No. 11-6533

In the Supreme Court of the United States

CURTIS SCHLEIGER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR THE TWELFTH DISTRICT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Anders v. California* and its progeny, an indigent defendant's right to counsel on direct appeal is satisfied if (1) appointed counsel, upon determining that no non-frivolous issues exist, files a brief addressing potential issues, and (2) the appellate court reviews that brief and agrees that no non-frivolous issues exist. If, however, the court identifies a non-frivolous issue, it should appoint new counsel for new briefing.

Under Ohio's sentencing laws, certain offenses result in the automatic imposition of "post-release control," a set of reporting obligations and other restrictions imposed upon a defendant after release from prison. A sentencing court is required to inform a defendant of any post-release control term and of its consequences. If a court fails to do so initially, it may later correct that ministerial error through a nunc pro tunc entry, and it must hold a hearing to inform the defendant of the correction. No appeal is needed for such corrections.

The question presented is

Does an Ohio appeals court satisfy *Anders* when it reviews appointed counsel's brief and a pro se brief and determines that no non-frivolous issues exist, but the court identifies a ministerial mistake regarding the imposition of post-release control and remands for the trial court to correct it?

LIST OF PARTIES

Petitioner Curtis Schleiger is a citizen of the state of Ohio currently serving a prison term for felonious assault and carrying a concealed weapon.

Respondent is the State of Ohio.

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INTRODUCTION

This case does not warrant review, because the legal issues regarding *Anders v. California,* 386 U.S. 738 (1967), are well-settled, and the decision below does not implicate any questions about applying *Anders.* The Ohio court of appeals found that Petitioner Schleiger's appeal did not raise any non-frivolous issues, so it properly concluded that no new counsel or new argument was needed. The court did instruct the trial court to correct a ministerial error regarding the sentencing entry, but that corrective process did not constitute identification of an "error" for *Anders* purposes. Even if it did, the petition does not warrant review.

Respondent State of Ohio agrees with Schleiger regarding this Court's requirements under *Anders* and *Penson v. Ohio,* 488 U.S. 75 (1988), and Ohio's appellate courts follow those procedures. The State agrees that if the court identifies any "arguable claims" or "arguable issues," it should appoint new counsel to argue adversarially on defendant's behalf. *Penson,* 488 U.S. at 83-85. Neither the State, nor the court below, maintains that a court may identify an arguable issue and proceed to resolve it on the merits without benefit of new counsel and an adversarial process.

The Ohio court here did not identify an arguable issue that would trigger an adversarial appeal, but it instead identified a ministerial mistake for the trial court to correct. Ohio law imposes—as a matter of law, not of discretion, in cases such as Schleiger's—a post-prison term of "post-release control," with the length of that control turning on the crime of conviction. Ohio Rev. Code 2967.28(B); *State v. Singleton,* 920 N.E. 2d 958, 961 (Ohio 2009). Ohio law further requires the trial

court to inform the defendant at sentencing of his post-release control term, and the court must also inform the defendant that violations of post-release control conditions may result in additional prison time. Ohio Rev. Code § 2929.19; *Singleton,* 920 N.E. 2d at 961.

Most important for this case, Ohio law provides a mechanism for trial courts to correct, by later nunc pro tunc entry, any failure to inform a defendant properly of these matters. Ohio Rev. Code § 2919.191; *Singleton,* 920 N.E. 2d at 961. Here, the appeals court noticed such an error, and it instructed the trial court to follow Ohio's statutory procedure and correct the entry. *State v. Schleiger,* 2010 Ohio App. Lexis 3454, 2010-Ohio-4080 (Twelfth District), Pet. App. A-8-A-10.

But the appeals court did not identify any *error of judgment* by the trial court, merely a ministerial error, which called for ministerial correction. It did not require adversarial argument, for there was nothing to argue. The Ohio appeals court below was correct, and that alone defeats any need for review.

At most, the issue presented here is whether the identification of such an "error" qualifies as an identified non-frivolous issue for *Anders* purposes. For several reasons, that issue does not warrant review. First, Ohio's courts understand their *Anders* obligations, and the exclusion of this unique, Ohio-specific process from serving as a trigger does not indicate any disagreement on principle. Second, Schleiger's purported "conflict" does not exist, and the cases he identifies involve other quirks that also fail to show any certworthy confusion on legal principles. Third, Schleiger's case is not a good vehicle to resolve any issues that

might exist from other jurisdictions, because the Ohio ministerial issue is unique. Fourth, Schleiger is currently prosecuting a fresh appeal from his corrected sentencing entry, and Ohio hereby waives any objection to his use of that vehicle to address additional issues that he now wishes to raise. Finally, if the Court sees any need to address Schleiger's issues beyond what his new appeal already offers, the State agrees with Schleiger that summary reversal, rather than full merits briefing and argument, is warranted, as there is nothing here to address.

For these reasons, the Petition should be denied.

