiss all other counts alleged in the indictment. Pursuant to the plea agreement, the court sentenced Mr. Chavez to 16 years. *Id.*

Mr. Chavez filed a timely Notice of Post-Conviction Relief and was appointed counsel. *Id.* Instead of filing a petition for post-conviction relief, his appointed counsel filed a "Notice of Completion of Post-Conviction Review by Counsel; Request for Extension of Time to Allow Defendant to File Pro Per Petition for Post-Conviction Relief" in the Superior Court. (App.069). This Notice stated that PCR counsel reviewed the case file but was "unable to find any claims for relief to raise in post-conviction relief proceedings" and requested that Mr. Chavez be permitted to file a petition *pro se*. The Superior Court granted the Order permitting additional time for Mr. Chavez to file a *pro se* petition and ordered Ms. Green to remain "in an advisory capacity." (App.067). There is no evidence in the record that Ms. Green provided any assistance whatsoever to Mr. Chavez in her "advisory capacity."

Chavez filed a pro se petition for post-conviction relief, which the superior court summarily denied. *Chavez*, 243 Ariz. at 314, 407 P.3d at 86.

B. Mr. Chavez files a petition for review in the Arizona Court of Appeals alleging that he was denied the protections of *Anders v. California* in his "of-right" PCR petition and the Court orders extensive briefing on that issue.

Chavez submitted a *pro se* Petition for Review to the Court of Appeals seeking review for "fundamental error." *Chavez*, 243 Ariz. at 315, 407 P.3d at 87. In

support of this ground for relief, Mr. Chavez cited *Montgomery v. Sheldon*, which held that "*Anders*-like review for fundamental error" *was not required* when a defendant files a PCR petition. *Id.*

Upon receiving the petition for review, and in light of the recently decided case of *Pacheco v. Ryan*, No. CV-15-02264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 12, 2016), which held that "*Anders* protections apply to Rule 32 of-right proceedings" and that "the requirements of those protections" were not satisfied by existing Arizona procedures, *id.* at *10, the Court of Appeals *sua sponte* ordered briefing on three additional issues, including "Do the procedural requirements of *Anders*…apply in a 'Rule 32 of-right proceeding,' and if so, how?" (App.062).

C. The Court of Appeals denies relief.

On November 16, 2017, the Arizona Court of Appeals issued its decision. The Court first held that Chavez had not waived his *Anders* issue by failing to raise it in the superior court. *Chavez*, 243 Ariz. at 314, 407 P.3d at 87. Addressing the merits of Chavez's claims, however, the court of appeals denied relief. Noting that "the Arizona Supreme Court, and this court, have held that no *Anders*-type review is required in Rule 32 proceedings," the court of appeals held that the prophylactic measures imposed by *Anders* do not apply to post-conviction proceedings under Rule 32 – even "of-right" proceedings. *Id.* at 89, 407 P.3d at 317. The court of appeals grounded this holding in their view that a pleading defendant does not have the right to counsel in an "of-right" Rule 32 proceeding – despite the fact that this proceeding is the equivalent of the direct appeal that the Arizona constitution guarantees in all criminal cases. *Id.*

The court of appeals bolstered its holding with the observation that "the practicalities of the matter demonstrate the fallacy in Chavez's contentions," arguing that *Anders*-type review would be difficult to perform in an "of-right" PCR proceeding. *Id.* at 89-90, 407 P.3d at 317-18 ("[T]he court is simply not situated to undertake an *Anders*-type review in a PCR proceeding."). But ultimately the court of appeals rooted its decision in binding case law from the Arizona Supreme Court, simply stating that "without further guidance from either the Arizona Supreme Court or the United States Supreme Court, we will continue to follow our state's established procedure" of denying *Anders* protections to pleading defendants. *Id.* at 318, 407 P.3d at 90.

