No. CR-23-0264-PR

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Respondent,

vs.

MICHAEL EUGENE TRAVERSO, Petitioner.

On Petition for Review of an
Opinion of the Court of Appeals, Division One
No. 1 CA-CR 22-0174 PRPC
Maricopa Co. Super. Ct. No. CR 2006-160536-001
Hon. Kathleen Cooper, Superior Court Judge, Presiding

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF GRANTING REVIEW

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INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. The Federal Public Defender for the District of Arizona (FPD-AZ) is the entity organized under 18 U.S.C. § 3006A(g) to provide representation to indigent persons who are seeking postconviction relief in federal court from their unconstitutional convictions and sentences. *See* 18 U.S.C. §§ 3006A(a)(1), (a)(2); 3599(a). FPD-AZ regularly encounters issues relating to preclusion of claims brought by Arizona state prisoners, and thus has an interest in ensuring that state courts may hear those claims. All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

In 2006, Mr. Traverso was indicted on six counts of sexual conduct with a minor under the age of 15, in violation of A.R.S. § 13-1405(A) and (B), and one count of public sexual indecency with a minor under the age of 15, in violation of A.R.S. § 13-1403(A), (B), and (C). (Pet'r App'x at 202) He faced a mandatory sentence of 79–159 years in prison. (Pet'r App'x at 202)

The superior court found that the state had offered Mr. Traverso a plea agreement under which he would plead guilty to one count of sexual conduct with a minor and two counts of attempted sexual conduct with a minor in exchange for a stipulated sentence of 13–27 years in prison followed by lifetime probation. (Pet'r App'x at 202) The state conveyed this offer in writing to Mr. Traverso's lawyers

on three separate occasions, but they never presented the offer to Mr. Traverso. (Pet'r App'x at 202) "Had counsel timely presented the State's plea offer," the superior court found, "Traverso would have accepted it. Finding it among the papers on counsel table the first morning of trial, he signed it immediately and told his attorney to accept it, only to be told that it was too late, the State had withdrawn the offer." (Pet'r App'x at 202) Mr. Traverso was convicted on all counts and sentenced to a total of 79½ years in prison. The court of appeals affirmed his convictions and sentences on direct review. *State v. Traverso*, No. 1 CA-CR 07-0533, 2008 WL 4990566 (Ariz. Ct. App. Nov. 20, 2008).

In 2009, Mr. Traverso filed a notice of postconviction relief in the superior court. He later retained counsel who filed a petition, but who declined to raise any claims regarding the failure of trial counsel to convey the plea offer to Mr. Traverso in time for him to accept it. (Pet'r App'x at 190) The superior court summarily dismissed this petition, and both the court of appeals and this Court denied review.

In 2013, Mr. Traverso filed a federal habeas petition with the assistance of retained counsel. For the first time, he asserted that he had received ineffective assistance of counsel, in violation of the Sixth Amendment, when his trial counsel failed to convey the state's plea offer in time for him to accept it. *See generally Missouri v. Frye*, 566 U.S. 134 (2012). The district court dismissed Mr. Traverso's petition as untimely, without addressing the merits of this claim. The Ninth Circuit affirmed, and the U.S. Supreme Court denied review.

In 2020 Mr. Traverso returned to the superior court and raised his claim in a second round of postconviction proceedings. The superior court ultimately ruled that this claim was timely and not precluded. The claim was timely filed because Mr. Traverso provided an adequate explanation, *see* Rule 32.4(b)(3)(D),[1] for the delayed filing. (Pet'r App'x at 193–95) And the claim was not precluded, the court ruled, because the right to effective assistance of counsel in plea negotiations was of sufficient constitutional magnitude as to require a personal waiver from the defendant, thus exempting the claim from preclusion under Rule 32.2(a)(3) and *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). (Pet'r App'x at 197–200) The superior court held an evidentiary hearing and ultimately granted relief, ordering the state to "immediately re-offer the plea agreement." (Pet'r App'x at 220)

On the state's petition for review, a divided panel of the court reversed and ruled that Mr. Traverso's claim was precluded under Rule 32.2(a)(3). Under *Smith*, the court reasoned, there was an "exception" to the exception for claims that require a personal waiver, under which "preclusion of a successive IAC claim in a successive petition" was required "without looking to the underlying facts." *State v. Traverso*, 537 P.3d 345, 348–49, ¶ 13 (Ariz. Ct. App. 2023). It alternatively rejected the superior court's reasoning that the right to effective assistance of counsel in plea negotiations was a right that required a personal waiver. *Id.* at 349–50, ¶¶ 14–19. And it declined to excuse preclusion on account of Mr. Traverso's

[1] Unadorned references in this document to "Rule _____" refer to the rules of criminal procedure.

prior postconviction counsel's refusal to raise the plea-bargaining ineffective-assistance claim. *Id.* at 350 ¶¶ 20–23. Having ruled that the claim was precluded, the court did not discuss whether there was an adequate explanation for the late filing of the claim. *Id.* ¶ 23.

