SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Respondent, v. LARRY DEAN ANDERSON, Petitioner.	Arizona Supreme Court No. CR-23-0008-PR Arizona Court of Appeals No. 2 CA-CR 22-0121-PR Pima County Superior Court No. CR062244001

LARRY ANDERSON'S SUPPLEMENTAL BRIEF

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INTRODUCTION

In 1998, Larry Dean Anderson was convicted of one count of conspiracy to commit first-degree murder. Because Mr. Anderson was in prison at the time of the alleged conspiracy, and because Mr. Anderson's purported co-conspirator went directly to the police when he was released from prison, none of the intended targets of the supposed conspiracy were ever in any real danger. Over the span of two years, Mr. Anderson was assigned three different attorneys who either withdrew or were removed from the case by the court. Finally, in late 1999, when Brick Storts was assigned to the case, Mr. Anderson was presented with a plea offer – 18 to 22 years in prison. He rejected the offer because his counsel told him that, even if he went to trial, he would be eligible for parole after serving 25 years. It was not until Mr. Anderson had been convicted and served over 20 years in prison that he learned that the advice of his counsel – on which he based his decision not to plead guilty – was legally incorrect.

Having discovered only in 2021 that he would never be parole eligible, Mr. Anderson quickly hired counsel and filed a successive petition for post-conviction relief. The trial court found that he had not stated a colorable claim. The court of appeals found, perversely, that the fact that both his counsel and the Arizona Department of Corrections ("ADC") told Mr. Anderson that he would be eligible for

parole was irrelevant, and that his claim was precluded because it was not brought sooner.

This case presents a truly unique circumstance. Because of the widespread – and incorrect – belief that parole would be available to people like Mr. Anderson, he did not know – indeed he *could not have known* – that his counsel was ineffective until ADC reversed itself and told him that he would not ever be eligible for parole. If his claim is precluded, he will be left with no option for raising this claim. And if this claim is found not to be colorable because of the widespread belief that parole was available, it will effectively amount to a rule which permits attorneys to misadvise their clients so long as enough other attorneys are similarly misinformed. That cannot be the rule, because an attorney who provides incorrect legal advice is *per se* ineffective.

Mr. Anderson is entitled to relief on his claim of ineffective assistance or, in the alternative, an opportunity to prove that he is entitled to relief at an evidentiary hearing pursuant to Ariz. R. Crim. P. 32.13.

FACTUAL BACKGROUND

Between December 1997 and April 1998, while Mr. Anderson was incarcerated in ADC on drug charges, he engaged in disucssions with his cell mate regarding a murder-for-hire scheme. In 1998, when Mr. Anderson's cell mate was released from prison, he went directly to the police and told them that Mr. Anderson

attempted to hire him to kill two witnesses who supplied information related to Mr. Anderson's drug convictions. Mr. Anderson's cell mate does not ever appear to have made any serious attempts to plan any murders on Mr. Anderson's behalf. As a result, no murders occurred. *See State v. Anderson*, Nos. 2 CA-CR 2000-0092, 2 CA-CR 2001-0509-PR (Ariz. App. Dec. 24, 2002) (consolidated appeals).

In July of 1998, Mr. Anderson was indicted on one count of conspiracy to commit first-degree murder and one count of conspiracy to commit kidnapping. The trial court appointed two different lawyers – Susan Kettlewell and James Alexander – for Mr. Anderson, both of whom eventually withdrew. The Court then appointed a third lawyer, David Darby, who was eventually removed from the case because he was unable to properly represent Mr. Anderson "due to his heavy caseload and very difficult trial schedule." APP 063. Finally, a fourth lawyer, Brick Storts, was appointed to represent Mr. Anderson on October 6, 1999. Mr. Anderson's trial was reset for January 2000.

While Mr. Anderson was awaiting trial, Mr. Storts told him that the State had offered a plea of 18 to 22 years. However, Mr. Storts also advised Mr. Anderson that if he went to trial and lost, he would be eligible for parole after 25 years. Based on this advice, Mr. Anderson rejected the plea offer. Instead, he went to trial and was convicted of one count of conspiracy to commit first-degree murder. At his sentencing hearing, the trial court said:

> The Court really has no discretion and it is therefore the Judgment and Sentence of the Court that you be imprisoned for the term of life without possibility of release until the service of at least 25 years.

APP 027. In its written order following sentencing, the trial court sentenced Mr. Anderson to "Life without the possibility of release on any basis until the service of 25 years." APP 032.

