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 Division Two No. 2 CA-CR 22-0121 Pima County Superior Court Case No. CR 062244001

BRIEF OF *AMICUS CURIAE* ARIZONA JUSTICE PROJECT

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The Arizona Justice Project ("AJP") is a non-profit organization dedicated to preventing and overturning wrongful convictions and other manifest injustices, such as excessive or unconstitutional sentences. Now in its 25th year, AJP has received several thousands of requests for assistance from Arizona inmates and has represented numerous individuals before courts of law and the Arizona Board of Executive Clemency, including many individuals who received 25-to-life sentences. AJP has been litigating issues related to these indeterminate life sentences for many years and represents numerous individuals—both in litigation and before the Board—with sentences similar to Mr. Anderson's. AJP has a compelling interest in ensuring affected defendants receive the meaningful opportunity for release that they were promised at their sentencing hearings and that their opportunities to pursue claims related to their sentences are not foreclosed by the courts.

INTRODUCTION

In 1993, the Arizona legislature upended the state's parole scheme by amending the section of Title 41 that governs the certification of inmates for parole hearings by the Arizona Department of Corrections ("ADC") to make that provision inapplicable to offenses committed after January 1, 1994, without amending Title 13 (the criminal code) to explicitly remove parole as a sentencing option. Ariz. Rev. Stat. § 41-1604.09; *see also State v. Vera*, 235 Ariz. 571, 575 ¶ 17 (App. 2014)

("Because the Arizona legislature had eliminated parole for all offenders who committed offenses after January 1, 1994, and replaced it with a system of 'earned release credits,' *see* 1993 Ariz. Sess. Laws, ch. 255, § 86—which has no ready application to an indeterminate life sentence—[a defendant similarly situated to Mr. Anderson]'s only possibilities for release would be through a pardon or commutation by the governor.") (cleaned up).

As this Court acknowledges in the questions posed, the system failed to inform individuals like Mr. Anderson as to what sentences they could legally receive. All participants in the criminal justice system with whom Mr. Anderson and others like him interacted—defense counsel, prosecutors, trial judges, and ADC—misinformed individuals like Mr. Anderson regarding their parole eligibility. Defendants like Mr. Anderson should not be punished—and should not be precluded from having the merits of their claims heard in court—because of the failures of other actors in the system who had a duty to be better informed of the state of the law. For this reason, the Court should find that Mr. Anderson's claim is timely, not precluded, and legally viable. However, because the record does not demonstrate that Mr. Anderson was actually offered a plea to a lesser offense prior to trial, this Court need not reach these issues in this case.

ARGUMENT

At the time of Mr. Anderson's trial in 2000, Arizona law provided only one sentencing option for someone convicted of conspiracy to commit first-degree

murder: "imprisonment without the possibility of release on any basis until the service of twenty-five years." Ariz. Rev. Stat. § 13-1003(D). Because the legislature had eliminated the parole system "for all offenses committed on or after January 1, 1994," *Chaparro v. Shinn*, 248 Ariz. 138, 140 ¶ 3 (2020), "the only kind of release for which [an Arizona defendant who received a sentence with the possibility of release after 25 years] would have been eligible . . . is executive clemency." *Lynch v. Arizona*, 578 U.S. 613, 615 (2016).

However, no one informed Mr. Anderson at the time of his trial that his only option for release was executive clemency, *i.e.*, pardon or commutation of sentence—which is essentially never granted to defendants similarly situated to Mr. Anderson in Arizona. *See Viramontes v. Att'y Gen. of Arizona*, No. CV-16-00151-TUC-RM, 2021 WL 977170, at *2 (D. Ariz. March 16, 2021) ("Unlike parole, the chances of obtaining release through executive clemency are slim."); *id.* at *2 n.2 (citing statistics from 2013 in which parole was granted in approximately 24% of cases, while commutation was granted in only 0.005% of cases); *see also State v. Dansdill,* 246 Ariz. 593, 603 ¶ 37 n.10 (App. 2019) ("[I]n Arizona, the possibility that a life sentence may allow for release [via commutation or pardon] after twenty-five years is more theoretical than practical" because the "likelihood of either is so remote.").