REASONS FOR DENYING THE WRIT

Schleiger's petition should be denied. No one denies his claim that an appeals court, in an *Anders* procedure, should appoint new counsel and restart the appeal process if the court identifies any non-frivolous issue for appeal. The parties do not disagree about that rule's existence, but on whether that rule was triggered here. The Ohio appeals court instructed the trial court to correct its sentencing entry to reflect Schleiger's proper term of post-release control and to inform him of its consequences. The identification of this ministerial mistake is not the type of error that triggers the need to restart an appeal. Alternatively, even if that issue is debatable, it does not warrant review, for several reasons below.

A. *Anders* requires new appellate counsel only when an appeals court finds a non-frivolous error, and a non-arguable, ministerial mistake in a sentencing entry under Ohio law does not qualify.

Schleiger is correct, as a general matter, that *Anders* and *Penson* require an appeals court to appoint new counsel whenever the court reviews an *Anders* brief and identifies a non-frivolous error. Schleiger is incorrect, however, in describing

the decision below as finding such an error or in disagreeing with that principle. Instead, the appeals court identified a ministerial mistake, not a legal error, so it properly concluded that no new adversarial process was needed.

1. *Anders* and *Penson* require a court to appoint new counsel after identifying any arguable legal error, to ensure that a defendant receives effective counsel in advancing any such arguable error.

As Schleiger properly notes, the procedure outlined in *Anders v. California,* and further refined in *Penson v. Ohio* and *Smith v. Robbins,* derives not just from the Sixth Amendment right to counsel, but also from the Fourteenth Amendment's guarantees of due process and equal protection: All defendants have a right to counsel, and indigent defendants should not be left without counsel for lack of funds. Pet. at 5-8; *Anders,* 386 U.S. at 741-42; *Penson,* 488 U.S. at 79-80; *Smith,* 528 U.S. 259, 276-77 (explaining convergence of due process and equal protection concerns). A State need not grant any appeal of right from a criminal conviction, *Smith,* 528 U.S. at 271, but if it grants such an appeal, it must provide counsel to an indigent defendant to press the appeal, *id.* at 276-77.

However, that right to counsel does not include a right to have counsel advance frivolous issues on appeal. *Id.* at 277-78. Consequently, if appointed counsel determines that no non-frivolous issues exist, counsel may file a motion to withdraw, accompanied by an explanatory "*Anders* brief" that identifies potential issues and explains why they lack merit. *Penson,* 488 U.S. at 80. The defendant may also file a pro se brief. If the appeals court agrees that no non-frivolous issues exist, it may grant counsel's withdrawal motion and reject the appeal, and the

defendant's right to counsel has been satisfied. *Id.* No further steps are needed after an appeals court properly concludes that no non-frivolous issues exist. *Id.*

Alternatively, if an appeals court identifies a non-frivolous issue, it should appoint new appellate counsel and restart the process, because the mere existence of that issue shows that the first counsel did not function as effective counsel for the defendant. *Id.* at 82-84. An appeals court should not, after identifying a non-frivolous issue, simply proceed to address that issue on the merits. *Id.* at 83. That is so because the principle to be vindicated is not merely the defendant's right to have an error addressed, or corrected by a court, but his right to have a fully committed, adversarial counsel acting on his behalf in advancing the claim of error. See *id.* at 84-85. Thus, in *Penson,* the Court reversed when an appeals court, without appointing new counsel, proceeded to the merits after finding a non-frivolous issue. *Id.* In *Penson,* counsel had not even filed an *Anders* brief, compounding the error. But the Court's analysis suggests, and the State here agrees, that the result is the same when an *Anders* brief is filed.

The *Penson* Court's explanation shows that the need for counsel is rooted in the belief that the *adversarial process* best develops arguable issues, and a court's own review, without adversarial representation, is no substitute. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Id.* at 84 (internal quotes and citations omitted). Consequently, by

"proceeding to decide the merits of petitioner's appeal without appointing new counsel to represent him, the Ohio Court of Appeals deprived both petitioner and itself of the benefit of an adversary examination and presentation of the issues." *Id.* at 85. Because the *process* itself is important, a failure to appoint counsel is not subject to the "prejudice" requirement of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), nor is it subject to "harmless error" analysis under *Chapman v. California*, 386 U.S. 18 (1967). *Penson,* 488 U.S. at 85. The lack of counsel in the face of a non-frivolous issue is a per se error, as counsel is needed to adversarially advance any arguable issues.

The State here fully agrees with all of this. The State notes that the Court has also explained that each State may develop procedures that vary from the precise process in *Anders,* as long as the process satisfies the principle of ensuring counsel whenever non-frivolous issues exist. *Smith,* 528 U.S. at 277-78, 284. Ohio, however, has committed itself to following *Anders* and *Penson,* as Schleiger rightly notes, and as the court below noted. See Pet. at 8; *State v. Murnahan*, 584 N.E.2d 1204, 1209-10 (1992) (citing *Anders* and *Penson*); Pet. App. at A-3.

