No. CR-23-0008-PR

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Respondent,

vs.

LARRY DEAN ANDERSON, Petitioner.

On Review of a Decision of the Court of Appeals, Division Two
No. 2 CA-CR 22-0121
Pima County Superior Court No. CR-062244
Hon. James E. Marner, Superior Court Judge, Presiding

BRIEF OF *AMICUS CURIAE* FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Federal Public Defender for the District of Arizona is the organization established under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g), to provide representation of indigent criminal defendants before the federal trial and appellate courts covering Arizona. Under 18 U.S.C. §§ 3006A(a)(2)(B) and 3599(a)(2), the FPD also represents Arizona state prisoners seeking relief in federal court under 28 U.S.C. § 2254 from their unconstitutional sentences of either incarceration or death. Accordingly, the FPD has an interest in ensuring that Arizona state courts are open to entertain claims for relief when the federal courts will not hear them because federal habeas law closes the courthouse doors. The FPD files this brief by invitation of the Court on August 22, 2023.

STATEMENT OF THE CASE

In 1998, Mr. Anderson was charged in the Pima County Superior Court with one count of conspiracy to commit first-degree murder, in violation of A.R.S. §§ 13-1003 and -1105(A). First-degree murder is a class 1 felony, A.R.S. § 13-1105(C), and so conspiracy to commit first-degree murder is punishable by "a sentence of life imprisonment without possibility of release on any basis until the service of twenty-five years," A.R.S. § 13-1003(D). Before trial, he was offered a plea bargain that, if the court accepted it, would have resulted in a sentence of 18–22 years in prison. But he rejected the offer because his lawyer told him that he would be eligible for *parole* if he lost at trial. He was convicted at trial and sentenced to the lawful term of life without the possibility of *release* for 25 years.

Parole and release are distinct paths to freedom from prison. *See Chaparro v. Shinn*, 248 Ariz. 138, 142 ¶ 16, 459 P.3d 50, 54 ¶ 16 (2020) (citing *Lynch v. Arizona*, 578 U.S. 613, 615 (2016) (per curiam); *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)). But institutional recognition of this distinction is only recent in origin—despite the fact that the legislature eliminated parole 30 years ago. *See id.* at 140 ¶ 3, 459 P.3d at 52 ¶ 3. Another judge who was on the criminal bench in Pima County when Mr. Anderson's case was pending has described the historic conflation of "release" and "parole" as "an error that has been repeated frequently in the Arizona courts." *Viramontes v. Ryan*, No. 4:16-cv-151-TUC-RM (BPV), 2018 WL 7287654 (D. Ariz. May 4, 2018) (Velasco, M.J.).

Mr. Anderson had been serving his sentence believing that he would be eligible for parole (as counsel had erroneously advised him) until August of 2021, when the Department of Corrections informed him that he would not be eligible for parole. He promptly initiated this third round of postconviction proceedings, arguing that his Sixth Amendment right to effective assistance of counsel in plea negotiations, *see generally Missouri v. Frye*, 566 U.S. 134 (2012); *State v. Donald*, 198 Ariz. 406, 413 ¶ 14, 10 P.3d 1193, 1200 ¶ 14 (App. 2000), was violated when his trial counsel erroneously told him that he would be eligible for parole and, based on that advice, rejected an offer for a sentence of 18–22 years.

After receiving a response and a reply, the superior court denied the petition. It ruled that the petition was timely and that the claim was not precluded because "as recently as 2021" there was "ambiguity" in Department of Corrections policy

about "whether inmates, such as defendant, who were sentenced to life with a minimum number of years to serve were eligible for parole." (Pet'r Appx. at 210) But it denied the claim on the merits. The court first found no deficient performance, reasoning that Mr. Anderson's acknowledgement that lawyer errors regarding the abolishment of parole were nearly universal barred his "claim that his trial attorney's failure to advise him that parole was not available could be considered incompetent under the prevailing professional norms." (Pet'r Appx. at 212) *But see State v. Miller*, 251 Ariz. 99, 103 ¶ 14, 485 P.3d 554, 558 ¶ 14 (2021) (conceding that "a lawyer's representation can be unreasonable under prevailing professional norms even when the legal community has uniformly made the same error") (citation omitted). The court then found no prejudice because, in its view, Mr. Anderson's claim was not "supported by any meaningful evidence." (Pet'r Appx. at 212) "Even assuming the letters defendant attached to his affidavit were written prior to his trial, there is nothing in the court record to support a claim that the plea offer actually existed." (Pet'r Appx. at 212) In the court's view, the "nature of the allegations" meant that it was "not particularly surprising that no plea offer was ever made." (Pet'r Appx. at 212–13) Furthermore, the "fact that an 18-to-22-year sentencing range would not 'fit' any reasonable reduction of charges proposal" was, in the court's view, "further evidence that no plea offer existed." (Pet'r Appx. at 213)