Mr. Anderson's attorney's incorrect legal advice that a life sentence would include parole constitutes deficient performance under *Strickland v. Washington*.

466 U.S. 668, 687–88 (1984). Since his lawyer, the courts, and ADC did not tell him otherwise, Mr. Anderson—like other similarly situated defendants—believed and understood that he would be eligible for *parole*—not just clemency—after serving twenty-five years. Because this understanding was reasonable under the circumstances for the reasons explained below, this Court should find that Mr. Anderson's petition is timely and not precluded due to "the unusual facts of this case." *See State v. Diaz*, 236 Ariz. 361 ¶ 1 (2014).

However, as the State points out in its supplemental brief, the Court need not reach these issues because, on the record before this Court, Mr. Anderson's claim fails because he cannot demonstrate prejudice under *Strickland*.

I. MR. ANDERSON'S CLAIM SHOULD BE DEEMED TIMELY AND NOT PRECLUDED BECAUSE THE ENTIRE CRIMINAL JUSTICE SYSTEM FAILED TO PUT HIM ON NOTICE THAT HE WAS NOT ELIGIBLE FOR PAROLE.

Generally, a defendant seeking post-conviction relief under Arizona Rule of Criminal Procedure 32.1(a)[1] must file a notice of post-conviction relief within 90

[1] While Mr. Anderson's Petition for Review is entitled a "Petition for Review of Third Petition for Post-Conviction Relief Under Arizona Rules of Criminal Procedure 32.1(g)," and this Court's August 22, 2023, order refers that title (including Rule 32.1(g)), it is clear from Mr. Anderson's Supplemental Brief in this Court, as well as the pleadings and decisions in the courts below, that Mr. Anderson is bringing a claim of ineffective assistance of counsel under Arizona Rule of Criminal Procedure 32.1(a). *See State v. Herrera*, 183 Ariz. 642, 645–46 (1995) (claims of ineffective assistance of counsel are properly brought under Ariz. R.

days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal" for the claim to be deemed timely. Ariz. R. Crim. P. 32.4(b)(3)(A). However, a 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 a notice was not the defendant's fault." Ariz. R. Crim. P. 32.4(b)(3)(D). Defendants are also precluded from relief under Rule 32.1(a) based on any ground "waived . . . in any previous post-conviction proceeding, except when a claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a)(3). The rules of preclusion are "designed to 'require a defendant to raise all *known* claims for relief in a single petition.'" *State v. Diaz*, 236 Ariz. 361, 363 ¶ 12 (2014) (quoting *State v. Petty*, 225 Ariz. 369, 373 ¶ 11 (App. 2010)) (emphasis added).

As explained in more detail below, participants in the criminal justice system—including defense lawyers and prosecutors, trial and appellate courts, and ADC—regularly failed to inform or even misinformed defendants like Mr. Anderson regarding their parole eligibility. Because Mr. Anderson did not know until a reasonable time before filing the present petition that his sentence did not include

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Crim. P. 32.1(a)). Accordingly, Amicus AJP addresses the questions posed by the Court in its August 22, 2023, order under the rules of timeliness and preclusion applicable to 32.1(a) claims. Notably, claims under Rule 32.1(g) are not subject to the same timeliness and preclusion rules. *See* Ariz. R. Crim. P. 32.2(b); Ariz. R. Crim. P. 32.4(b)(3)(A), (B), (D).

parole eligibility, this Court should find that his claim was not waived in a prior petition and is not precluded under Rule 32.2. Moreover, because Mr. Anderson was misinformed regarding his parole eligibility, the superior court correctly held that his failure to file a timely notice was not his fault, and thus his claim should be deemed timely under Rule 32.4(b)(3).

A. Arizona lawyers and courts regularly misadvised or failed to properly advise defendants like Mr. Anderson regarding their parole eligibility.