For 21 years, based on the advice of his lawyer and based on representations made by ADC, Mr. Anderson believed that he would be eligible for parole after he served 25 years. In anticipation of that goal, he was a model inmate. His last disciplinary infraction was in 1998 – while serving time on his previous conviction. He has participated in programming, earned an Associate's Degree, organized fundraisers for charity, founded and authored a prison newsletter, and served as a mentor for younger prisoners serving with him in ADC. He would be an ideal candidate for parole.

But in August of 2021, after he tried unsuccessfully to enroll in a Bachelor's Degree at Ashland College, ADC informed him – for the first time – that he would not be eligible for parole even after he had served 25 years. APP 098. Within two months, Mr. Anderson retained counsel to resolve this issue with the State. After initially attempting to reach a negotiated settlement, counsel filed a Notice Requesting PCR on February 11, 2022 – less than six months after Mr. Anderson had discovered he was ineligible for parole. APP 085-86. The State opposed, arguing

that there was no evidence of a plea offer and – even if there were – the claim was precluded by Rule 32.2(a)(3) and untimely under Rule 32.4(b)(3)(A).

The trial court held that the claim was not precluded or untimely:

> Defendant…only recently became aware that parole was not available as he was nearing what he claims he though was a parole eligibility date. To support this position, defendant filed a supplemental reply brief with attached Arizona Department of Corrections policies which, as recently as 2021, suggest ambiguity about whether inmates, such as defendant, who were sentenced to life with a minimum number of years to serve were eligible for parole (as opposed to release) after serving 25 years if he was convicted at trial, the Court concludes that…[t]he defendant's current petition shall not be subject to preclusion nor shall it be deemed untimely.

APP 210. Nonetheless, the Court denied the petition, finding that there was not sufficient evidence that a plea agreement had been offered in Mr. Anderson's case and, in any event, there was no deficient performance because "his trial attorney's failure to advise him that parole was not available" did not fall below "prevailing professional norms" because Mr. Anderson had alleged that many other attorneys were so advising their clients. APP 212.

Mr. Anderson filed a petition for review in the Arizona Court of Appeals, arguing that the trial court's determination that no evidence supported his claim without ordering an evidentiary hearing was error. In a brief opinion, the Court of Appeals upheld the trial court's denial, but on different grounds, finding that Mr.

Anderson's 32.1 (a) claim was both precluded and untimely and that his "failure to recognize a valid claim might exist" did not overcome those procedural bars. *State v. Anderson*, No. 2 CA-CR 2022-0121-PR (Ariz. Ct. App. Dec. 8, 2022).

ARGUMENT

I. Mr. Anderson is entitled to the benefit of the plea bargain because his trial counsel improperly advised him during plea negotiations that he would be eligible for parole after serving 25 years.

Both the Sixth Amendment and Article II, Section 24 of Arizona's Constitution guarantee a criminal defendant the right to effective assistance of counsel. "Ineffective assistance of counsel that leads a defendant to reject a plea bargain is a constitutional violation that a fair trial does not remedy." *State v. Donald*, 198 Ariz. 406, 413 ¶ 13 (App. 2000); *see also Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (holding that rejection of a plea offer based on defense counsel's deficient advice amounted to ineffective assistance of counsel). A claim of ineffective assistance of counsel is cognizable under Rule 32.1(a). *State v. Petty*, 225 Ariz. 369, 373 ¶ 12 (App. 2010). To demonstrate that his counsel was ineffective, a defendant must demonstrate both that counsel's performance was "deficient" and that counsel's deficient performance "prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. When trial counsel gives a client incorrect legal advice, his performance is *per se* deficient.

"To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give

information necessary to allow the petitioner to make an informed decision whether to accept the plea." *Donald*, 198 Ariz. at 413 ¶ 16. This case implicates both types of ineffective assistance. First, Mr. Anderson's trial counsel gave him erroneous advice – claiming that he would be eligible for parole after 25 years if convicted at trial. But Mr. Anderson's counsel also failed to give him information "necessary to make an informed decision" when he failed to tell Mr. Anderson that he would be ineligible for parole and would likely have to serve a natural life sentence if convicted of conspiracy to commit first-degree murder.