Against this consensus on legal principle, the sole question is whether anything in the decisions below violated those principles. The appeals court below identified a mistake in Schleiger's sentencing entry, and it ordered the trial court to correct it. Schleiger insists that the identification of that mistake constituted the finding of non-frivolous error, triggering *Penson*'s requirement of new counsel and a

restart of his appeal. At first blush, Schleiger might seem right, under the idea that any identified mistake qualifies. But he is wrong.

That conclusion results from, first, understanding the nature of Ohio's post-release control scheme, and the body of law that has developed to correct ministerial errors in its imposition (as Part A-2 details), and second, understanding what happened below in light of that (as Part A-3 details). Together, this context confirms that the court below did not violate the *Anders* rules. And as Part B explains, any question on that score does not warrant review.

2. Ohio law treats failures regarding the imposition of post-release control as ministerial mistakes and provides for ministerial correction, even in adversarial, non-*Anders* cases.

Ohio's "post-release control" system was enacted in 1996 as part of a broader sentencing reform that, among other things, largely abolished the prior parole system. Most Ohio convicts, if sentenced to prison, also receive at the outset a sentence of "post-release control" (also called PRC). Ohio Rev. Code 2967.28. While under PRC, a defendant is supervised by the Ohio Adult Parole Authority, must periodically report to the Parole Authority, undergo drug testing in some cases, and so on. *Id.* That PRC status is set for a fixed term initially, but its duration may be reduced by the Parole Authority for good behavior, or extended if the defendant violates its conditions. Ohio Rev. Code 2967.28(D)(2). In addition, certain violations of PRC may result in a return to prison. Ohio Rev. Code 2967.28(D)(1). Some crimes result in a discretionary imposition of PRC, whether by the sentencing court or, if pre-approved by the sentencing court, by the Parole Authority. Ohio Rev. Code 2967.28(D).

Notably, in many cases, including Schleiger's, both the imposition of PRC and its duration are fixed by statute; a sentencing court has no discretion in the matter. Ohio Rev. Code 2967.28(B); *Singleton,* 920 N.E. 2d at 961. In these cases, a sentencing court must still inform a defendant of the imposition of PRC and must record it in its sentencing entry. Ohio Rev. Code 2967.28(B); *Singleton,* 920 N.E. 2d at 961. Over the last twenty-five years, Ohio case law and statutory law have addressed the implications of a trial court's failure to inform a defendant properly of his PRC term—and that body of law has changed.

In a series of earlier cases, the Ohio Supreme Court had held that a trial court's failure to inform a defendant properly regarding PRC rendered the resulting sentence—the entire sentence, including the prison term as well as PRC—void, and subject to review on direct appeal or collateral attack. *State v. Jordan*, 817 N.E.2d 864 (2004) (holding that failure to inform defendant properly regarding PRC, even when sentencing entry was proper, rendered sentence void); *State v. Bezak*, 868 N.E.2d 961, 964 (2007) (holding that entire sentence was void, not merely the PRC portion, and requiring de novo sentencing on remand). The Court based that conclusion on earlier holdings that "a sentence is void because it does not contain a statutorily mandated term," and that "the proper remedy" in such cases is to "resentence the defendant." *Jordan,* 817 N.E.2d at 871 (citing *State v. Beasley*, 471 N.E.2d 774 (Ohio 1984); *Bezak*, 868 N.E.2d at 963 (citing *Beasley* as basis for *Jordan* and *Bezak*). That void status resulted if a trial court *either* failed to tell the defendant about his PRC term at his sentencing hearing, *Jordan,* or if a trial court

omitted its inclusion in a sentencing entry. *Id.* Further, a sentence was void even if the court informed the defendant and included it in the sentencing entry, if the court's explanation to the defendant did not specify the particular consequence of more prison time if he violated PRC.

The characterization of the entire sentence as "void" had confusing implications for defendants and the State. Because the sentence was void, it was as if it were never imposed, so resentencing was possible—as long as a defendant was still in prison when the omission was noted. *Bezak,* 868 N.E.2d at 964. Thus, defendants who had completed their terms were able to avoid PRC entirely, despite the "mandatory" imposition by statute. *Id.* But defendants in prison could not escape PRC, as it could be imposed in resentencing. The earlier sentencing, because void, did not trigger double jeopardy and was not res judicata. *State v. Fischer,* 842 N.E2d 332, 337-39 (2010) (explaining result of *Bezak* and *Jordan*). Some imprisoned defendants still benefited from resentencing, however: Because the sentencing hearing was de novo as to the entire sentence, it gave them another chance to urge a sentencing court to impose a lesser prison term. It also gave them another appeal on the entire sentence. See *Fischer,* 842 N.E2d at 337-38.