By making parole "inapplicable" for crimes committed after January 1, 1994, in Title 41 (State Government), but failing to amend Title 13 (Criminal Code) to specify that parole was no longer a form of "release" available to defendants like Mr. Anderson, the legislature failed to provide adequate notice to all actors in the criminal justice system about what sentences were legally available. For more than two decades, numerous criminal justice actors and courts in the State of Arizona have defined and conflated "release" eligibility as parole, community supervision, and even probation. Every participant in the system—prosecutors, defense attorneys, ADC, superior courts, the Arizona Court of Appeals, and even this Court—continued to refer to parole as still being available.

Over the past several years, Amicus AJP has attempted to identify and collect sentencing records (including sentencing minute entries or sentencing orders, sentencing transcripts, and, where applicable, plea agreements, and change of plea

hearing transcripts and minute entries) for all individuals in Arizona who were convicted of first-degree murder or conspiracy to commit first-degree murder for offenses occurring on or after January 1, 1994, and who—like Mr. Anderson—received sentences of life imprisonment with some possibility of release after a period of years. AJP analyzed and compiled the data contained in these sentencing documents. (*See* attached Exhibit A, Ziegler Declaration dated September 26, 2023.) The data shows that, since 1994, sentencing courts in Arizona have arbitrarily used the words "parole" and "release" when sentencing individuals convicted of first-degree murder or conspiracy to commit first-degree murder to non-natural life sentences. The evidence demonstrates that courts used these words interchangeably, with no discernable substantive differences between the cases in which judges used "parole" and those in which they used the word "release." In several cases, judges used both "parole" and "release" at the same time in explaining to a defendant that he was receiving a sentence with a meaningful opportunity for release. And, in 35% of cases, different terms ("parole" vs. "release") were used at the oral pronouncement of sentence and in the sentencing order, suggesting that courts believed these terms were synonymous and interchangeable.

In the vast majority of cases, the judges imposed a "mandatory" term of community supervision pursuant to Ariz. Rev. Stat. § 13-603(I) in addition to an indeterminate life sentence, even though the system of community supervision and earned release credits—which "replaced" parole in Arizona—"has no ready

application to an indeterminate life sentence." *Vera*, 235 Ariz. at 575 ¶ 17; *see also* Ariz. Rev. Stat. §§ 13-603(I) (requiring sentencing courts in felony cases to impose a term of community supervision "for a period equal to one day for every seven days of the sentence or sentences imposed"); 41-1604.07 (creating a system of earned release credits allowing for early release on community supervision of one day for every six days of imprisonment for most offenders). AJP did not observe a single sentencing order or minute entry that included a reference to A.R.S. § 41-1604.09 (or to Title 41 at all for that matter), the legislative provision that made parole inapplicable for offenses committed on or after January 1, 1994. A review of sentencing transcripts reveals that sentencing judges, prosecutors, and defense attorneys all failed to advise defendants that their only opportunity for release was through clemency and instead regularly explained to defendants that they would have a good chance to be released from prison after 25 years if they exhibited good behavior while in prison and reformed themselves.

Moreover, at the time Mr. Anderson was sentenced and for at least 15 years afterward, appellate courts throughout Arizona—including this Court—regularly held that life with the possibility of parole was a valid sentence for individuals sentenced to first-degree murder for crimes committed after January 1, 1994. *See, e.g.*, *State v. Benson*, 232 Ariz. 452, 465 ¶ 56 (2013) (Timmer, J.) ("Arizona law does not make [the defendant] ineligible for parole."); *State v. Cruz*, 218 Ariz. 149, 160 ¶ 42 (2008) (Berch, V.C.J.) (noting that "[n]o state law would have prohibited

[the defendant's] release on parole after serving twenty-five years, had he been given a life sentence," and concluding that the "jury was properly informed of the three possible sentences [the defendant] faced if convicted: death, natural life, and life with the possibility of parole after twenty-five years"); *State v. Fell*, 210 Ariz. 554, 557–58 ¶ 11 (2005) (Hurwitz, J.) ("confirm[ing]" that the Court "accurately explained the law" in *State v. Ring*, 200 Ariz. 267, 279 ¶ 42 (2001), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584 (2002), that "in first degree murder cases, '[t]he range of punishment allowed by law . . . is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release").

