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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

LARRY DEAN ANDERSON,

Petitioner,

vs.

HON. JAMES MARNER,
Judge of the Superior Court of the State of
Arizona, in and for the County of Pima,
Respondent,

and

THE STATE OF ARIZONA,
Laura Conover, Pima County Attorney,

Real Party in Interest.

Arizona Supreme Court
No. CR-23-0008-PR

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

Pima County
Superior Court
Nos. CR062244-001

**RESPONSE TO PETITION
FOR REVIEW**

I. ISSUE PRESENTED.

Did the Court of Appeals abuse its discretion in finding that the trial court erred in reaching the merits of Anderson's claim because it was untimely and precluded?

II. FACTS AND PROCEDURAL HISTORY.

On January 25, 2000, a jury convicted Anderson of conspiracy to commit first-degree murder. (M.E. 1/25/00.) The trial court sentenced him to "life without the possibility of release on any basis until the service of 25 years." (R.T. 2/27/00, at 5.) While his direct appeal was pending, Anderson filed his first post-conviction relief petition on May 2, 2000, raising claims of ineffective assistance of counsel. The trial court rejected his claims, finding them to be without merit. Anderson filed a petition for review of the decision to the Court of Appeals.

In a consolidated memorandum decision, the Court of Appeals affirmed Anderson's conviction and sentence, as well as the trial court's denial of his PCR petition. *State v. Anderson*, 2 CA-CR 2000-0092 & 2 CA-CR 2001-0509-PR (cons) (App. 2002). Anderson filed a Petition for Review with this Court, which was denied. Anderson then filed a second post-conviction relief notice in July of 2003, also raising claims of ineffective assistance of counsel. The petition was denied as untimely. The Court of Appeals and this Court ultimately affirmed that denial.

More than sixteen years later, on February 11, 2022, Anderson filed a third post-conviction relief notice, through counsel. The petition raised a claim that Anderson received ineffective assistance of counsel during alleged plea negotiations. Anderson argued that his attorney told him about a plea agreement of “18 to 22 years” in prison, but that he would be eligible for “parole” if he went to trial and lost. Anderson claimed that he rejected the alleged plea on that basis.

The State responded, arguing that Anderson’s claims were untimely, precluded, and meritless. On August 8, 2022, the trial court denied Anderson’s claims in a five-page ruling. (Ruling, 8/08/22.) Specifically, the trial court found that Anderson’s claims were not untimely or subject to preclusion. However, it found that Anderson failed to prove deficient performance or prejudice. (*Id.* at 4) (“Defendant’s claim that he was offered a plea agreement with the sentencing range of 18 to 22 years is not supported by any meaningful evidence.”).

Anderson filed a petition for review in the Court of Appeals, arguing the trial court abused its discretion in denying his ineffective assistance claim. *State v. Anderson*, 2 CA-CR 2022-0121-PR (mem. dec. filed Dec. 8, 2022). The Court of Appeals did not reach the merits of Anderson’s claim, however, because it determined that the trial court erred in finding Anderson’s petition to be timely. *Id.*

at ¶ 6 (Rule 32.4(b)(3)(D) does not “excuse a defendant’s failure to timely seek relief based on the mere failure to recognize a valid claim might exist.”).¹ The court also found that Anderson’s claim, even if considered timely, would be precluded under Rule 32.2(a)(3) because he failed to raise it in a previous proceeding.

It is from this decision that Anderson petitions this Court for review.

III. LAW AND ARGUMENT.

A. Special Action jurisdiction is not warranted.

This Court’s decision to accept jurisdiction of a petition for review is highly discretionary. *King v. Superior Court*, 138 Ariz. 147, 149 (1983). Generally, this Court only accepts jurisdiction of cases “where the issues raised in the petition are such that justice cannot be satisfactorily obtained by other means,” or when the lower court’s decision cannot be justified under any rule of law. *Id.*; *see also* Ariz. R. Pro. Sp. Actions 1(a). Discretionary jurisdiction of a petition for review is also appropriate when a matter “presents a purely legal issue of first impression that is of statewide importance.” *Brailsford v. Foster*, 242 Ariz. 77, ¶ 10 (App. 2017).