Prior to trial, Mr. Anderson was offered a plea agreement to an 18-to-22-year prison term. His trial counsel advised him that if he went to trial and was convicted, he would be eligible for parole after 25 years. This advice was incorrect – the mandatory minimum sentence for conspiracy to commit first-degree murder – which purports to offer a "possibility of release" after 25 years – does not permit release on parole. *See Chaparro v. Shinn*, 248 Ariz. 138, 140 ¶ 3 (2020) ("In 1993, the Arizona Legislature amended § 41-1604.09 to eliminate parole for all offenses committed on or after January 1, 1994."); *Lynch v. Arizona*, 578 U.S. 613, 615 (2016) ("[U]nder [Arizona] law, the only kind of release for which [a post-1993 defendant] would have been eligible—as the State does not contest—is executive clemency.").

The conclusion that Mr. Anderson's counsel provided deficient performance when he misadvised his client on the law is not undercut by the fact that many others

in the criminal justice system believed parole was still available. *See Viramontes v. Att'y Gen. of Arizona*, No. CV-16-00151-TUC-RM, 2021 WL 977170, at *1 (D. Ariz. Mar. 16, 2021) ("Despite the elimination of parole, prosecutors continued to offer parole in plea agreements, and judges continued to accept such agreements and impose sentences of life with the possibility of parole."). When an attorney gives his client incorrect information about the law, his performance falls below "an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, regardless of the fact that many other attorneys were similarly misinformed about the law. Indeed, this Court seems to have agreed with this proposition as recently as two years ago, noting in a discussion of a different IAC claim that "[w]e are not averse to Miller's argument that a lawyer's representation can be unreasonable under prevailing professional norms even when the legal community has uniformly made the same error." *State v. Miller*, 251 Ariz. 99, 103 ¶ 14 (2021).

The question of whether counsel's performance fell below the standard of reasonableness is objective. *Strickland*, 466 U.S. at 688. The focus of that inquiry must be on the advice that an attorney gave to his client in a particular instance – and not on what other attorneys may have advised their clients at the same time. It is clear that providing incorrect advice is *per se* unreasonable. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable

performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *see also Lafler*, 566 U.S. at 162 (upholding court of appeals opinion that an attorney "provided deficient performance by informing respondent of 'an incorrect legal rule.'").

That other attorneys were similarly misinformed about that state of the law regarding parole eligibility also should not change a court's determination of "prevailing professional norms" under *Strickland*. The Supreme Court has long held that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like…are guides to determining what is reasonable…" *Strickland*, 466 U.S. at 688. *See also Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam); *Florida v. Nixon,* 543 U.S. 175, 191 (2004); *Wiggins v. Smith,* 539 U.S. 510, 524 (2003); *Williams v. Taylor,* 529 U.S. 362 (2000). It should come as no surprise that the prevailing ABA standards of the time required a defense counsel to – at a minimum – know what the law was. "Because the law is a learned profession, lawyers must take pains to guarantee that their training is adequate and their knowledge up-to-date in order to fulfill their duty as advocates." ABA Standards for Criminal Justice: Defense Function § 4-1.2, cmt. (3d ed. 1993). Arizona's own ethical rules also require that a lawyer demonstrate competence, and that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice." ER 1.1, cmt. 6.

By his own admission, Mr. Anderson's attorney told Mr. Anderson that he would be eligible for parole if he were convicted at trial. That information was legally incorrect. It therefore "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

B. Trial counsel's incorrect legal analysis prejudiced the defense because it resulted in Mr. Anderson's rejection of a plea.

Having established that his trial counsel provided deficient performance, Mr. Anderson can also establish prejudice. To demonstrate prejudice in the rejection of a plea offer, "a defendant must show a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer." *Donald*, 198 Ariz. at 414 ¶ 20 (internal quotations omitted). Although the Arizona Court of Appeals has recognized that evidence of prejudice "is easy to claim but hard to secure" and that this evidence "must consist of more than conclusory assertions and be supported by more than regret," it has also recognized that a defendant "may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would have been imposed as a result of a plea." *Id*. at 414 ¶ 21. Undoubtedly, Mr. Anderson can make such an inference – his plea agreement would have had him out after 18 to 22 years, whereas his current sentence calls for him to be incarcerated for life unless he somehow obtains an exceedingly improbable grant of executive clemency. In addition to this inference, Mr. Anderson himself has attested that he would have accepted the plea

offer had he known he was facing a life sentence. At a minimum, these allegations rise to the level of a colorable claim, entitling Mr. Anderson to an evidentiary hearing. *State v. Bennett,* 213 Ariz. 562, 567 ¶ 21 (2006) ("A colorable claim is one that, if the allegations are true, might have changed the outcome."); *see also State v. Gutierrez*, 229 Ariz. 573, 578 ¶ 25 (2012) (holding that a trial court must set a hearing to determine "material issues of fact or law"); Ariz. R. Crim. P. 32.13 ("The defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses for the hearing.").