Judge Gass dissented from the preclusion ruling. He concluded that Mr. Traverso had provided an adequate explanation for the delayed filing. "Here, the superior court found Traverso did not cause the delay because he attempted to raise the claim earlier, he pursued state- and federal-court litigation on claims in his direct appeal and first PCR petition, and his new counsel for his second PCR took time to investigate his case." *Id.* at 358 ¶ 74. And he concluded that the claim was not precluded under *Smith*. He read *Smith* to rest on outdated versions of Rule 32.2(a)(3), rather than the version in effect when Mr. Traverso filed his petition. *Id.* at 359–60 ¶¶ 77–84. He distinguished the facts in *Smith* from the facts in this case, noting that the petitioner in *Smith* had sought postconviction relief multiple times, whereas Mr. Traverso had done so only twice. *Id.* at 360 ¶¶ 85–87. He reasoned that his prior postconviction counsel's active interference with Mr. Traverso's effort to raise his plea-bargaining ineffective-assistance claim absolved him of blame for failing to raise the claim earlier. *See id.* at 361 ¶ 92 (discussing *State v. Diaz*, 236 Ariz. 361, 362 ¶¶ 3–5, 340 P.3d 1069, 1070 ¶¶ 3–5 (2014)). And he pointed to the court of appeals's decision in *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), to conclude that the right to effective assistance of counsel in plea negotiations can only be waived personally by the defendant. *Traverso*, 537 P.3d at 361 ¶¶ 94–96.

ARGUMENT

In "today's criminal justice system," the "negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). This Court has said that it is a "recurring issue of statewide importance" for courts to monitor the quality of advice given to criminal defendants during plea negotiations. *State v. Nunez-Diaz*, 247 Ariz. 1, 4 ¶ 9, 444 P.3d 250, 253 ¶ 9 (2019); *see also Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (highlighting the courts' "responsibility under the Constitution to ensure that no criminal defendant… is left to the mercies of incompetent counsel"). No advice to criminal defendants is more important than their relative sentencing exposure under the terms of a plea agreement vis-à-vis following a loss at trial. Thus it ultimately falls to the courts to ensure that plea bargaining comports with the requirements of the Sixth Amendment. *See Glover v. United States*, 531 U.S. 198, 203 (2001) (explaining that "any amount of actual jail time has Sixth Amendment significance"). This case presents an opportunity for this Court to explain that the preclusion rule accommodates the courts' role in safeguarding the right to effective assistance of counsel in plea negotiations.

1. This case presents an important opportunity to clarify that ineffective-assistance claims relating to plea negotiations qualify for an exception to the preclusion rule.

When applying Arizona's preclusion rule, courts have always distinguished between waiver and forfeiture of claims. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is

the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

When Rule 32 was first enacted in 1973, the preclusion rule was a *waiver* rule—claims could be raised in successive postconviction proceedings unless they were knowingly, voluntarily, and intelligently waived. Keith J. Hilzendeger, *Arizona State Post-Conviction Relief*, 7 Ariz. Summit L. Rev. 585, 651 (2014). But in 1992, the rule was converted into *forfeiture* rule for most claims. *Id.* at 652. *See* Rule 32.2(a)(3) (1992) (preclusion applies to any ground "that has been waived at trial, on appeal, or in any previous collateral proceeding"). Although the text uses the term "waived," the commentary approved by this Court clarified that it is a forfeiture rule. For "most claims, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding" in order for preclusion to apply. Rule 32.2(a)(3) 1992 cmt. The commentary further clarified that for some claims, waiver was still required. "If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant knowingly, voluntarily, and intelligently waived the claim." *Id.*

The passage of time has only solidified that Rule 32.2(a)(3) is a waiver-forfeiture hybrid. After the Ninth Circuit ruled that this rule required an examination of the merits of the underlying claim, *Smith v. Stewart*, 241 F.3d 1191, 1197 (9th Cir. 2001), the U.S. Supreme Court asked this Court to clarify whether that was a correct interpretation of state law, *Stewart v. Smith*, 534 U.S. 157 (2001).

This Court held that the waiver component of the preclusion rule depends "merely on the particular right alleged to have been violated." *Stewart v. Smith*, 202 Ariz. 446, 447 ¶ 3, 46 P.3d 1067, 1068 ¶ 3 (2002). Thus the waiver component only governs when the defendant asserts a certain kind of claim—one that "implicates a significant right." *Id.* at 450 ¶ 12, 46 P.3d at 1071 ¶ 12. The current text of the rule, as amended in 2020, retains the waiver-forfeiture hybrid for claims of "sufficient constitutional magnitude." Rule 32.2(a)(3).