Most notably, in *State v. Wagner*, which considered a vagueness challenge to the first-degree murder sentencing statute for a crime committed after January 1, 1994, this Court held that "Arizona's statute . . . 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*." 194 Ariz. 310, 313 ¶ 11 (1999) (McGregor, J.) (emphasis added). The Court concluded that "a person of ordinary intelligence can easily determine the range of punishment he or she faces for committing first degree murder," and therefore that the sentencing statute was not "unconstitutionally vague." *Id.* However, this Court later stated in *Chaparro* that courts cannot lawfully sentence someone to life with the possibility of parole for crimes committed after January 1, 1994. 248 Ariz. at 139–42 ¶¶ 2, 3, 18. *See also Lynch v. Arizona*, 578

U.S. 613, 615 (2016) (Under Arizona law, "parole is available only to individuals who committed a felony before January 1, 1994."). Given the confusion of judges throughout the state that parole was still available, it is not unreasonable that a "person of ordinary intelligence" like Mr. Anderson would believe that he was parole eligible until ADC specifically told him he was not.

B. The Arizona Department of Corrections misadvised defendants like Mr. Anderson regarding their parole eligibility.

Although AJP does not represent Mr. Anderson and does not have access to his complete ADC file, AJP has represented and obtained documents from ADC regarding other individuals who were also sentenced to life imprisonment without the possibility of release for 25 years. ADC regularly provided a "sentence expiration date" ("SED") or "parole eligibility date" ("PED") to these individuals upon their admission to ADC, when an initial time computation audit is conducted. The SEDs or PEDs indicated that these inmates would either be eligible for parole or that their sentences would expire after the passage of 25 years. Later, ADC provided such individuals "Earned Release Credit Dates" ("ERCD") or "Community Supervision Beginning Dates" ("CSBD")—which again indicated to these inmates that they would be released from incarceration and placed on some other type of supervision after 25 years, even though, as explained above, the community supervision and earned release credit programs are seemingly incompatible with

indeterminate life sentences. In 2017, ADC issued a Departmental Order, which was provided to inmates, which explained that individuals with indeterminate life sentences *were* eligible for parole:

> 1.2 Inmates whose date of offense is on or after January 1, 1994 shall not be eligible for:
>
> 1.2.1 Parole. With the exception of those inmates who were sentenced to Life with a minimum number of years to serve (i.e., 25 or 35 years). Inmates with a Natural Life are not eligible , unless otherwise permitted per statute.

Arizona Department of Corrections, Department Order 1002: Inmate Release Eligibility System, April 10, 2017.[2]

Many individuals do not learn that they are, in fact, not eligible for parole until ADC conducts a final time computation audit just before an inmate is certified for a parole hearing—or in some cases, after such a hearing occurs. *See, e.g., Shinn v. Arizona Bd. of Exec. Clemency*, 254 Ariz. 255 ¶¶ 5–8, 521 P.3d 997, 1000–01 (2022). Thus, inmates like Mr. Anderson regularly spend twenty-plus years incarcerated in ADC believing that they are parole eligible and are not told until

[2] ADC later revised this policy, and it now states: "Inmates whose date of offense is on or after January 1, 1994 shall not be eligible for . . . Parole. With the exception of those inmates who were sentenced to Life with a minimum number of years to serve (i.e., 25 or 35 years) and are eligible pursuant to Arizona Revised Statute (A.R.S.) § 13-716, § 13-718 and by the Chapparo [sic] decision." DO 1002 – Inmate Release Eligibility System, *available at* https://corrections.az.gov/sites/default/files/documents/policies/1000/1002_amended_01-22-23.pdf. However, ADC has no written policy explaining which inmates are eligible for parole under *Chaparro*.

decades later—when they are expecting to have a meaningful opportunity to go home—that their only chance for release is actually the remote possibility of executive clemency. Like Mr. Anderson, many such inmates performed admirably while in prison, avoiding disciplinary issues, seeking employment, completing programming, and bettering themselves in preparation to becoming productive citizens upon their return to society, acting in reliance on the promise that they would have a meaningful opportunity for release via a parole hearing where they could demonstrate to the Board that they are unlikely to violate the law and that their release is in the best interest of the state. Ariz. Rev. Stat. § 31-412(A). This Court should find that it is consistent with the purposes of Rule 32 to allow such individuals to bring claims challenging their sentences—and to not find such claims untimely or precluded—when they had no reason to know and did not actually know at the time of their sentencing that they were not parole eligible.