Because the court of appeals decision rested entirely on the question of whether *Anders*-type review was required in "of-right" Rule 32 proceedings, the Court did not address whether the procedures afforded Mr. Chavez satisfied *Anders* and its progeny. However, its finding that a superior court "is simply not situated to undertake an *Anders*-type review in a PCR proceeding," implicitly acknowledged that the procedures in Mr. Chavez's case did not satisfy *Anders*. *Id.*

Mr. Chavez filed a petition for review in the Arizona Supreme Court, which was denied. (App.061). The Arizona Court of Appeals opinion is thus the "last reasoned decision" of a state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

III. THE ARIZONA SUPREME COURT AMENDS RULE 32 IN LIGHT OF THE COURT'S DECISION IN *CHAVEZ*.

Shortly after the Arizona Court of Appeals issued its decision in *State v. Chavez*, the Arizona Supreme Court assembled a task force whose purpose was to

recommend changes to Arizona Rule of Criminal Procedure 32. That task force filed its Rule Change Petition on January 10, 2019. Among other changes, the Rule Change Petition proposed that Rule 32 be split into two separate rules of criminal procedure, with the new Rule 33 containing "all the provisions concerning post-conviction relief for defendants who entered a guilty or no-contest plea." (App.012). The new Rule 33 would allow "'pleading' defendants to have a single, self-contained rule, customized to their procedural circumstances, to guide them through the post-conviction process." (App.012-13)

The Task Force was aware of the issue posed by *Chavez* and listed "*Anders*-type review/*Chavez* issues" in its initial list of topics for consideration. Recognizing that the Court of Appeals' decision in *Chavez* posed an issue, the Task Force implemented some changes to the new Rule 33 to implement an *Anders*-type briefing procedure. "After discussing *State v. Chavez*. . . members decided to establish a list of rule requirements that counsel must address when filing a Notice of No Colorable Claims." (App.020-21). This list differed from the requirements of Rule 32 "because they are tailored to whether the defendant was convicted after a trial or entered a plea." (App.021).

The proposed Rule 33 included a list of twelve items that a "Notice of No Colorable Claim" *had* to include. (App.032-33). The rule that was ultimately adopted by the Supreme Court was more robust and included a specific list of sixteen things that counsel had to brief in order to file a "Notice of No Colorable Claim":

> If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant. The notice must include or list:
>
> (1) a summary of the facts and procedural history of the case;
>
> (2) the specific materials that counsel reviewed;
>
> (3) the date counsel provided the record to the defendant, and the contents of that record;
>
> (4) the dates counsel discussed the case with the defendant;
>
> (5) the charges and allegations presented in the complaint, information, or indictment;
>
> In the notice, counsel should also identify the following:
>
> (6) that the plea agreement contains the correct classification of offenses and the correct sentencing range of each offense;
>
> (7) any potential errors related to the entry of the plea for which there were no objections, but which might rise to the level of fundamental error;
>
> (8) any determination of the defendant's competency that was raised prior to sentencing;
>
> (9) any objections raised at the time of sentencing;
>
> (10) the court's determination of the classification and category of offenses for which the defendant was sentenced under the plea agreement;
>
> (11) any aggravating factors are supported by the record;
>
> (12) the court considered any mitigation evidence that was offered;
>
> (13) the court's determination of pre-sentence incarceration credit;
>
> (14) the sentence imposed by the court;
>
> (15) if a sentence above the presumptive term was imposed, the court relied on at least one proven statutory aggravating factor; and
>
> (16) any potential claims of ineffective assistance of counsel.

Ariz. R. Crim. P. 33.6(c). Counsel also now has to fill out a "checklist" contained in Form 25(b), "with citations to the pertinent portions of the record." *Id.* The proposed comment to Rule 33.6(c) notes that these changes are necessary "to ensure that substantial justice is done." (App.033).

The new Rule 33 – including the list of sixteen items that must be included in a "Notice of No Colorable Claim" – was adopted by the Supreme Court. It became

effective on January 1, 2020, more than five years after Mr. Chavez's PCR counsel filed the two-page "Notice of Completion" at issue in this case.

IV. ON HABEAS PROCEEDINGS, THE DISTRICT COURT GRANTS A CONDITIONAL WRIT OF HABEAS CORPUS AND THE COURT OF APPEALS REVERSES.

A. The District Court grants a conditional writ of habeas corpus.

Chavez filed a timely petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254. The district court granted the petition and issued a conditional writ requiring that Mr. Chavez be released within 90 days unless he "is permitted to file a new of-right Rule 33 PCR proceeding, including the filing of either a merits brief by counsel or a substantive brief consistent with *Anders v. California*, 386 U.S. 738 (1967)." (App.007).