Mr. Anderson petitioned for review from the court of appeals. Without calling for a response from the state, the court of appeals granted review and denied relief. The court held that the superior court "erred in reaching the merits of

Anderson's claim." (Mem. Disp. at 3) The superior court should not have excused the untimely filing "based on the mere failure to recognize a valid claim might exist." (Mem. Disp. at 3 (citing *State v. Poblete*, 227 Ariz. 537, 539–40 ¶¶ 6–7, 260 P.3d 1102, 1104–05 ¶¶ 6–7 (App. 2011))) And even if the tardiness of the filing were excused, the claim was nevertheless precluded under Rule 32.2(a)(3)[*] by virtue of Mr. Anderson's failure to raise the claim in a previous postconviction proceeding. (Mem. Disp. at 3) It rejected Mr. Anderson's framing of the claim as based on newly discovered evidence, because "Rule 32.1(e) does not contemplate a claim of newly discovered ineffective assistance of counsel." (Mem. Disp. at 3) And it said that Mr. Anderson had not identified any change in the law, such that his claim would arise under Rule 32.1(g), noting in a footnote that an unpublished decision of a federal district court was not a "significant change" in Arizona law. *Accord Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.").

Mr. Anderson then petitioned this Court for review. The Court granted the petition, identifying two questions presented: (1) whether Mr. Anderson's "ineffective assistance of counsel claim based on erroneous advice regarding the availability of parole [is] precluded and untimely considering the extent of confusion in Arizona about the availability of parole after it was abolished"; and (2) whether "erroneous advice about the availability of parole [is] objectively

[*] In this document, unadorned references to "Rule ____" are references to the Arizona Rules of Criminal Procedure.

unreasonable in light of the extent of confusion in Arizona surrounding the availability of parole."

ARGUMENT

1. Even if Mr. Anderson's petition for postconviction relief were held to be untimely or precluded, this Court can and should adopt exceptions to those bars under the circumstances presented here.

In Arizona postconviction proceedings, claims for relief based on a violation of constitutional law in the conviction or sentence, *see* Rule 32.1(a), are precluded if they have been "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," Rule 32.2(a)(3). And such claims are untimely if filed later than 30 days after the mandate issues in the direct appeal unless the defendant "adequately explains why the failure to timely file a notice was not the defendant's fault." Rule 32.4(b)(3)(A), (D). There are exceptions to these rules for other kinds of claims. *See* Rule 32.2(b). And this Court has interpreted the term "waived" in Rule 32.2(a)(3) to encompass certain other exceptions for claims under Rule 32.1(a). *See, e.g.*, *State v. Diaz*, 236 Ariz. 361, 340 P.3d 1069 (2014); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002).

Mr. Anderson's supplemental brief correctly explains why his ineffective-assistance-of-trial-counsel claim is neither untimely nor precluded. (Pet'r Supp. Br. at 12–17.) The state does not dispute his explanation. As to timeliness, the state acknowledges that Mr. Anderson's trial lawyer's affirmatively misleading advice

about parole "might constitute sufficient explanation" under Rule 32.4(b)(3)(D) for "why he did not raise these claims initially." (State's Supp. Br. at 6) As to preclusion, the state agrees that this Court may find that "the 'extent of confusion' surrounding the availability of parole is sufficient 'unusual circumstances' such that Anderson falls within the exception" that this Court created in *Diaz*. (State's Supp. Br. at 10)

This Court granted review in order to decide whether, under the circumstances presented here, a claim for postconviction relief based on a violation of federal constitutional law is precluded or untimely within the meaning of Rules 32.2(a)(3) and 32.4(b)(3)(D). Through judicial interpretation of these rules, this Court has excused these procedural bars in other cases. It should do so here as well.

1.1. This Court's authority to create exceptions to the preclusion and timeliness rules through judicial interpretation is well established.