II. MR. ANDERSON'S COUNSEL'S DEFICIENT PERFORMANCE CANNOT BE EXCUSED JUST BECAUSE OTHER ACTORS IN THE SYSTEM ALSO ERRED.

As explained above, Mr. Anderson's lawyer was certainly not the only one who misinformed his client regarding parole eligibility following the 1994 legislative changes. However, the fact that other participants in the criminal justice system were also mistaken does not relieve trial counsel of his Sixth Amendment obligation to provide his client with sound legal advice. *See State v. Miller*, 251 Ariz.

99, 103 ¶14 (2021) (acknowledging that "a lawyer's representation can be unreasonable under prevailing professional norms even when the legal community has uniformly made the same error"); *Hinton v. Alabama*, 571 U.S. 263, 274–75 (2014) (A "mistake of law" or "ignorance of a point of law that is fundamental to his case" is "a quintessential example of unreasonable performance under *Strickland*.").

A lawyer advising a client regarding a proffered plea offer must give correct legal advice regarding the consequences of pleading guilty versus preceding to trial, including the applicable sentence and collateral effects such as deportation. *Padilla v. Kentucky*, 559 U.S. 356, 364–65 (2010); *State v. Nunez-Diaz*, 247 Ariz. 1, 4–5 ¶¶11–12 (2019). For example, in *State v. Donald*, the Court of Appeals found that a defendant had made a colorable claim of ineffective assistance of counsel during plea bargaining where counsel misadvised him regarding the sentence he would face if he went to trial. 198 Ariz. 406, 413 (App. 2000). Because Mr. Anderson's claim is not legally distinguishable from the one at issue in *Donald*, the Court should find that Mr. Anderson has presented a colorable claim of ineffective assistance of counsel here.[3]

[3] However, for the reasons explained below, this Court could alternatively find that Mr. Anderson has failed to demonstrate prejudice and decline to reach this issue. As the Court stated in *Donald*, prejudice from misadvice during plea bargaining is "easy to claim but hard to secure." 198 Ariz. at 414 ¶¶ 20–21.

III. THIS CASE DOES NOT PRESENT A GOOD VEHICLE FOR THE COURT TO ADDRESS THE QUESTIONS POSED.

While AJP believes that the answers to the questions the Court posed in its August 22, 2023, order, as explained above, are that Mr. Anderson's ineffective assistance claim is not precluded and is legally viable in spite of other parties' confusion regarding parole eligibility, it does not believe that the Court needs to answer these questions in this case. While the Court should vacate the Court of Appeals' decision finding Mr. Anderson's claim untimely and precluded, as the State argues, it could uphold the superior court's decision on the alternative basis that Mr. Anderson has not demonstrated that a plea deal was offered, and thus cannot demonstrate prejudice. *See Lafler v. Cooper*, 566 U.S. 156, 168 (2012) ("If no plea offer is made . . . the issue raised here simply does not arise."). Alternatively, the Court should remand to the superior court for an evidentiary hearing to determine whether Mr. Anderson can demonstrate that such an offer was made before this Court unnecessarily addresses these additional issues. *See Donald*, 198 Ariz. at 414–15 ¶ 24.

Respectfully submitted this 26th day of September, 2023.

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EXHIBIT A

DECLARATION OF SHAWNEE RAE ZIEGLER

I, Shawneé Rae Ziegler, declare the following to be true to the best of my information and belief:

1. I am the Director of Operations and Intake Coordinator of the Arizona Justice Project. I have served in this role since 2015.

2. The Arizona Justice Project ("AJP") is a not-for-profit organization that provides *pro bono* legal representation to indigent defendants in Arizona who have been wrongfully convicted or suffered a manifest injustice.