The district court divided the inquiry into two questions. First, the District Court considered the "Applicability Question" – whether *Anders* applied to Mr. Chavez's PCR proceeding. It answered this question in the affirmative, holding that "[t]he state court decision that no *Anders*-type review is required was an unreasonable application of clearly established law." (App.004). The district court reached this conclusion by noting that "it is clearly established law that *Anders* applies to a defendant's first appeal as of right." *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987)).

Second, the district court considered the "Adequacy Question" – whether "the procedures provided to petitioner were 'at least as good as' those provided by *Anders*." *Id.* In finding that the procedures afforded Mr. Chavez were *not* adequate to satisfy the constitutional requirement, the district court noted that the

procedures Chavez received were "nearly identical to the California procedures rejected in *Anders*." *Id.* The district court found that "[s]ubmission of a mere no-merit letter unaccompanied by an *Anders* brief" was insufficient – even though PCR counsel was appointed by the court to "remain in an advisory capacity" until the final disposition of the PCR. *Id.* The "advisory counsel" was insufficient to satisfy the constitutional requirement because "the role of advisory counsel. . . is not that of an active advocate on behalf of his client." *Id.* The district court also found that "a one-tier system, like Arizona's, is inadequate because a trial judge 'who understandably had little incentive to find any error warranting an appeal'" would also review the "of-right" PCR petition. *Id.* (quoting *Smith v. Robbins*, 528 U.S. 259, 281 (2000)).

The district court also rejected the State's argument (which was not raised until oral argument, after the petition had been fully briefed) that Mr. Chavez's claim was procedurally defaulted. The district court found that "Petitioner's claims were properly presented to the Arizona Court of Appeals," and that even if they were not, "the Court of Appeals did not rely on any independent state procedural bar in denying [Mr. Chavez] relief." (App.007). The district court also found that this claim had been waived because the State waited "until oral argument to raise it." *Id.* The State appealed.

B. The Court of Appeals reverses the grant of habeas corpus.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court decision. *Chavez v. Brnovich*, 42 F.4th 1091 (9th Cir. 2022). The court of appeals first held that the phrase "no *Anders*-type review is required in

Rule 32 proceedings" from the state court opinion should not be given its plain meaning – that Arizona courts do not apply *Anders* to "of-right" Rule 32 proceedings. *Id.* at 1099. Instead, the court of appeals read that statement to mean that *Anders* applies, but Arizona courts simply don't do any of the things that *Anders* requires when reviewing "of-right" Rule 32 proceedings. *Id.* This Court noted that it read "*Anders*-type review" as shorthand for "the one aspect of the *Anders* procedure that Chavez focused on – an independent review of the record by the PCR court for arguable issues." *Id.* Because the court of appeals held that the state court *must have* meant to say that *Anders* applied, it also held that the state court *must have* determined that the procedures afforded Chavez were adequate under *Anders* – even though it could point to nothing in the state court opinion that even remotely indicated that the state court conducted such a review.

Second, because the court of appeals found that the state court had held that the procedures afforded Chavez complied with *Anders*, it applied ADEPA deference to that determination. *Id.* at 1101. Although the district court found that the procedures Chavez received were "nearly identical to the California procedures rejected in *Anders*," (App.005), the court of appeals rejected that finding. It identified two ways in which the procedures in *Anders* differed from the procedures afforded Chavez by Arizona: (1) instead of determining whether any claims would have "merit" as was the case in *Anders*, the Arizona court requires counsel to determine if such claims are "colorable;" and (2) instead of permitting counsel to withdraw upon finding the appeal unlikely to succeed, the Arizona court requires

counsel to remain "in an advisory capacity." *Chavez*, 42 F.4th at 1101. Because the Arizona procedure – though *substantially similar* to the procedure ruled unconstitutional in *Anders* – is not *exactly the same* as that procedure, the court of appeals determined that the state court's decision upholding it was not "contrary to clearly established federal law."