Three times over the past three decades, this Court has interpreted the term "waived" in Rule 32.2(a)(3) to create exceptions to the preclusion rule set forth there. First, in *Smith* this Court approved of commentary to the text of the rule that excused certain kinds of constitutional claims from preclusion. "Criminal defendants possess two types of constitutional rights, and a different waiver standard applies to each." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (quoted in *Smith*, 202 Ariz. at 450 ¶ 9, 46 P.3d at 1071 ¶ 9). For those rights that require the defendant's "personal knowledge," the state must show that the defendant knowingly, voluntarily, and intelligently waived the right. *Smith*, 202 Ariz. at 449 ¶ 9, 46 P.3d at 1070 ¶ 9. For all other rights, the mere failure to raise

the claim in prior proceedings was sufficient to apply the preclusion rule. *Id.*, 46 P.3d at 1070 ¶ 9. Thus, the Court held, whether "waiver" under Rule 32.2(a)(3) requires a knowing, voluntary, and intelligent waiver in order to apply preclusion "depends merely upon the particular right alleged to have been violated." *Id.* at 450 ¶ 10, 46 P.3d at 1071 ¶ 10 (citing *State v. Espinoza*, 200 Ariz. 503, 29 P.3d 278 (App. 2001)).

Second, in *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006), this Court held that a claim of ineffective assistance of appellate counsel was not "waived" under Rule 32.2(a)(3) by virtue of not being raised in a first postconviction petition when the same lawyer handled both the direct appeal and the first postconviction proceedings. "Normally," the Court said, the claim would be precluded in a second round by virtue of the failure to raise it in the first round. *Id.* at 566 ¶ 15, 146 P.3d at 67 ¶ 15. But the Court had "previously noted" that the same lawyer cannot argue on appeal that she was ineffective at trial because the ineffective-assistance claim required "objective" evaluation "which we feel can best be developed by someone other than the person responsible for the conduct." *Id.* ¶ 14, 146 P.3d at 67 ¶ 14 (quoting *State v. Marlow*, 163 Ariz. 65, 68, 786 P.2d 395, 398 (1989)). "The same principles apply when post-conviction relief counsel might argue his own ineffectiveness on direct appeal." *Id.*, 146 P.3d at 67 ¶ 14. Accordingly, the claim was not "waived" and subject to preclusion under Rule 32.2(a)(3).

Third, in *Diaz* the Court explained what a "waiver" of a constitutional right not previously advanced in prior rounds of postconviction proceedings means when

the defendant was "blameless" for the failure to advance that ground for relief. *Diaz*, 236 Ariz. at 363 ¶ 10 n.1, 340 P.3d at 1071 ¶ 10 n.1. The defendant had filed two prior *notices* of postconviction relief, but those notices were dismissed when each time appointed counsel failed to timely file *petitions* relating to the notice. *Id.* at 362 ¶¶ 3–4, 340 P.3d at 1070 ¶¶ 3–4; *see also Canion v. Cole*, 210 Ariz. 589, 600 ¶ 11, 115 P.3d 1261, 1263 ¶ 11 (2005) (explaining the difference between a notice and a petition). After the defendant filed a third notice, appointed counsel filed a petition that asserted a violation of the Sixth Amendment right to effective assistance of counsel in connection with plea negotiations—the same claim for relief that Mr. Anderson is raising here. *See id.* ¶ 5, 340 P.3d at 1070 ¶ 5.

This Court noted that this ineffective-assistance claim did not qualify for the exception described in *Smith* because the right did not require a knowing, voluntary, and intelligent waiver. *Id.* ¶ 9, 340 P.3d at 1070 ¶ 9 (citing *Rivera-Longoria v. Slayton*, 228 Ariz. 156, 158 ¶ 10, 264 P.3d 866, 868 ¶ 10 (2011)). Nevertheless, the Court held that the defendant had not "waived" the claim within the meaning of Rule 32.2(a)(3). The failures of the defendant's two previous postconviction lawyers to file timely petitions should not be attributed to the defendant himself. The lawyers had not previously explained that they were unable to find viable grounds for relief. *Diaz*, 236 Ariz. at 363 ¶ 10, 340 P.3d at 1071 ¶ 10; *see generally Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.3d 614, 616 (1995). "Rather, despite Diaz's efforts to assert an IAC claim, he was deprived of that opportunity through no fault of his own. He timely filed a notice of PCR to raise an IAC claim, but his former PCR attorneys failed to file a petition to enable

adjudication of the claim." *Diaz*, 236 Ariz. at 363 ¶ 10, 340 P.3d at 1071 ¶ 10. So even though it was the defendant's third postconviction proceeding, his claim was raised in a petition for the first time. Because the defendant was not responsible for this situation, the Court held that the claim was not "waived" within the meaning of Rule 32.2(a)(3). *Id.* ¶¶ 11–13, 340 P.3d at 1071 ¶¶ 11–13.

