IN THE SUPREME COURT
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-23-008-PR

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

Pima County
Superior Court
No. CR062244-001

SUPPLEMENTAL BRIEF

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ISSUES REPHRASED BY THE COURT AND PRESENTED FOR REVIEW

1. Is Anderson's ineffective assistance of counsel claim based on erroneous advice regarding the availability of parole precluded and untimely considering the extent of confusion in Arizona about the availability of parole after it was abolished?

2. If not, is erroneous advice about the availability of parole objectively unreasonable in light of the extent of confusion in Arizona surrounding the availability of parole?

ARGUMENT

I. THE COURT NEED NOT ADDRESS THE REPHRASED ISSUES BECAUSE THE TRIAL COURT'S DECISION WAS LEGALLY CORRECT ON OTHER GROUNDS

The rephrased issues discussed below do not need to be addressed in Mr. Anderson's case. Anderson's 3rd Petition for Post-Conviction Relief was denied by the trial court on separate, legally sufficient grounds. Because Anderson has not established he was offered a plea agreement, he has not established he was prejudiced by incorrect advice on the availability of parole.

"We will "affirm the trial court's ruling if the result was legally correct for any reason." *State v. Carlson*, 237 Ariz. 381, ¶7 quoting *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). When reviewing a denial by the trial court of a Petition for Post-Conviction Relief, an appellate court "can affirm the trial court's ruling for any reason supported by the record." *State v. Banda*, 232 Ariz. 582 ¶13 (Ct. App, 22013). As a matter of judicial restraint, the Courts generally do not address moot issues or issue advisory opinions. *Dunwell v. Univ. of Ariz.*, 134 Ariz. 504, 507 (App. 1982) (recognizing, absent the presence of a discretionary exception, "[i]t has long been the rule of this state that the appellate court is not empowered to decide moot questions or abstract propositions, or declare, for the sake of future cases, principles or rules of law which cannot affect the result of the

instant issue."). An appellate court should not give advisory opinions or decide issues unless it is required to do so in order to dispose of the appeal under consideration. *Progressive Specialty Ins. Co v. Farmers Ins. Co. of Arizona*., 143 Ariz. 547, 548(1985).

The trial court ruled that Mr. Anderson's 3rd Petition for Post-Conviction Relief failed both prongs of *Strickland v. Washington, 104 S.Ct. 2052(1984).* Specifically, the court found that Mr. Anderson had failed to show he was prejudiced by his trial court's failure to advise him that parole was not available:

> In the end, the defendant simply does not present sufficient evidence to support his claim that he had, at any time, a plea offer available to him in this case. Consequently, defendant fails to satisfy the second *Strickland* prong that but for his trial attorney's erroneous representation about the availability of parole after 25 years, the result would have been different. (August 8, 2022 Ruling, p. 5)

Thus, even if the Court were to decide the timeliness, preclusion and deficient performance issues in Mr. Anderson's favor, he still is not entitled to relief.

Therefore, it may be unnecessary for this Court to address the rephrased issues.

II. IS ANDERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON ERRONEOUS ADVICE REGARDING THE AVAILABILITY OF PAROLE PRECLUDED AND UNTIMELY CONSIDERING THE EXTENT OF CONFUSION IN ARIZONA

ABOUT THE AVAILABILITY OF PAROLE AFTER IT WAS ABOLISHED?

In its rephrased issues, the Court notes the "extent of confusion in Arizona about the "availability of parole" at the time Anderson was convicted, and asks whether such confusion affects the analysis of timeliness and preclusion of Anderson's third petition for post-conviction relief.

There can be no question that, after the legislature abolished parole for felonies committed on or after January 1, 1994, the legal system was rife with inaccurate legal opinions and imprecise language use about the availability of parole. As recently as 2018, the court of appeals affirmed that the trial court imposed a legal sentence for a first-degree murder charge after noting "the court sentenced Anderson to prison terms of life with the possibility of parole after 25 years." *State v. Anderson (Kevin)*, No. 1 CA-CR 16-0194, 2018 WL 618583 ¶¶ 13, 27; *see also Viramontes v. Attorney General*, 2021 WL 977170, CV-16-00151 ["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."). *See, e.g., id*. (noting that the sentencing court was mistaken about the availability of parole); Governor's Letter to Ariz. Sec'y of State (Apr. 30, 2018), available at sb1211.pdf (expressing puzzlement as to why parole sentences

continued to be imposed after January 1, 1994)."]