3. As the Director of Operations and Intake Coordinator at AJP, I receive and review requests for assistance and acquire and review case materials so that I and other AJP staff can review cases in which assistance is requested.

4. In this capacity, I, along with others working at my direction and under my supervision, have attempted to identify and collect sentencing records (including: sentencing minute entries or sentencing orders, sentencing transcripts, and, where applicable, plea agreements, and change of plea hearing transcripts and minute entries) for all individuals in Arizona who were convicted of first-degree murder or conspiracy to commit first-degree murder for offenses occurring on or after January 1, 1994.

5. These documents were obtained by submitting public records requests to the Arizona Department of Corrections, to the clerks of each of the superior courts of Arizona (for each of the fifteen counties), and in some instances, to the relevant county attorney's office;

from defendants or their family members; and/or directly from the case file (paper or electronic) at the clerk's office of the relevant superior court and/or court of appeals.

6. I and others working at my direction and under my supervision have reviewed the documents obtained, including sentencing minute entries, sentencing orders, and sentencing transcripts and have observed the following with respect to individuals in Arizona who were convicted of first-degree murder or conspiracy to commit first-degree murder for offenses occurring on or after January 1, 1994, and who received non-natural life sentences:

7. Of the 607 cases in which Sentencing Minute Entries/Orders were obtained, 47% of minute entries/orders include the word "parole," 28% include the word "release," 22% contain neither of the words "release" or "parole," and 3% contain both "release" and "parole."

a. In Maricopa County, 53% of minute entries/orders include the word "parole," 18% include the word "release," 27% contain neither of the words "release" or "parole," and 2% contain both "release" and "parole."

b. In Pima County, 40% of minute entries/orders include the word "parole," 43% include the word "release," 13% contain neither of the words "release" or "parole," and 4% contain both "release" and "parole."

8. Of the 416 cases in which Sentencing Transcripts were obtained, 38% of transcripts use the word "parole," 40% use the word "release," 14% use neither "release" nor "parole," and 8% use both the word "release" and the word "parole."

a. In Maricopa County, 43% of transcripts use the word "parole," 39% use the word "release," 11% use neither "release" nor "parole," and 7% use both the word "release" and the word "parole."

b. In Pima County, 31% of transcripts use the word "parole," 44% use the word "release," 19% use neither "release" nor "parole," and 6% use both the word "release" and the word "parole."

9. In 35% of cases, the language used (i.e., release, parole, neither word, or both words) in the sentencing minute entry/order did not match the language used in the sentencing transcript.

a. In Maricopa County, the language used in the sentencing minute entry/order did not match the language used in the sentencing transcript in 35% of cases.

b. In Pima County, the language used in the sentencing minute entry/order did not match the language used in the sentencing transcript in 35% of cases.

10. In the sentencing orders/minute entries reviewed, community supervision was imposed along with an indeterminate (non-natural) life sentence in 71% of cases.

a. In Maricopa County, community supervision was imposed in 83% of cases.

b. In Pima County, community supervision was imposed in 50% of cases.

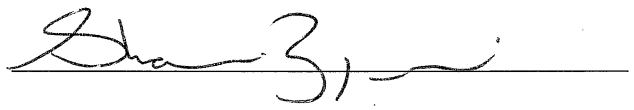
11. Zero (0) of the sentencing orders/minute entries reviewed, across all counties, included a reference to A.R.S. § 41-1604.09, the legislative provision that made parole inapplicable for offenses committed on or after January 1, 1994.

12. Across all counties, 98% of the sentencing orders/minute entries reviewed included a reference to the relevant substantive criminal sentencing statute contained in A.R.S. Title 13.

a. In Maricopa County, 99% of sentencing orders/minute entries included a reference to the relevant substantive criminal sentencing statute contained in A.R.S. Title 13.

b. In Pima County, 99% of sentencing orders/minute entries included a reference to the relevant substantive criminal sentencing statute contained in A.R.S. Title 13.

DATED this 26th Day of September, 2023.



Shawneé Rae Ziegler