This line of caselaw thus supports two ideas. First, this Court has the authority to create exceptions to procedural bars through judicial interpretation of the rules. Second, as demonstrated by *Bennett* and *Diaz*, this Court does not attribute certain kinds of attorney misconduct to the defendant when examining whether a postconviction claim was "waived" by virtue of a failure to advance it in prior proceedings. The exceptions in *Bennett* and *Diaz* are fully consistent with the purpose of the preclusion rule. "Preclusion is designed to require a defendant to raise all known claims for relief in a single petition, and thereby prevent endless or nearly endless reviews of the same case in the same trial court." *Diaz*, 236 Ariz. at 363 ¶ 12, 340 P.3d at 1071 ¶ 12 (cleaned up). But excusing preclusion because of counsel's conflict or other professional misconduct would not result in "repeated review of the IAC claim; it would result in its first review." *Id.*, 340 P.3d at 1071 ¶ 12. Because this Court should construe the preclusion rule "to protect the fundamental rights of the individual," Rule 1.2, it should accept appropriate opportunities to adjust the procedural bars in Rule 32 in a manner that does not overly punish defendants for the mistakes of their lawyers—or indeed the state's entire criminal justice system writ large.

1.2. Because of recent developments in federal habeas law, it is more important than ever for this Court to ensure that an adequate state forum is available for vindicating the right to effective assistance of counsel at trial and in plea bargaining.

Recent changes in the availability of a federal habeas remedy for claims like Mr. Anderson's also justify adoption of an exception to state procedural bars to allow merits review of those claims. Adopting such an exception would ensure that Arizona state prisoners have an adequate and effective forum for vindicating their rights to effective assistance of counsel at trial and in plea bargaining.

Before a state prisoner may seek relief in federal court on his claims, the prisoner must first exhaust any available remedies he may have in state court. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). This requirement is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). If a petitioner has not met the exhaustion requirement, a federal habeas court may find the claim procedurally defaulted. If the state courts have expressly found the claim subject to a procedural bar, or would do so if presented with the claim for the first time at the time of filing the habeas petition, and the procedural bar is an adequate and independent ground in state law, then federal habeas courts will apply a procedural default to the claim. *See id.* at 735 & n.1; *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010).

The procedural-default doctrine is an equitable one, and so can be excused for equitable reasons. *See Reed v. Ross*, 466 U.S. 1, 9 (1984). One test for excusing a procedural default is "cause and prejudice:" Cause for excusing a procedural

default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). If "the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Id.* (cleaned up) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). And although a state prisoner has no Sixth Amendment right to the effective assistance of postconviction counsel, *see Coleman*, 501 U.S. at 753–54, such "inadequate" assistance of postconviction counsel can amount to cause to excuse the default of certain ineffective assistance of *trial* counsel (IATC) claims, *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

In crafting this formulation of cause to excuse a procedural default of an IATC claim, the Court in *Martinez* described such claims as of "particular concern" because the Sixth Amendment right to effective trial counsel is a "a bedrock principle in our justice system." *Id.* at 12. Because that right is so fundamental, the Court emphasized that at least *one* court should be open to hearing a state prisoner's IATC claim. "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id.* at 10. If those initial-review collateral proceedings are the first opportunity to bring an IATC claim (as they are in Arizona, *see State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002)), then inadequate assistance of counsel in postconviction proceedings will result in a federal procedural default of the IATC

claim unless that inadequate assistance amounts to cause to excuse the procedural default. *See id.* at 11.

In the wake of *Martinez*, the federal courts recognized that *Martinez* required federal habeas petitioners to be able to fully develop evidence in support of their IATC claims. Because such claims nearly always depend on new evidence developed after trial, *Martinez*'s remedy "would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc); *see also Dickens v. Ryan*, 740 F.3d 1302, 1320–22 (9th Cir. 2014) (en banc); *Woods v. Sinclair*, 764 F.3d 1109, 1138 n.16 (9th Cir. 2014).