A. Timeliness

A Petition for Post-Conviction Relief alleging that the conviction or sentence was obtained in violation of the Arizona or United States Constitution must be raised within 90 days of sentence or 30 days of issuance of the mandate, whichever is later. Rule 32.4(b)(3)(A) of the Arizona Rules of Criminal Procedure. Therefore, the time for raising the issues found in Anderson's 3rd Petition for Post-Conviction Relief past years ago. However, Rule 32.4(b)(3)(D) makes certain exceptions for this strict timeliness rule:

> (D) Excusing an Untimely Notice. 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.[1]

Anderson was sentenced on February 16, 2000, to "a term of life without possibility of release until the service of at least 25 years". According to the affidavit executed by Anderson's trial counsel, he was affirmatively told that parole was available to him. This, standing alone, might constitute sufficient explanation as to why he did not raise these claims initially.

[1] In his Petition for Review, Anderson does not state under which subsection of Rule 32.1 he is seeking relief. Nevertheless, claims of ineffective assistance of counsel arising from violations of the United States or Arizona Constitution fall under Rule 32.1(a). To the extent Anderson presents his claim under Rule 32.1(g) as the title of his petition suggests, he has not identified any change in the law relevant to the claim.

However, even if the rule requires more than just reliance on his trial counsel's advice, his failure to file may still be excusable for some time. After his sentencing, had Anderson exercised more due diligence by conducting legal research in an attempted to ascertain if "possibility of release" included the availability of parole, he would have found *State v. Wagner*, 194 Ariz. 310, ¶11 (1999), which reads: "Arizona's statute, however, states with clarity that the punishment for committing first degree murder is either death, natural life, **or life in prison with the possibility of parole**." [Emphasis added]. If he had waited several more years and once again confirmed that the range of punishment for first degree murder cases is "life with the possibility of parole or imprisonment of 'natural life' without the possibility of release. . . .we today confirm that our statement in that case accurately explained the law…" *State v. Fell*, 210 Ariz. 554 ¶11 (2005)[citations and internal quotations omitted].

For some length of time, it would appear that Andersons untimely filing of this PCR was not his fault. But he must be tasked with some element of continued due diligence. At some point, it must be acknowledged that availability of parole was a legal concern which should be addressed by any inmate expecting parole. The legislature expressly addressed the issue of parole for those convicted of first-degree murder in 2018 by added A.R.S §13-718. That change in the law

retroactively allowed defendants whose plea agreements included the possibility of parole to be given parole, notwithstanding the prior wholesale elimination of parole in 1994.

When answering a question of timeliness and "adequate explanation" of delay, some delay is clearly warranted due to the "extent of confusion in Arizona about the availability of parole." The question becomes, when should that excusable neglect have been corrected by a reasonably diligent defendant?

B. PRECLUSION

The question of legal preclusion must also be answered by Anderson. His 3rd Petition for Post-Conviction Relief seems precluded pursuant to Rule 32.2(a):

> (a) Preclusion. A defendant is precluded from relief under Rule 32.1(a) based on any ground:
> (1) still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
> (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or
> (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.[2]

[2] It is important to note that Rule 32.2(b) allows for claims raised in successive PCRs to be excused from preclusion if the defendant adequately explains why he did not raise the claim in a previous petition. The excusable neglect exception of Rule 32.2(b) does not apply to constitutional claims raised pursuant to Rule. 32.1(a), as is the case here.

