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SUPREME COURT OF ARIZONA

STATE OF ARIZONA,
Respondent,

Arizona Supreme Court
No.

Court of Appeals
Division 2
No. 2 CA-CR 2022-0121-PR

Pima County Superior Court
No. CR052244001

vs.

LARRY DEAN ANDERSON,
Petitioner.

**PETITION FOR REVIEW OF THIRD PETITION FOR POST-CONVICTION
RELIEF UNDER ARIZONA RULES OF CRIMINAL PROCEDURE 32.1(g)**



LAW OFFICES OF
Robert J. McWhirter

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Attorney for Petitioner

1 **ISSUE FOR REVIEW**

2 Should this Court correct Division Two’s erroneous holding that he did
3 not seek timely relief?
4

5 **STATEMENT OF FACTS**

6 Mr. Larry Dean Anderson served 20 years of his sentence believing he was
7 eligible for parole. Sometime around August 2021, Mr. Anderson tried to enroll in
8 Ashland College to get his bachelor’s degree. On August 12, 2021, and August 18,
9 2021, he submitted clarification from his Arizona Department of Corrections
10 (DOC) case manager. Only then did the DOC advise him he could not enroll
11 because he was parole ineligible:
12

13 Not parole Eligible per ARS 13-716, 13-718 or Chaparro. Created by A
14 Valdez on 4/20/2021 at 09:34:53 COIII Foote, 3742 8/19/2021.

15 **Attachment One:** *Mr. Anderson’s Inmate Letter, August 12, 2021, and August 18,*
16 *2021.*
17

18 Mr. Anderson retained undersigned counsel on October 27, 2021, who
19 immediately entered discussions with the Pima County Attorney’s office. The
20 tenor of those discussions provided hope to Mr. Anderson that the Pima County
21 Attorney’s office was open to resolving his case without the need to file a petition
22 for postconviction relief. As discussions progressed, however, the Pima County
23 Attorney’s office agreed Mr. Anderson should file his Notice for Post-Conviction
24
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26

1 Relief on February 11, 2022. (The State mistakenly asserts Mr. Anderson filed his
2 notice of PCR on March 7, 2022, the date he filed his Petition).

3
4 DOC delayed Mr. Anderson’s ability further because DOC did not comply
5 with his request for his original case files from long-term storage. Thus, he was
6 unable to locate several letters between himself and prior attorneys Darby and
7 Storts evidencing the State had offered him a plea. Again, this hampered his
8 ability to file his petition any sooner than he did.
9

10 **I. Division 2 Incorrectly Held Rule 32 Precludes Mr. Anderson:**

11 Arizona Rule of Criminal Procedure 32.4(b)(3)(D) allows the petitioner to
12 raise any issue he could not have foreseen within the 90/30-day time limits for
13 filing a Petition under Rule 32.1. But Rule 32.4(b)(3)(D) states this Court “*must*
14 *excuse an untimely notice ... if the defendant adequately explains why the failure*
15 *to timely file a notice was not the defendant’s fault.*” (Added emphasis). The issue
16 Mr. Anderson now raises is only now coming to light. He had no way of knowing
17 for over 20 years that when his sentencing judge on February 28, 2000, imposed a
18 sentence of “*life without possibility of release until the service of at least 25 years*”
19 he was ineligible for parole. Division 2’s Decision mentions none of these facts.
20
21

22 The did not contradict Mr. Anderson’s sentencing judge never intend to
23 impose a natural life sentence. The Arizona Supreme Court in *Chaparro v. Shinn*,
24 248 Ariz. 138, 459 P.3d 50 (2020), the Arizona Court of Appeals in *Shinn v. Az*
25
26

1 *Bd. Of Executive Clemency*, No. 1 AZ-CV 20-0617 (Oct. 19, 2021), and the
2 Federal District Court in *Robert Ray Viramontes v. Atty. Gen. of Arizona, et al*, No.
3 *CV-16-00151-TUC-RM* all recognize the issue Mr. Anderson now raises is
4 timely.

5
6 Rule 32.4(b)(3)(D) language stating this Court “*must excuse an untimely*
7 *notice*” contradicts Division 2’s Decision. The regular time limits in Rule 32.1(a)
8 still apply to any issues that could have been raised “within 90 days after the oral
9 pronouncement of the sentence or within 30 days after the issuance of the mandate
10 in the direct appeal....” Nobody, especially Mr. Anderson and his sentencing
11 judge, knew 20 years ago Mr. Anderson was ineligible for parole.

12
13 The rules allow “a defendant to raise issues unknown or unavailable at trial”
14 that demonstrate “the conviction or sentence was obtained in disregard of
15 fundamental fairness, which is essential to our concept of justice.” *State v. Watton*,
16 164 Ariz. 323, 328 (1990). The recent nature of this issue underscores Rule
17 32.4(b)(3)(D)’s imperative language that this Court “*must excuse an untimely*
18 *notice*” and the timeliness of Mr. Anderson’s petition.

19
20
21 Division 2’s decision shut down Mr. Anderson’s day in court. He has good
22 grounds to show he received ineffective assistance of counsel. The trial court
23 precluded him from an evidentiary hearing. Although the State protested Mr.
24 Anderson’s affidavit was the only evidence the State offered him a plea agreement,
25
26

1 the State offered no contradictory evidence. Mr. Anderson’s affidavit and
2 supporting circumstantial evidence stands unrefuted.

3 *Robert Ray Viramontes v. Attorney General of the State of Arizona, et al.*,
4 No. CV-16-00151-TUC-RM where the court ordered the prosecutors to reoffer
5 petitioner his original 18–20-year plea is indistinguishable from Mr. Anderson’s
6 case. That the State has no documentation on the crucial issue of a plea offer,
7 documentation being a basic standard of legal professionalism, underscores this
8 Court should construe this issue in Mr. Anderson’s favor. Division 2’s Decision
9 precludes Mr. Anderson being able to present his valid evidence on this issue.
10
11

12 **CONCLUSION AND PRAYER**

13 Mr. Anderson is effectively serving a natural life sentence neither judge,
14 prosecutor, nor defense attorney intended or contemplated. Mr. Anderson did not
15 know of this until recently, making his petition timely under Arizona Rule of
16 Criminal Procedure 32.4(b)(3)(D).
17

18 Mr. Anderson request this Court overturn Division 2’s Decision and allow
19 Mr. Anderson his day-in-court.
20

21
22 Respectfully submitted 9 January 2023

23 The Law Offices of Robert J McWhirter
24 s/ Robert J. McWhirter
25 Robert J. McWhirter
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A copy of the Court of Appeals Decision Memorandum is attached hereto.

January 9, 2023

/s/ Robert J. McWhirter
Attorney for Petitioner

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