But last year the Supreme Court strictly limited the circumstances under which a state prisoner would be allowed to develop new evidence to support the *Martinez* cause formulation for the first time in federal court. In *Shinn v. Ramirez*, 142 S. Ct. 1718 (2002), the Court held that federal statutory limits on evidentiary development, *see* 28 U.S.C. § 2254(e)(2), also applied to state prisoners' efforts to develop the facts supporting an effort to invoke the *Martinez* cause formulation. The Court did not disagree with the dissent's warnings that applying the statute to such claims would "leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel." *Id.* at 1740 (Sotomayor, J., dissenting). That truth notwithstanding, because "Congress ha[d] erected a constitutionally

valid barrier to habeas relief," federal courts are constrained to apply it without regarding to its practical consequences. *Id.* at 1736.

Ramirez is consistent with the principles of comity and federalism animating federal habeas law, which aims to funnel all claims, included newly developed ones, to state courts for "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Ramirez*, 142 S. Ct. at 1732 (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)). *Ramirez* emphasized that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction *without giving an opportunity to the state courts to correct a constitutional violation*." *Id.* (internal citation omitted; emphasis added).

Thus the Supreme Court has invited the state courts to ensure that state prisoners have a state-court forum for airing newly discovered but substantial IATC claims, when inadequate assistance of prior postconviction counsel has led to the procedural default. *Ramirez* prohibits federal court consideration of the evidence supporting IATC claims like Mr. Anderson's if the state courts have not first had an opportunity to first address them. This Court should now ensure the Arizona state courts actually have that opportunity. Only by permitting state court review of the merits of Mr. Anderson's claim—either under the plain terms of Rule 32, or in the form of an exception to usual rules of preclusion, *cf. Diaz*, 236 Ariz. at 363 ¶ 11—will *some* forum exist for it. And without any such forum, fissures in "a bedrock principle in our justice system" will grow and fester unaddressed. 566 U.S. at 12.

Indeed, as the Arizona Solicitor General told the U.S. Supreme Court during the *Ramirez* oral argument: "[I]f somebody has a—a good claim, then they need to go to state court and file a second or successive habeas petition." Transcript of Oral Argument at 26:18-21, *Shinn v. Ramirez*, 142 S. Ct. 1718 (U.S. Dec. 8, 2021) (No. 20-1009), 2021 WL 9526559, at *26. And in the wake of *Ramirez*, other state courts have endorsed this approach. These courts have recognized the need for a state forum for airing a blameless petitioner's substantial IATC claims that are supported by evidence first discovered after an initial postconviction proceeding. *See, e.g.*, *Frost v. State*, 514 P.3d 1182, 1188 (Or. Ct. App. 2022), *opinion adhered to as modified on reconsideration*, 525 P.3d 98 (Or. Ct. App. 2023) (reviewing merits of unpreserved claim after recognizing that, after *Ramirez*, "at least as far as any opportunity for substantive relief for petitioner's post-conviction counsel's [errors]… or failure to preserve an appellate argument, state courts are likely the end of the line."); *Commonwealth v. Debois*, 281 A.3d 1062, 1062 (Pa. Super. Ct. 2022) (unpublished) ("An affirmance in this instance would effectively close off any avenue for additional state post-conviction collateral review. That result would forever cut off any opportunity for Appellant to create an evidentiary record for his ineffective claims in light of the United States Supreme Court's recent decision in *Shinn v. Ramirez*."); *cf. Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013) (recognizing right to effective post-conviction counsel).

Federal courts in Arizona and elsewhere have also recognized the need for state courts to reassess the availability of a forum for newly discovered IATC claims in the wake of *Ramirez*. *See, e.g.*, *Pandeli v. Shinn*, No. CV-17-01657-PHX-

JJT, 2022 WL 16855196 (D. Ariz. Nov. 10, 2022), *reconsideration denied*, No. CV-17-01657-PHX-JJT, 2023 WL 120960 (D. Ariz. Jan. 6, 2023) (granting petitioner leave to pursue newly developed IATC claims in state court, because "with the path to presenting new evidence in federal court cut off by *Ramirez*, it is imperative that he be allowed an opportunity to offer the evidence in state court"); *Guevara-Pontifes v. Baker*, No. 320CV00652ARTCSD, 2022 WL 4448259 (D. Nev. Sept. 23, 2022) (granting petitioner leave to pursue newly developed IATC claims in state court on the grounds that the state court should "permit the use of the principles set forth in *Martinez* for purposes of overcoming state procedural bars").