A court assessing prejudice may also consider what Mr. Anderson believed to be the "respective consequences after a trial and by plea." *Lee v. United States*, 137 S.Ct. 1958, 1966 (2017). In a recent case from the District of Arizona regarding substantially this same issue, the Court determined that a defendant who had been offered a plea to "a minimum of 20 years in prison" had demonstrated prejudice when he went to trial thinking that he would serve a sentence of life with the possibility of parole after 25 years. *Viramontes*, 2021 WL 977170. That Court reasoned that "[h]ad Petitioner been adequately advised by his attorney as to the impossibility of parole, 'it seems quite reasonable that when faced with a probable life sentence without the possibility of parole, [Petitioner] would have jumped at a negotiated plea to a lesser offense. After all, going home eventually is far preferable

than never going home at all.'" *Id*. at * 5 (quoting *Byrd v. Skipper*, 940 F.3d 248, 259 (6th Cir. 2019)).

Prior to trial, Mr. Anderson was offered a plea to 18 to 22 years. Relying on his trial attorney's advice that if he went to trial he faced a maximum of 25 years, he declined the offer. If he had accepted the offer, he would have been released from ADC in 2019 and lived the last five years as a free man. Instead, he now faces the prospect of a life in prison, his only hope for release the vanishingly small possibility of a commutation from the governor – a hope which, in reality, is no hope at all. *See Solem v. Helm*, 463 U.S. 277, 303 (1983) ("The possibility of commutation is nothing more than a hope for 'an ad hoc exercise of clemency.'"). To say that Mr. Anderson has suffered prejudice from his trial attorney's deficient performance is an understatement.

II. Mr. Anderson's 32.1(a) claim is not precluded and is timely.

Mr. Anderson's claim for ineffective assistance of counsel is not precluded under Rule 32.2(a)(3) because (1) he did not know that he would not be eligible for parole until 2021—making it impossible for him to "waive" any claim related to his ineligibility for parole – and (2) the right to effective assistance of trial counsel in determining whether to accept or reject a plea offer is of sufficient constitutional magnitude that the failure to adequately raise and support this claim in the initial

petition must have been "knowingly, voluntarily, and personally" waived by Mr. Anderson. *See* Ariz. R. Crim. P. 32.2(a)(3).

The record in this case clearly demonstrates that Mr. Anderson believed until 2021 that he would be eligible for parole. That belief was not irrational – indeed, it was buttressed both by the fact that his trial counsel told him he would be eligible for parole at the time of trial, APP 037, and by the fact that the Arizona Department of Corrections continued to tell him that he was eligible for parole until 2021, APP 098. Additionally, Arizona appellate courts – including this one – repeatedly told similarly situated defendants that they would be eligible for parole. *State v. Wagner*, 194 Ariz. 310, 313 ¶ 11 (1999); *State v. Fell*, 209 Ariz. 77, 79 ¶ 3 (App. 2004) (describing the two non-death sentences for first-degree murder as "a natural life term of imprisonment or a life term with the possibility of parole after twenty-five years"). Indeed, in *Wagner*, this Court explained – more than five years after parole had been abolished – that "Arizona's statute…states with clarity that the punishment for commiting first degree murder is either death, natural life, or life in prison with the possibility of parole," such that "a person of ordinary intelligence can easily determine the range of punishment he or she faces." 194 Ariz. at 313 ¶ 11. To hold that a defendant waives a claim due to ignorance when this Court reinforced the ignorance would be perverse indeed.

Additionally, it is well-established that whether a 32.1(a) claim raised for the first time in a successive Rule 32 petition is precluded is "determined by the nature of the right allegedly affected by counsel's ineffective performance." *Stewart v. Smith*, 202 Ariz. 446, 450 ¶ 12 (2002). "If that right is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver, the claim is not precluded." *Id.* The Sixth Amendment right to aid of counsel with respect to whether to enter a guilty plea is one of those rights of "sufficient constitutional magnitude" that it requires "personal waiver by the defendant." *Wilson v. Rose*, 366 F.2d 611, 615 (9th Cir. 1966); *see also Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (holding that a defendant may only waive right to counsel during plea negotiations if he understands "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."); *see also State v. Brown*, 212 Ariz. 225, 229 ¶ 15 (2006) ("A defendant's waiver of his Sixth Amendment rights must be knowing, voluntary, and intelligent."). Because Mr. Anderson did not "knowingly, voluntarily, [or] personally" waive his right to effective counsel in determining whether to accept a plea offer, his IAC claim is not precluded under Rule 32.2(a)(3).