After years of this approach, both Ohio's legislature and supreme court narrowed the effect of PRC sentencing mistakes. In 2006, the Ohio General Assembly enacted a statutory procedure for correcting of PRC-defective sentences, dispensing with the need for appeals or collateral attacks. See Ohio Rev. Code 2929.191; *Singleton,* 920 N.E. 2d at 959. The statute established a process for trial

courts to correct such sentences, as long as the offender was imprisoned as of the statute's July 2006 effective date, Ohio Rev. Code 2929.191(A), or sentenced after the statute's effective date, Ohio Rev. Code 2929.191(C). The statute applies to various types of mistakes: "fail[ing] to notify the offender" at the hearing, Ohio Rev. Code 2929.191(A), failure "to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence," *id.*, or failure to inform the offender that PRC violations could lead to more prison time, Ohio Rev. Code 2929.191(B).

The statutory process for correcting judgments has two steps. A trial court must hold a hearing at which the court may properly inform the offender of his PRC term, and the defendant and prosecuting attorney may offer a statement as to the correction of the judgment. Ohio Rev. Code 2929.191(C). The trial court may then issue a corrected judgment as a *nunc pro tunc* entry, and that entry "shall have the same effect as if the court at the time of original sentencing" had handled the PRC issue properly. Ohio Rev. Code 2929.191(A)(2).

The Ohio Supreme Court has affirmed the validity of this statutory process, *Singleton,* 920 N.E. 2d at 966, and it has also modified its own case law so that judicially-imposed corrections of PRC mistakes no longer have the effect of voiding the non-PRC remainder of a sentence, *Fischer,* 842 N.E2d at 340-41. That is, defendants no longer receive a de novo sentencing hearing. "[T]he new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control." *Id.* at 341.

All of the above means, indisputably, that in a non-*Anders* case in Ohio, the discovery of a sentencing mistake regarding PRC does not constitute a typical legal error warranting reversal of guilt or even of sentencing, but is now treated as a ministerial mistake calling for ministerial correction. An omission in a sentencing entry could be characterized as scrivener's error, and an omission in the judge's oral statement at hearing is the oral equivalent of such an error.

3. In noting the PRC mistake in Schleiger's sentencing, the Ohio appeals court identified only a ministerial mistake, not a legal error, so it properly declined to appoint new appellate counsel.

Here, the appeals court's treatment of Schleiger's appeal, in the *Anders* context, is best understood in light of the Ohio-specific PRC error-correction principles above. It is also helpful to compare what would have happened if Schleiger's appointed counsel had advanced the PRC issue in his brief as an adversarial matter, or, conversely, if the court had not noticed the issue at all. Had the PRC issue been pressed, it would have earned Schleiger nothing more than the ministerial correction process outlined in Ohio Rev. Code 2929.191. Had the issue been missed, it could have been raised later on collateral attack, and would have opened up only the same, narrow issue of correcting the entry to reflect the statutorily-mandated PRC term. See *Fischer*, 842 N.E2d at 341. That result is no different because the appeals court here identified the ministerial mistake while it was reviewing Schleiger's appeal in the *Anders* context.

Just weeks before addressing Schleiger's appeal, the same Ohio appeals court adopted the same approach in *State v. Harrison,* 2010 Ohio App. Lexis 3028, 2010-Ohio-3561 (Twelfth District Aug. 2, 2010). In *Harrison,* the court also reviewed an

Anders brief, *id.* at *1, found no non-frivolous error, *id.* at *2, and allowed counsel to withdraw, *id.* at *3. However, the court discovered a PRC mistake. The trial court had properly informed the defendant about PRC, but the sentencing entry failed to reflect that the information was conveyed. The court described the mistake as "a clerical error," and it explained that it could be "corrected by a nunc pro tunc entry" that "accurately reflects the sentence imposed by the trial court at the sentencing hearing." *Id.* at *3. The court cited *Penson,* showing that it recognized its obligations under *Anders* to address arguable errors, but it reasoned that such a plain mistake warranted "immediate action to remedy." *Id.* Thus, it remanded for that quick fix of a "clerical error." Likewise, that same approach was taken by Ohio's Seventh District Court of Appeals in *State v. Ericson,* 2010 Ohio App. Lexis 3641, 2010-Ohio-4315.

In Schleiger's case, just four weeks after *Harrison* (on August 30), the court did the same thing. See Pet. App. at 8-10. Although the court's decision did not use the same language as *Harrison* regarding "clerical error," its opinion was straightforward in separating the PRC mistake from the potential errors identified by counsel and advanced by Schleiger. The court first described the case's posture and summarized the *Anders* process. *Id.* at A-8-A-9. The court then described the errors advanced in Schleiger's pro se brief, which included several guilt-phase issues, but did not concern PRC or any aspect of sentencing. *Id.* at A-9. The court did not describe the items in counsel's *Anders* brief, but those, too, were all trial-

based. The court concluded that it had "accordingly examined the record and [found] no error prejudicial to appellant's rights . . . except as set forth below." *Id.*

The court then described two errors regarding the trial court's imposition of PRC. *Id.* First, the trial court mistakenly told Schleiger that his PRC term would be five years. But the statute imposes only three years, not five, for a second-degree felony. *Id.*; Ohio Rev. Code 2967.28(B)(2). Second, the trial court told Schleiger that PRC violations led to consequences, but the court did not explain those consequences. *Id.* at A-9-A-10. In particular, it did not explain the possibility of more prison time. *Id.*; Ohio Rev. Code 2929.19(B)(3)(e). The appeals court said that these two errors meant that "postrelease control was not properly imposed in this case." *Id.* at A-10.