Turning to the question of whether the decision was "an unreasonable application of federal law," the court of appeals again answered in the negative, reading the relevant precedent so broadly that it could *never* effectively be found to have been applied unreasonably. Despite the fact that *Smith v. Robbins*, 528 U.S. 259 (2000), explicitly says that a state must apply certain procedures, at a minimum, to comply with *Anders* – procedures which Chavez was unquestionably not afforded – the court of appeals determined that "the rule announced in *Smith* [*v. Robbins*] is very general" and requires only that a state's procedure "reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Chavez*, 42 F.4th at 1101. The court of appeals then went on to explain that, because this Court has not found that *the exact procedures* followed by Arizona did not comport with due process, "fairminded jurists" could disagree about whether the procedures reasonably ensured an indigent's appeal would be resolved on the merits. If true, this holding effectively announces a new rule with respect claims of *Anders* violations on habeas review – the claim must fail unless this Court has previously struck down the *exact procedures* challenged. *Id.* at 1102-

03. Otherwise, even a change in wording, e.g. exchanging "colorable" for "meritorious," is fatal to an *Anders* claim on habeas review.

Finally, the court of appeals determined that clearly established federal law required that *Anders* apply to Arizona's "of-right" PCR proceedings – underscoring the importance of its determination that the state court actually did hold that (all evidence to the contrary notwithstanding). *Chavez*, 42 F.4th at 1098.

REASONS FOR GRANTING REVIEW

I. THE NINTH CIRCUIT INCORRECTLY APPLIED THE PRESUMPTION THAT A STATE COURT KNOWS AND APPLIES THE LAW EVEN THOUGH ANY PURPORTEDLY AMBIGUOUS LANGUAGE IN THE STATE COURT OPINION SUGGESTS THAT IT MISAPPLIED CLEARLY ESTABLISHED FEDERAL LAW

A. It is clearly established federal law that *Anders* applies to Arizona's "of right" Rule 32 proceedings.

All parties to this proceeding – and the court of appeals –agree that *Anders* applies to Chavez's "of-right" Rule 32 proceeding. *Chavez v. Brnovich*, 42 F.4th 1091, 1098 (9th Cir. 2022). That holding is correct on the merits.

It is clearly established federal law that a defendant is entitled to appointed counsel on his first appeal as of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). It is also clearly established federal law that the prophylactic framework set forth in *Anders v. California* must apply when a defendant has a preexisting right to counsel. *Id.* Because Chavez had a right to counsel in his "of-right" Rule 32 proceeding, the protections of *Anders* apply. The state court decision reaching the opposite conclusion is contrary to clearly established federal law.

A State is under no federal constitutional obligation to provide appellate review of criminal convictions. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005). "Having provided such an avenue, however, a State may not 'bolt the door to equal justice' to indigent defendants." *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)). Arizona guarantees the right to a criminal appeal. Ariz. Const. Art. 2, § 24 ("In criminal prosecutions, the accused shall have the right . . . to appeal in all cases."). And because such an appeal is guaranteed "in all cases," Arizona law provides an "of-right" postconviction proceeding pursuant to Rule 32 when a defendant has pled guilty. *See Summers v. Schriro*, 481 F.3d 710, 717 (9th Cir. 2007) (holding Arizona's "Rule 32 of-right proceeding was a form of direct review" under AEDPA). The Federal Constitution thus imparts a right to effective assistance of appointed counsel in "of-right" proceedings under Rule 32. *See Evitts v. Lucey*, 469 U.S. 387, 388 (1985) ("[T]he Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal as of right."); *State v. Ward*, 211 Ariz. 158, 162, 118 P.3d 1122, 1126 (Ct. App. 2005) ("of-right" Rule 32 petition "is the functional equivalent of a direct appeal.").

Even effective counsel, however, will sometimes not find any arguable issues on appeal. When that happens, this Court has required that counsel must nonetheless advocate on behalf of the defendant, which "requires that he support his client's appeal to the best of his ability." *Anders*, 386 U.S. at 744. In *Anders*, this Court held that, in order to vindicate a defendant's right to effective assistance of counsel, when appellate counsel finds no colorable issues on appeal he must

nonetheless file a brief "referring to anything in the record that might arguably support the appeal." *Id*. It further held that the appellate court, using this "*Anders* brief" as a roadmap, must "proceed[], after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id*. If the court is satisfied that there are no arguable issues, it may dismiss the appeal. *Id.* On the other hand, if the court finds arguable issues, it must "afford the indigent the assistance of counsel to argue the appeal." *Id*.