Ramirez thus provides a new prudential reason for interpreting the "waiver" language in Rule 32.2(a)(3) and the "adequate reason" language in Rule 32.4(b)(3)(D) to allow review of a "blameless" defendant's IATC claim that arises in a successive postconviction proceeding.

2. This case is a poor vehicle for addressing the merits of Mr. Anderson's ineffective-assistance claim now because the record is not sufficiently developed.

With respect to the second question that this Court identified for review—whether Mr. Anderson received ineffective assistance of counsel in connection with plea bargaining—the record has been left insufficiently developed for this Court to address it. This Court thus should dismiss review of that question as improvidently granted and leave it to the courts below to develop the record on remand. *Cf.* Order, *State v. Delahanty*, No. CR-18-0341-PC (Ariz. Feb. 18, 2022) (vacating review as improvidently granted).

The parties have never disputed—neither before this Court nor in any lower court—whether "erroneous advice about the availability of parole [is] objectively unreasonable in light of the extent of confusion in Arizona surrounding the availability of parole." In its response to Mr. Anderson's petition in superior court, the State twice expressly conceded that Mr. Anderson could show constitutionally ineffective assistance if "his trial attorney misadvised him about the possibility of 'parole.'" (Pet'r Appx. at 69; *see also id.* at 82) The state has reaffirmed this position in this Court. (State's Supp. Br. at 10-11 (conceding "an attorney's incorrect advice to a defendant on his parole eligibility is objectively unreasonable and constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984)). But these admissions were more theoretical than practical—the superior court dismissed the claim on the merits without a hearing, ruling that the claim was not colorable even though the state had not adduced any evidence to contradict Mr. Anderson's assertions.

The lack of adversarial testing on deficient performance is particularly problematic in the context of Mr. Anderson's claim. As this Court recently recognized, *Strickland* claims like Mr. Anderson's that are based on common or even universally made legal errors can be colorable. *See State v. Miller*, 251 Ariz. 99, 103 ¶ 14, 485 P.3d 554, 558 ¶ 14 (2021). But these claims must, like all *Strickland* claims, be tested on a case-by-case basis. *Id.* Under *Miller*, such claims turn on the record of deficient performance presented to the factfinder. *See id.*; *cf. Williams v. Taylor*, 529 U.S. 362, 391 (2000) (explaining that analyzing deficient performance under *Strickland* "of necessity requires a case-by-case examination of the

evidence"). Here, because there was no dispute over deficient performance before the lower courts, the record on that question was necessarily left undeveloped. Given *Miller*'s recognition that such claims must be evaluated on a case-specific record, this Court should defer review of that question. It should simply reverse the court of appeals's ruling that Mr. Anderson's claim is precluded and untimely, dismiss review of any other issues as improvidently granted at this stage, and return this case to the superior court for further proceedings.

Finally, the FPD notes that this Court's grant of review reflected the Petitioner's captioning of his petition as based on Rule 32.1(g). But, as the parties' briefing in this Court and below makes clear, this case presents no claims under Rule 32.1(g). Although Mr. Anderson check-marked the Rule 32.1(g) box in his Notice of Postconviction Relief (Pet'r Appx. at 8), he did not cite that Rule again in his PCR petition, and he made no effort to identify a "significant change in the law" relevant to his claim (Pet'r Appx. at 10–16). Neither party thereafter addressed Rule 32.1(g) in any lower court pleading. On review, the Court of Appeals cited Rule 32.1(g) only to recognize this omission from Mr. Anderson's briefing. (Mem. Disp. at 3) Mr. Anderson then did not cite it in his petition for review before this Court other than on the caption page. That captioning appears to have been mere scrivener's error. Neither the State nor Mr. Anderson have since cited Rule 32.1(g) in their supplemental briefing. Thus, if the Court intended to address Rule 32.1(g), this case presents in inappropriate vehicle.

CONCLUSION

This Court should hold that Mr. Anderson's claim for relief is not untimely or precluded. This Court should not address any other questions in this case; rather, it should direct the superior court to conduct further proceedings not inconsistent with that holding.

Respectfully submitted: September 26, 2023.

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