An abuse of discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Quigley v. City Ct. of City of Tucson*,

¹ (citing *State v. Poblete*, 227 Ariz. 537, ¶¶ 6-7 (App. 2011)).

132 Ariz. 35, 37 (App. 1982). When reviewing for an abuse of discretion, this Court “only intervene[s] where no evidence exists to support the decision.” *Bishop v. Law Enf’t Merit Sys. Council*, 119 Ariz. 417, 421 (App. 1978).

Here, the Court of Appeals did not abuse its discretion in declining to consider Anderson’s claim on the merits because it was untimely and precluded. As will be explained below, Anderson has not demonstrated that his petition was timely and should have been considered. Thus, this Court should decline review.

B. Anderson’s notice of post-conviction relief alleging ineffective assistance of counsel was untimely.

Post-conviction petitioners must file the notice for any claims arising under Rule 32.1(a) “within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.” Ariz. R. Crim. P. 32.4(b)(3)(A). However, the court “must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant’s fault.” Ariz. R. Crim. P. 32.4(D).

Here, Anderson filed his third Notice of PCR on March 7, 2022, more than 16 years after the denial of his second post-conviction petition. His allegation that his counsel rendered ineffective assistance by misadvising him about parole is untimely.

At the trial court level, Anderson admitted his petition was untimely, but claimed “Arizona Rule of Criminal Procedure Rule 32.4(b)(3)(D) excuses the time limits for filing this Petition because Petitioner has only recently learned of this issue and has since been in extensive discussions with the Pima County Attorney’s office seeking a resolution.” (Pet. at 6.) In other words, the timeliness rules do not apply until a petitioner “learns” of an issue. Such an interpretation would render the timeliness rules meaningless.

While Anderson argues that his current notice is timely under *Chaparro v. Shinn*, 248 Ariz. 138 (2020), and *Robert Ray Viramontes v. Atty. Gen. of Ariz., et al.*, 2021 WL 977170 (2021), this is inaccurate. The claim raised in *Chaparro* was one of a significant change in the law under Rule 32.1(e), which is governed by different timeliness rules than an ineffective assistance of counsel claim under Rule 32.1(a). Anderson does not argue that *Chaparro* is a significant change in the law that applies to his case, because his minute entry and sentencing transcript unambiguously reference life with the possibility of release, not parole.

Rather, Anderson argues that he allegedly turned down a plea offer based on the mis-advice of his trial attorney that he would be eligible for parole if he went to trial and lost. Accordingly, Anderson’s claim and requested relief are similar to that

presented in *Viramontes*. 2021 WL 977170. But *Viramontes* is a federal case that was not controlling on the trial court or Court of Appeals when making their determinations. The Court of Appeals was not required to determine that Anderson's petition was timely simply because a federal court considered *Viramontes*' claim.

C. Anderson's ineffective assistance of counsel claim is precluded.

As recognized by the Court of Appeals, Anderson's claim is also precluded under Rule 32.2(a)(3) because he failed to raise it in a previous proceeding. *See State v. Swoopes*, 216 Ariz. 390, 397, ¶ 23 (App. 2007) ("In general, when 'ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.'") (quoting *State v. Spreitz*, 202 Ariz. 1, ¶ 4 (2002)); *see also State v. Mata*, 185 Ariz. 319, 334 (1996) (rejecting approach that would permit "a never-ending tunnel" of post-conviction proceedings in which "defendants could endlessly litigate effectiveness of counsel by claiming that their latest version ... was not presented on earlier petitions due to counsel's inadequate representation.").

Thus, Anderson's claim is precluded because he did not raise it in a previous proceeding.