The procedures outlined in *Anders* are not constitutional commands themselves, but merely "a prophylactic framework" that this Court established "to vindicate the constitutional right to appellate counsel." *Robbins*, 528 U.S. at 273. The procedures in *Anders* are intended as "safeguards" to ensure that "a criminal appellant [is not] denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80 (1988). The framework established by *Anders* – and further explicated by this Court's later jurisprudence – applies in every appeal that a defendant may take as of right.

This Court has repeatedly held that a defendant is entitled to the protections of *Anders* when he has the constitutional right to counsel. Chavez unquestionably had the constitutional right to counsel in his "of right" Rule 32 proceeding. Thus, any state court decision declining to apply *Anders* to that proceeding would be contrary to clearly established federal law.

B. The court of appeals improperly read this court's case law to require it to bend over backwards and misread the clear text of the state court opinion in order to find that it correctly applied clearly established federal law.

Because it was clearly established federal law that *Anders* applied to Arizona's "of right" Rule 32 procedures, the court of appeals' finding that the state court opinion properly held that *Anders* applied was vital to its ultimate holding. The court of appeals read *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) to require that it give the state court opinion "the benefit of the doubt." But *Visciotti* does not stand for the proposition that the plain language of a state court decision should be ignored in favor of a strained interpretation.

In *Visciotti*, this Court held that the California Supreme Court's occasional use of the term "probable" instead of "reasonably probable" when describing the standard for evaluating ineffective assistance of counsel claims should be "given the benefit of the doubt." 537 U.S. at 24. But *Visciotti* does not involve a clear statement from the court that a certain rule of law does not apply. That is the case here, where the state court very clearly stated that "no *Anders*-type review is required in Rule 32 proceedings." *Chavez*, 243 Ariz. at 317, 407 P.3d at 89. And although the state court opinion does not flatly say that it is holding that *Anders* does not apply to "of-right" Rule 32 proceedings, its statements throughout the opinion leave little doubt that its holding relies on such a finding:

- "[A]n of-right Rule 32 petitioner is not entitled to a review of the record by the superior court for arguable issues as required for direct appeals under *Anders v. California* and *State v. Leon*. *Chavez*, 243 Ariz. at 314, 407 P.3d at 86 (internal citations omitted).

- "[T]he Arizona Supreme Court, and this court, have held that no *Anders*-type review is required in Rule 32 proceedings." *Id.* at 317, 407 P.3d at 89.

- "While Arizona has granted defendants in of-right post-conviction proceedings the right to counsel, and the federal constitution guarantees defendants counsel in such proceedings, our supreme court has found no requirement that such state-created post-conviction review be subject to *Anders* review." *Id.* (internal citations omitted).

- "Because the superior court is not able to undertake an extra-record investigation, the court is simply not situated to undertake an *Anders*-type review in a PCR proceeding." *Id.* at 318, 407 P.3d at 90.

- "I agree that under controlling Arizona Supreme Court authority and our current Rules of Criminal Procedure, Chavez is not entitled to the relief he requests. I write separately, however, to express my view that there are compelling reasons for the Arizona Supreme Court to consider modifying the procedural rules to provide for a limited *Anders*-type review in Rule 32 of-right proceedings for pleading defendants that is similar to the review currently provided on appeal for non-pleading defendants." *Id.* at 319, 407 P.3d at 91 (Cattani, J., specially concurring).

The court of appeals decision held that these clear statements do not mean that *Anders* did not apply, but rather that *Anders* applies but Arizona courts don't do "*Anders*-type review." But it does not explain what is left of *Anders* without this review.

Indeed, this Court in *Robbins* recognized that *Anders* required something more than what was afforded Chavez here. 528 U.S. at 266 (""The precise holding in *Anders* was that a 'no merit' letter…was not enough.'" (quoting *People v. Wende*, 600 P.2d 1071, 1076 (Cal. 1979)). Thus, a determination that "no *Anders*-type review is required" is synonymous with a holding that *Anders* has no application. The *Anders*-type review is the beating heart of *Anders*. *See Penson v. Ohio*, 488 U.S. 75, 82-83 (1988). Without that procedure, *Anders* means nothing.