The court then invoked Ohio Rev. Code, 2919.191, the "mechanism for a trial court to correct" PRC mistakes. *Id.* The court narrowly "remanded with instructions to the trial court to correct the improper imposition of postrelease control pursuant to the procedures outlined in [Ohio Rev. Code] 2929.191." *Id.* The court's return to the *Anders* question stated merely, in conclusion, that counsel's withdrawal motion was granted. *Id.*

Schleiger then moved the appeals court, under a special Ohio process, to re-open the appeal on the ground that he had received ineffective appellate counsel in the proceeding. In that motion, his present counsel, the Ohio Public Defender, urged the theory advanced here: namely, that the appeals court's identification of the PRC mistake triggered the need for new counsel and new, full appeal. See

Application for Reconsideration under Rule 26(B). In response, the State argued, as it does here, that *Anders* requires counsel only for "arguable issues," and that the sentencing "error" at issue is not such a trigger because it is not an "arguable" issue. See State's Response to Application to Reopen at 3-7. The State noted its agreement with the legal principle that *Anders* and *Penson* require new counsel if any arguable issue is found. *Id.* at 3. It explained that here, "there were no arguable issues as the only error was a non-arguable error regarding a sentencing omission." *Id.* at 4. The State further explained that such mistakes were curable through a corrective hearing under Ohio Rev. Code 2929.191, and urged that therefore, the appeals court "properly did not order merits briefs to be filed for this issue to be briefed, as it was not arguable issue." *Id.* Thus, the State has never maintained that arguable errors can be resolved *against* defendants without further briefing, but instead, has said only that PRC errors are such clear ministerial errors that there is nothing about them to argue.

In light of all this—*Harrison,* the initial *Schleiger* decision, and the State's arguments opposing reopening—the appeals court's second decision, rejecting the application to reopen, is best read as adopting the view that the PRC error was ministerial, and thus not an arguable issue. See Entry Denying Application to Reopen Appeal, Feb. 3, 2011, Pet. App. at A-3-A-5. To be sure, the appeals court did cite the two-pronged "performance" and "prejudice" prongs of *Strickland,* and the court did say that Schleiger was not prejudiced. *Id.* at A-4. In the abstract, those statements do seem incorrect, as the *Strickland* prejudice prong does not apply

when counsel files an *Anders* brief and fails to identify a non-frivolous, arguable issue that the court finds. See *Penson,* 488 U.S. at 85. Prejudice is presumed when counsel misses an arguable issue, as it indicates the absence of adequate, adversarial counsel.

But the appeals court's reasoning shows that it did not require "prejudice" in the usual *Strickland* sense, but instead distinguished the *ministerial* nature of the PRC mistake here from the type of "arguable issue" that triggers a fresh start under *Anders*. The court explained that Schleiger's arguments "do not raise a *genuine issue* as to whether counsel was ineffective since [Schleiger's] arguments relate to the remedy provided in the court's decision, not ineffective assistance of appellate counsel in filing an *Anders* brief." *Id.* In other words, counsel is ineffective in filing an *Anders* brief when he leaves unexplored an issue that, if successful, would produce relief, and that is so no matter how longshot the issue is, as long as it is just above frivolous. When counsel misses a longshot issue, he demonstrates that the defendant did not have an effective, adversarial counsel, triggering the need for a fresh round *with* such counsel.

Put another way, it is not that the prejudice inquiry is dispensed with when counsel misses an issue and files an *Anders* brief, but instead, prejudice is *presumed;* the mere existence of a missed, arguable issue is treated the same as a missed, meritorious issue. But that is not the same as "missing" a ministerial issue that would warrant only technical correction once noticed, for the issue could not earn the defendant *any meaningful relief*. Moreover, a ministerial mistake, when

plain, does not trigger the need for "adversarial examination and presentation of the issues." *Penson,* 488 U.S. at 85.

Understood that way, the appeals court was correct in saying that the remedy it imposed, of PRC correction, did not implicate the first counsel's decision to file an *Anders* brief. In stating that Schleiger "cannot establish any prejudice resulting from appellate counsel's failure to raise" the PRC issue, *id.,* it was not adopting the view that it could proceed to examine an arguable issue and resolve it against a defendant. Nor did the court adopt the view that Schleiger ascribes to it, namely, that a "court may evade the requirement to appoint new counsel . . . in a non-frivolous appeal by granting nearly useless (or potentially harmful) relief on a minor point." Pet. at 2. It was not the grant of "relief" that was dispositive, or the extent of the relief, but the fact that the issue was clerical and non-arguable.