The allegation of ineffective assistance of trial counsel regarding availability of parole is not still raisable on direct appeal or Rule 24 and has not been adjudicated in a previous post-conviction proceeding. However, ineffective assistance of trial counsel was raised generally in Anderson's first Petition for Post- Conviction Relief and is precluded as "the ground of ineffective assistance of counsel cannot be raised repeatedly. There is a strong public policy against piecemeal litigation." *Steward v. Smith*, 202 Ariz. 446, ¶12 (2002). So *Stewart* mandates that all ineffective assistance of counsel claims be litigated in one and only one petition and Rule 32.2 does not allow an exception for this preclusion even when the defendant has adequate explanation for it.

Thus, *Stewart* would seem to end the analysis. However, this Court has noted that in certain "unusual circumstances" a subsequent claim of ineffective assistance of counsel may be excused. *State v. Diaz*, 236 Ariz. 361, ¶10 (2014). In *Diaz*, the defendant had filed two Notices of Petition of Post-Conviction Relief asserting ineffective assistance of counsel and they were denied. *Id*. ¶3, 4, 11. In both cases, his appointed attorney did not actually file a Petition on his behalf, so they were procedurally denied. He thereafter filed a 3rd Petition for Post-Conviction Relief. "Because [Diaz] was blameless regarding his former attorneys' failure to file an initial PCR petition, we will not deem his [3rd] IAC claim

waived." *Id*. ¶11. The court noted that Rule 1.2 requires construction of rules to "secure…fairness in administration…and to protect the fundamental rights of the individual while preserving the public welfare." *Id*.

If the "extent of confusion" surrounding the availability of parole is sufficient "unusual circumstances" such that Anderson falls within the exception crafted by *Diaz* is a question for this Court to answer.

III. IF NOT, IS ERRONEOUS ADVICE ABOUT THE AVAILABILITY OF PAROLE OBJECTIVELY UNREASONABLE IN LIGHT OF THE EXTENT OF CONFUSION IN ARIZONA SURROUNDING THE AVAILABILITY OF PAROLE?

Patently incorrect legal advice on the availability of parole is objectively unreasonable, regardless of the number of legal practitioners administering the same advice.

To establish ineffective assistance of counsel during plea bargaining, a defendant must demonstrate that "the advice ... he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the [plea] offer." *Turner v. Calderon*, 281 F.3d 851, ¶51 (9th Cir. 2002) citing *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992).

The state does not dispute that, in general, an attorney's incorrect advice to a defendant on his parole eligibility is objectively unreasonable and constitutes

deficient performance under *Strickland v. Washington*. 104 S. Ct. 2052 (1984).

IV. DOES THE EXTENT CONFUSION AROUND THE AVAILABILITY OF PAROLE FOR LIFE SENTENCE AFTER 1994 JUSTIFY AN RARE EXCEPTION TO THE ABOVE ISSUES OF TIMELINESS, PRECLUSION, DEFICIENT PERFORMANCE AND PREJUDICE?

Anderson faces significant procedural hurdles when attempting to address the inaccurate advice he received from his attorney and the court system in general. Presumably, he detrimentally relied on this information and his belief that he was available for some form of release informed his decision-making and behavior in the last 20 years. As the Court implicitly acknowledged when reframing the issues in this appeal, the "extent of confusion" around this issue is extraordinary and unique. The extent of confusion, and severity of the consequences to Anderson and many other defendants may require that Court to fashion an exception to some of these rules, as the Court did in *Diaz, supra*.

Specifically, the criminal laws in the State of Arizona are declared to:

> 2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;
> …
> 7. To promote truth and accountability in sentencing. A.R.S. §13-101.

The extent of confusion and therefore inaccurate advice by defense counsel, prosecutors, and the judicial system surrounding the availability of parole after

1994 clearly violates these fundamental precepts of criminal law outlined in the very first chapter of Title 13.

Defendants were not given fair warning of the sentence authorized if they were convicted of first-degree murder. Sentencings were not truthful, if the sentence given or implied was not accurate.

Is this an extraordinary, unique circumstance that would allow the Court to fashion a remedy consistent with the public policy declarations in A.R.S. §13-101?

CONCLUSION

The State respectfully requests this address the equities involved in the extent on confusion regarding availability of parole for those convicted of first-degree murder after 1994.

Respectfully submitted this 12th day of September, 2023.

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