State v. Diaz, 236 Ariz. 361, 362 ¶ 9 (2014), which notes in passing that "defendants do not have a constitutional right to a plea bargain," does not compel this Court to hold that Mr. Anderson's claim is precluded. While there may not be a constitutional right to a plea bargain, it is irrefutable that when the State offers a plea, "the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer." *Donald*, 198 Ariz. at 413 ¶ 14; *see also State v. Lee*, 142 Ariz. 210, 215 (1984) (noting that while defense counsel should "provide guidance" regarding plea agreements, "the ultimate decision[] on whether to plead guilty…[is] to be made by the client."). Mr. Anderson is not asserting the right to a plea bargain, but the right to be effectively counseled once the State offers a plea.

The Supreme Court has also held that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler*, 566 U.S. at 168. In *Lafler*, the court also rejected arguments that the defendant's claim of ineffective assistance failed because there was no right to a plea bargain:

> It is, of course, true that defendants have no right to be offered a plea nor a federal right that the judge accept it. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. As in those cases, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.

Id. (internal quotations and citations omitted).

Undeniably, a defendant has a right to effective assistance of counsel in the plea bargaining phase of a criminal trial. The right to be given *correct* information by counsel during that process is a right that must be personally waived by the defendant. Because Mr. Anderson could not have known about his counsel's failure to correctly advise him until he learned that the advice he received was false, his claim is not precluded under Rule 32.2(a)(3).

For these same reasons, Mr. Anderson's untimely notice must be excused. Rule 32.4(b)(3)(D) requires that a court accept an untimely notice when "the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Here, Mr. Anderson engaged counsel as soon as he knew that he was not parole eligible, began negotiations with the State, and when negotiations with the State failed to bear fruit, he filed the notice. The time between his discovery

of his parole ineligibility and his filing of the notice was less than six months. Mr. Anderson moved as quickly as he could after discovering the basis for his claim.

Finally, to the extent that it is ambiguous whether Mr. Anderson is entitled to either preclusion under 32.2(a)(3) or an untimely petition under 32.4(b)(3)(D), those ambiguities must be resolved in Mr. Anderson's favor. *See State v. Pena*, 140 Ariz. 545, 550 (App. 1983) ("the rule of lenity dictates that any doubt should be resolved in favor of the defendant"); *see also Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring) ("From the start, lenity has played an important role in realizing a distinctly American version of the rule of law – one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.").

III. In the alternative, Mr. Anderson may bring this claim under Rule 32.1(e).

If this Court finds that Mr. Anderson is precluded from bringing his claim under Rule 32.1(a), it may also be brought under Rule 32.1(e). Claims under Rule 32.1(e) are not subject to preclusion under Rule 32.2(a)(3). Mr. Anderson only discovered that his sentence did not provide a mechanism for release through parole when he was told by ADC in 2021. Had he known that he would not be eligible for parole—and that his only opportunity for ever being released from prison was an exceedingly unlikely grant of executive clemency from the governor—he would

have accepted the State's plea offer of 18 to 22 years. Thus, if this "newly discovered evidence" (Mr. Anderson's personal understanding that he would not be eligible for parole after serving 25 years) had been available at the time of trial, it "probably would have changed" Mr. Anderson's sentence. Ariz. R. Crim. P. 32.1(e).

CONCLUSION

Because of the unique circumstances of this case, it was not possible for Mr. Anderson to bring a 32.1(a) claim any earlier than he did. Because Mr. Anderson cannot have waived a claim he had no reason to know existed, it cannot be precluded. Nor does his claim fail on the merits merely because other attorneys were also misinformed about the law.

Mr. Anderson's attorney gave him legally incorrect information. Mr. Anderson relied on that information when he rejected a plea offer. This is textbook ineffective assistance of counsel. Accordingly, Mr. Anderson respectfully requests that this court grant him the opportunity to prove up his claim at an evidentiary hearing pursuant to Ariz. R. Crim. P. 32.13.

September 12, 2022

Respectfully submitted,

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