Schleiger sought to obtain Ohio Supreme Court review by three paths, and the briefing in those attempts further confirms that the appeals court's decisions are best read as rooted in the ministerial nature of PRC mistakes, as opposed to reading the court as adopting the merits-reaching approach that this Court rejected in *Penson.* Schleiger sought the Ohio Supreme Court's discretionary review twice, attempting appeals from both the appeals court's initial decision and its denial of the application to reopen. (And he sought reconsideration after denial in the former.) He also moved the appeals court, after its denial of reopening, to "certify a conflict" among Ohio's appeals courts; that process also takes a case to the Ohio Supreme Court.

Schleiger claimed that Ohio's appeals courts were in conflict: He cited several cases in which courts did the right thing, in his view, by ordering new briefing after identifying an error missed in an *Anders* brief, and he cited other cases in which courts, as here, declined to appoint new counsel to address similar sentencing errors. The State pointed out that this "conflict" actually showed a proper understanding of *Anders,* as the Ohio courts' grants and denials of new counsel followed the right pattern of granting for "arguable" errors and denying for ministerial, non-arguable issues. (See below at Part B-1 for other Ohio cases.)

Consequently, the appeals court was correct when it declined to appoint new counsel for Schleiger, and *Anders* was satisfied when the court concluded that no arguable issues existed. The court's identification of the PRC mistake was not identification of an "arguable issue" for *Anders* purposes. And even if that conclusion is somehow wrong, review is not warranted, for the reasons below.

B. Even if correction of PRC mistakes under Ohio law counts as an "error" warranting new counsel under *Anders,* this case does not raise any certworthy issue and would be a poor vehicle to address any abstract *Anders* issues.

As explained above, the State believes that the Ohio appeals court was correct in declining to appoint new counsel for Schleiger and in declining to restart his first appeal. In the alternative, even if the appeals court was wrong, and even if, in retrospect, it should have appointed new counsel, Schleiger's Petition still does not warrant review. Among other reasons detailed below, neither Ohio's courts nor other States' are confused on this issue, and Schleiger's case is not a good vehicle for addressing any extant issues. Further, his new appeal is an opportunity for him to

raise his issues anew. Finally, if his case warrants any correction, it should be by way of summary reversal, as nothing here calls for full briefing and argument.

1. Ohio's courts understand their *Anders* obligations, and the exclusion of this unique, Ohio-specific process from serving as a trigger for a new appeal stage does not indicate any disagreement on principle.

As shown above, the Ohio appeals court did not adopt any broad theory similar to the one rejected in *Penson*. The court did not rule that an identified, arguable issue could simply be reached on the merits, without appointing new counsel and restarting the appeal. Such a view already warranted reversal in *Penson,* so if that same mistake had occurred here, summary reversal would be appropriate. But here, the court adopted the narrower view that identification of ministerial mistakes in PRC imposition is simply not an identified error for *Anders* purposes. Independent of the State's argument that this view was correct, the State urges that this narrower proposition, even if wrong, does not warrant review.

First, Ohio's other appellate cases show that Ohio's courts are systematically distinguishing cases that present arguable issues from those that involves only ministerial mistakes. In several cases, Ohio courts have, after identifying an arguable issue in an *Anders* case, appointed new counsel and started the appeal process anew. See, e.g., *State v. McClain,* 2011 Ohio App. Lexis 3883, *14-15, 2011-Ohio-4690 (Sixth Dist.) (appointing new counsel); *State v. Kerby*, 2007 Ohio App. Lexis 177, *9, 2007-Ohio-187 (Second Dist.) (noting, in appeal with new counsel, that court had previously identified an arguable issue after an *Anders* brief and had appointed counsel); *State v. Pullen,* 2002 Ohio App. Lexis 6554, 2002-Ohio-6788

(Second Dist.) (appointing new counsel). And, as noted above, Ohio courts have, as the court below did, declined to appoint counsel when the only "identified error" was PRC or a similar non-arguable sentencing error and did not implicate the need for adversarial counsel. See, e.g., *Harrison,* 2010 Ohio App. Lexis 3028; *Ericson,* 2010 Ohio App. Lexis 3641; see also *State v. Brown,* 2006 Ohio App. Lexis, *10, 2006-Ohio-3985 (finding no arguable error in *Anders* proceeding but remanding to reduce sentence automatically to minimum under *Blakely v. Washington,* 542 U.S. 296 (2004)). This pattern shows that the distinction is a deliberate one. Thus, even if these courts are all wrong, they are wrong only insofar as the narrow exception for ministerial mistakes—and specifically, Ohio PRC mistakes—is wrong.

Second, that narrower issue simply does not warrant review. Schleiger identifies no other courts from other States carving off ministerial-only issues under *Anders,* so at most, this is an Ohio quirk, and a narrow one at that. Further, this "systemic" error, if it is error, is systemically harmless in the certworthiness sense. That is *not* to say that Ohio's courts are adopting "harmless error" in the *Chapman* sense, or that the State here advocates that test. It is, instead, merely a recognition that the ministerial-mistake rule, if wrong, does no harm, as it exists only when a defendant has no other issues, guilt-phase or sentencing, that would benefit from further adversarial exploration.