Arizona courts have recognized that *Anders* requires an independent review of the record in order to confirm counsel's assessment that the appeal presents no arguable issues. The Arizona Court of Appeals has held that "[t]he *Anders* line of decisions outlines a procedure that must be followed to ensure compliance with these minimum constitutional standards." *Clark*, 196 Ariz at 536, 2 P.3d at 95. This procedure is, in short, that "counsel first files a brief that indicates to the appellate court that counsel has diligently attempted to find an arguable issue for the defendant," and then "[t]he appellate court then reviews the record to ensure counsel's diligence." *Id.* That is the *Anders* procedure. *See also State v. Gilreath*, 107 Ariz. 318, 318, 487 P.2d 385, 385 (1971) ("*Anders* requires that, among other things, an attorney must submit a brief referring to anything in the record that might arguably support the appeal."); *United States v. Griffy*, 895 F.2d 561, 562 (9th Cir. 1990) (describing the "uniform body of federal authority" that requires counsel to file a brief and the court to conduct an independent review of the record). To read the state court's decision as saying that *Anders* applies, but no *Anders*-type review is required, would effectively be a finding that the state court did not know the Arizona precedents it was applying.

Visciotti does not require that a court twist the plain language of a state court decision to find that it complies with clearly established federal law. *See also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (explaining that "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion," a "federal habeas court simply reviews the specific reasons given by the

state court and defers to those reasons if they are reasonable"). This Court's review is required to clarify that a federal court sitting in habeas jurisdiction need not twist the clear words of a state court decision to reach a determination that complies with clearly established federal law.

II. THE COURT OF APPEALS MISAPPLIED THE CLEARLY ESTABLISHED LAW OF *ROBBINS*, WHICH REQUIRES THAT ANY STATE PROCEDURE FOR INDIGENT APPEALS BE "SUPERIOR TO, OR AT LEAST AS GOOD AS" THOSE PROMULGATED BY THIS COURT IN *ANDERS*, AND WHICH CLEARLY LAYS OUT CERTAIN PROCEDURES WHICH DO NOT SATISFY THIS STANDARD.

A. The procedures at issue in *Anders* and those provided by Arizona here are materially indistinguishable, and so any holding that the Arizona procedures comply with *Anders* is contrary to clearly established federal law.

The court of appeals attempts to read this Court's jurisprudence so narrowly as to foreclose the possibility of habeas relief ever being granted on an *Anders* issue. Indeed, the court of appeals determination that the procedures in *Anders* and the procedures afforded under Arizona law are "materially distinguishable" hinges on two very minor semantic differences between the California procedure found invalid and the Arizona procedure that is, according to the court of appeals, valid.

First, there is a difference in a single word – "colorable" – in the Arizona procedures. According the court of appeals, while the California procedure struck down by *Anders* permitted an appointed attorney to file a notice and withdraw if she found that the claims in an appeal would lack "merit," 386 U.S. at 743, the Arizona analog of that rule would permit such an attorney to withdraw only if an appeal was not "colorable," *Chavez*, 42 F.4th at 1101.

Second, the court of appeals notes that "Arizona also does not permit counsel to withdraw" but rather "remain[] in an advisory capacity until the PCR court's final determination." *Chavez*, 42 F.4th at 1101. But as the district court here properly found, advisory counsel in the context of a petition for postconviction relief is all but worthless, noting that "[t]he role of advisory counsel. . . is not that of an active advocate on behalf of his client." (App.004). Indeed, there is no evidence at all in the record that Chavez's counsel did anything at all in her capacity as "advisory counsel."