Third, Schleiger's invocation of *State v. Hubbs,* 2010 Ohio App. Lexis 4087, 2010-Ohio-4849 (Seventh Dist.), does not show an internal conflict in Ohio, as that case involved a pro-defendant reversal after an *Anders* brief, without further merits

briefing. In *Hubbs,* the appeals court "violated" *Penson* in the sense that it proceeded to merits review after reviewing an *Anders* brief and finding a non-frivolous issue. *Id.* But that "violation" was no violation at all, for the court found the non-frivolous issue to be meritorious, and it reversed in defendant's favor and vacated his sole count of conviction. *Id.* at *13. Thus, the defendant, who is the sole party with constitutional rights at issue, benefited. That rush-to-merits denied *the State* its chance to brief the issue, but the State has no constitutional rights at issue. Whatever might be said for the *Hubbs* approach as a prudential matter, or as a matter of Ohio state-court procedure, it raises no federal issue.

In sum, the issue here, even if rooted in error, is not certworthy.

2. Schleiger's purported "conflict" does not exist, and the cases he identifies involve other quirks that also show no confusion on principle.

Schleiger is no more successful in describing "an unacknowledged conflict" among state supreme and appellate courts "about whether they may summarily reverse after an indigent appellant's lawyer has filed an *Anders* brief." Pet. at 12. The cited cases show that no conflict exists on any certworthy issue, and further, that any minor issue is distinct from the issue in this case.

First, Schleiger cites a Mississippi Supreme Court case for the "good" side of his alleged split, namely, one restating the undisputed rule that courts should appoint new counsel after reviewing an *Anders* brief and identifying a non-frivolous error. Pet. at 12 (citing *Overstreet v. State,* 787 So. 2d 1249, ¶ 16 (Miss. 2001). That, of course, is correct, and as shown above, several Ohio cases also show a proper application of *Anders,* both by stating the correct rule and by appointing

counsel when warranted. See, e.g., *McClain,* 2011 Ohio App. Lexis 3883, *14-15, *Kerby*, 2007 Ohio App. Lexis 177, *9, *Pullen,* 2002 Ohio App. Lexis 6554, *2-3.

Second, Schleiger cites two cases in which courts identified sentencing errors after reviewing an *Anders* brief, and summarily granted sentencing relief without new briefing or new counsel. Pet. at 12 (citing *Donahey v. State,* 909 So. 2d 858, 859 (Ala. Crim. App. 2005), and *State v. Williams,* 660 S0. 2d 919, 925 (La. App. 1995). To the extent that these cases *grant* relief without more, they of course do not violate defendant's rights, and, as with *Hubbs* above, it is the State that has a complaint, but not one of constitutional dimensions.

To the extent that these cases, by granting *only* sentencing relief, amount to improper denial of a right to broader briefing on both guilt and sentencing, the State acknowledges a potentially interesting question in the abstract. Perhaps a bright-line sentencing-vs.-guilt division is warranted under *Anders,* as after all, a successful, adversarial attack on sentencing earns only sentencing relief, and does not earn a new trial, so perhaps the same rule should obtain in the *Anders* context. On the other hand, perhaps the identification of one error calls into question counsel's diligence across the board, so that a full restart of the appeal is warranted. But that question does not warrant review based on two cases in the entire *Anders* universe.

More important, that broader sentencing-vs.-guilt distinction would most likely not be resolved here, because Ohio's distinction here is based on the ministerial nature of the sentencing error, not the broader notion that even an

arguable sentencing error is cordoned off from triggering review of guilt-phase issues. To be sure, Ohio could, and would, argue that distinction in the alternative, but it is distinct enough from the ministerial issue here to render this a poor vehicle for the broader sentencing issue. If the Court wishes to address that issue, it should await a case where that distinction was at issue.

Schleiger also cannot show a split by pointing to *People v. Brown,* 555 N.E. 2d 794 (Ill. App. 1990). In *Brown,* the court did not identify any issue that it characterized as non-frivolous. *Id.* at 794. Instead, it first stated its allowance of counsel's withdrawal motion, without stating any views as to the frivolousness of any issues. Then, without explanation, the court added, "However, we will address the merits of the defendant's issue on appeal." *Id.* It went on to reject a sentencing issue. At most, this seems to be a classic example of reaching an issue in the alternative, out of an abundance of caution and solicitude for defendants' rights. But it does not amount to an instance of resolving an issue on the merits *despite* a finding of a non-frivolous issue. Without such a predicate finding, *Brown* does not show any confusion below.

Indeed, Schleiger's description of the "split" as "unacknowledged," Pet. at 12, and his complaint that "[c]ourts almost never even acknowledge the issue," *id.,* show that no split exists.

3. Schleiger's case is not a good vehicle to resolve any issues that might exist from other jurisdictions, because the Ohio ministerial issue is unique.