Finding a significant difference between the words "meritorious" and "colorable," and between the procedure that permits actual withdrawal of counsel and one that permits functional withdrawal, the court of appeals held that Arizona's procedures, which were otherwise virtually identical to the procedures this Court found invalid in *Anders*, somehow survives. Thus, according to the court of appeals' reasoning, no state procedure can be attacked for failure to comply with *Anders* until that exact same procedures in the exact same context have been addressed by this Court on a writ of certiorari. But even the highly deferential AEDPA standard does not require such a narrow reading of "clearly established" federal law. The *Anders* line of cases very clearly set forth a minimum set of standards a state must follow in order to comport with the constitutional right to counsel. *Robbins*, 528 U.S. at 276 (holding that states need not strictly comply with the procedure in *Anders*, but must apply procedures that "are superior to, or at least as good as, [those] in *Anders*"). A federal court sitting in habeas jurisdiction may apply those standards

to the state procedure at issue to determine its constitutionality even though this Court has not previously spoken on *that specific* set of procedures. *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) (habeas relief may be granted "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.").

The court of appeals' new test, which requires that a state procedure must be *exactly the same* as the procedure in *Anders* in order to be "contrary to" clearly established federal law is contrary to this Court's jurisprudence in *Lockyer*, and review is required to correct this misapplication of its precedent.

B. *Robbins* lays down very clear standards which must be met in order for a procedure to satisfy *Anders*, and any procedure – like Arizona's – that does not meet those standards is an unreasonable application of clearly established federal law.

Although *Robbins* explains in great detail what procedures are not sufficient to satisfy *Anders*, the court of appeals determined that "the rule announced in *Smith* [*v. Robbins*] is very general" and requires only that a state's procedure "reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Chavez*, 42 F.4th at 1101. Reading the rule in *Robbins* so broadly, however, effectively guarantees that *any* procedure, even one that has been rejected by *Robbins* as the procedures in this case have been, are permissible under the deferential AEDPA standard.

Instead, this Court should explain that *Robbins* meant what it says – that states are granted "wide discretion, *subject to the minimum requirements of the Fourteenth Amendment*, to experiment with solutions to difficult problems of policy."

Robbins, 528 U.S. at 273 (emphasis added). *Robbins* goes on to explain what those minimum requirements are:

1. First, the reviewing court may not resolve a defendant's appeal based solely on counsel's bare representation that the defendant is unlikely to prevail. *See Robbins*, 528 U.S. at 279.

2. Second, a defendant must be represented by counsel throughout the process. A court cannot relieve counsel and force defendant to appear *pro se* at any time before it resolves the case. *See id.* at 280. If the reviewing court identifies arguable issues, it must appoint counsel to brief and argue those issues. *See Robbins*, 528 U.S. at 279; *see also Penson*, 488 U.S. at 83 (holding that reviewing court erred "by failing to appoint new counsel to represent petitioner after it had determined that the record supported several arguable claims.").

3. Third, the reviewing court must require that counsel file a brief that, at a bare minimum, contains a "summary of the case's procedural and factual history, with citations of the record, [which] ensures that a trained legal eye has searched the record for arguable issues." *Robbins*, 528 U.S. at 281.

4. Fourth, to ensure that the defendant has received constitutionally competent counsel, a court must independently review the record to ensure that counsel's assessment of the case is correct. *See id.*; *see also Anders*, 386 U.S. at 744 (requiring "the court—not counsel" to decide "whether the case is wholly frivolous" after "a full examination of all the proceedings"). This review should not be conducted by the sentencing judge. *See Robbins*, 528 U.S. at 281 (sentencing judge "understandably had little incentive to find any error warranting an appeal").

Chavez was afforded virtually none of these procedures, which *Robbins* calls "the minimum requirements of the Fourteenth Amendment." 528 U.S. at 273. Any state court decision holding that his procedures satisfied *Anders* must be an unreasonable application of clearly established federal law.

In sum, the court of appeals has replaced the clear standard of *Robbins* with its own. *Robbins* requires that any state procedures be "superior to, or at least as

good as" those set forth in *Anders*. 528 U.S. at 276. The court of appeals, however, has rewritten that standard, holding that *any* state procedure is permissible so long as "a fairminded jurist could conclude that [it] reasonably ensures that the appeal will be resolved on the merits." *Chavez*, 42 F.4th at 1102. This Court's review is required to clarify exactly what standard was established by *Robbins*, and which must be applied to state decisions to determine whether they are unreasonable applications of *Robbins*.

CONCLUSION

For all these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted: March 6, 2023.

s/ Randal McDonald
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