As noted above, Ohio's PRC issue, and the statutory procedure for correcting ministerial mistakes, appears to be unique. Schleiger cites no other cases in which

courts decline to appoint new counsel based on a determination that the identified issue is not "arguable." Thus, this case is not a good vehicle for addressing any broader issues, whether the settled rules of *Anders* and *Penson,* or any question about broader sentencing errors, as suggested by *Donahey* and *Williams*.

Moreover, Schleiger's complaints about the decision below are based mostly upon his reading of the language in the court's later memorandum opinion rejecting his application to reopen, Pet. App. at A-4, not the court's initial decision, Pet. App. at A-8. While both decisions are unpublished, the memorandum opinion is not even available on Lexis or Westlaw or any other database, to the State's knowledge. Thus, the language that Schleiger objects to most strongly, regarding *Strickland* and prejudice, is not only non-precedential, but is virtually undiscoverable. The result is not certworthy, either, in the State's view. But if the need ever arises to review the application of *Anders* to Ohio's PRC-correction process, the Court would be better served by reviewing a case in which a court more clearly adopted the views expressed in *Harrison* and *Ericson,* above.

4. Schleiger is currently prosecuting a fresh appeal from his corrected sentencing entry, and Ohio hereby waives any objection to his use of that vehicle to address additional issues.

Not only does Schleiger's case fail to warrant review over any broader legal principles, but it is also unnecessary to review his case to vindicate any potential issues in his individual case. In part, that is true because he has not identified any issue that would benefit from further briefing if his appeal were reset from the start. And it is also true because he has a new direct appeal in progress, which offers him another chance to litigate his claims.

As noted above, the appeals court here remanded for proper imposition of Schleiger's PRC term. Since the Petition was filed, that proceeding has been held. (The State acknowledges that this information was not in the record as of the Petition filing, but it does constitute the record of Schleiger's ongoing case. Thus, the State will lodge any materials as needed, and they are available should the Court call for the record.) On October 20, 2011, the trial court held a hearing at which it explained the PRC correction. See Transcript of Oct. 20, 2011.

While the terms of the remand and R.C. 2919.191 limited the scope of that hearing to the PRC issue, Schleiger sought to challenge the merits of the sentencing regarding his prison term. He argued that he should not have received the upper end of the range for each conviction—eight years for felonious assault and eighteen months for carrying a concealed weapon—and that his sentences should have been concurrent rather than consecutive. The court refused to consider those arguments, citing the limited scope of the remand to PRC issues, under both the appeals court's order and Ohio Rev. Code 2929.191. Schleiger appealed that new entry, and his brief is currently due in January 2012.

Although Schleiger's new appeal is properly limited to the PRC imposition itself, see the State hereby waives any objection to his expanding that appeal to cover his broader sentencing objections, or even any guilt-phase issues that he seeks to raise again. That is, under the terms of the appeals court's remand, under R.C. 2929.191, and under *Fischer,* the resentencing, and thus the appeal, should be limited to PRC issues. Res judicata has already closed off issues regarding guilt or

any non-PRC sentencing issues. *Fischer*, 842 N.E2d at 341. But res judicata is waivable, and the State hereby offers to waive that defense, and to allow Schleiger, next month, to revisit either the sentencing issues that he sought to raise in the latest proceeding or any other issue.

That offer is not to say that the State concedes any weakness on its position here, or that any issue he might raise is anything other than frivolous. To the contrary: It is precisely the absence of any no non-frivolous issues that makes the State willing to face those issues again in the fresh appeal, and to take that non-risky "risk," rather than to spend time in this Court rehashing settled law. (The State will send a courtesy copy of this brief to Schleiger's new appellate counsel, so he will be aware of this opportunity.)

5. Summary reversal, not a full grant, would be appropriate to address any issues here

Finally, if the Court sees any need to address Schleiger's issues beyond what his new appeal already offers, the State agrees with Schleiger that summary reversal, rather than full merits briefing and argument, is warranted, as there is nothing here to address. Even if such summary reversal reopens the full appeal from the point of the *Anders* brief, such a procedure would consume less in taxpayer resources than rehashing the settled rules at this Court.

CONCLUSION

For the above reasons, the petition should be denied.

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December 22, 2011

No. 11-6533

In the Supreme Court of the United States

CURTIS SCHLEIGER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR THE TWELFTH DISTRICT

CERTIFICATE OF SERVICE

I, Stephen P. Carney, Counsel for Respondent, hereby declare that the Brief in Opposition to the Petition for Writ of Certiorari was served on Counsel for Petitioner:

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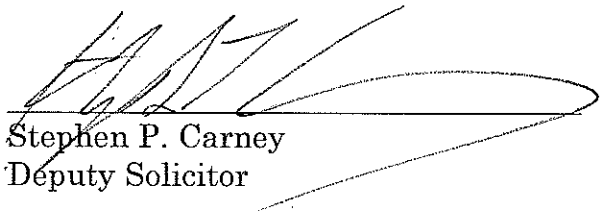
The foregoing document was served on this 22nd day of December, 2011.



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