Even if a claim has been forfeited, this Court has recognized certain exceptions to the preclusion rule that allow a postconviction court to reach the merits of the claim in successive proceedings. For instance, a claim that has been forfeited because the same lawyer handled the direct appeal and the first round of postconviction proceedings is not precluded. *State v. Bennett*, 213 Ariz. 562, 566 ¶¶ 14–15, 146 P.3d 63, 67 ¶¶ 14–15 (2006). And a claim that has been forfeited through the failure of prior postconviction counsel to file a timely petition in support of the notice is not precluded. *State v. Diaz*, 236 Ariz. 361, 363 ¶ 10, 340 P.3d 1069, 1071 ¶ 10 (2014). This Court has the authority to create other exceptions to the forfeiture component of the preclusion rule. *See State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 ¶ 11, 982 P.2d 815, 818 ¶ 11 (1999) (citing *Slayton v. Shumway*, 166 Ariz. 87, 91, 800 P.2d 590, 594 (1990)).

The proper analysis for determining whether Rule 32.2(a)(3) precludes merits review of a claim raised in a successive postconviction proceeding proceeds as follows: The court should first determine whether the claim in question is

subject to forfeiture, or instead is of "sufficient constitutional magnitude" to require waiver. If the claim requires waiver, the court should reach the merits unless the state can point to a knowing, voluntary, and intelligent waiver of the claim in the record of prior proceedings. *See* Rule 32.2(b); *State v. Brown ex rel. McMullen*, 212 Ariz. 225, 229 ¶ 15, 129 P.3d 947, 951 ¶ 15 (2006) ("We cannot presume waiver of this important federal right from a silent record.") (cleaned up) (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).[2] If the claim has been forfeited, then the court should proceed whether an exception to the preclusion rule allows it to reach the merits of the claim. While the opinion below applies this framework to the preclusion issue in this case, the divergent analysis at each step of the inquiry between the panel majority and Judge Gass's dissent highlights the need for this Court's intervention and clarification. This Court should grant review to explain either that claims like Mr. Traverso's are subject to *waiver*, or that they qualify for an excuse from *forfeiture* on account of inadequate representation of postconviction counsel.

2. Allowing plea-bargaining ineffective-assistance claims to be reviewed on the merits in successive postconviction proceedings will ensure that defendants are not penalized for incompetence of postconviction counsel—a recurring failure of the postconviction defense bar.

The superior court found that Mr. Traverso's counsel failed to convey a formal, written plea offer to him three times. That was unquestionably deficient

[2] Because waiver cannot be presumed from a silent record, no court may find the claim waived *sua sponte* as authorized by Rule 32.2(b), because a silent record does not allow for such a finding by a preponderance of the evidence.

performance, contrary to prevailing professional norms and governing law in many jurisdictions. *See Missouri v. Frye*, 566 U.S. 134, 145–46 (2012). Yet his first postconviction counsel failed to raise the claim. In the experience of *amici*, postconviction counsel in this state frequently fail to raise claims of plea-bargaining ineffective assistance even when the record contains tantalizing indications that such claims are viable. *See Stankewitz v. Wong*, 698 F.3d 1163, 1171 (9th Cir. 2012) (explaining that it is deficient performance for counsel not to follow up on "tantalizing indications in the record"). Three examples are illustrative.

Robert Viramontes. Mr. Viramontes had been charged with first-degree murder following an altercation at a Christmas party. His lawyer advised him to reject an offer to plead guilty to second-degree murder because, he said, Mr. Viramontes would be eligible for parole after 25 years if he lost at trial. At a pretrial hearing, the judge, the prosecutor, and defense counsel all confirmed that Mr. Viramontes was rejecting the deal and would be eligible for "probation" if he lost at trial. (*Amici* App'x at 19–22) He was convicted at trial and sentenced to life without the possibility of release for 25 years. (*Amici* App'x at 25) His first appointed postconviction lawyer raised no ineffective-assistance claim regarding the plea offer even though everyone agreed at the pretrial hearing that Mr. Viramontes would be eligible for "probation" if he lost at trial.

In 2014, after the Department of Corrections informed him that he was not eligible for parole, Mr. Viramontes filed a second round of postconviction proceedings in which he challenged the advice his trial lawyer gave him about the

state's plea offer. The court found the claim precluded despite prior postconviction counsel's incompetent failure to raise the issue simply by virtue of the prior postconviction filing. (*Amici* App'x at 26–27) The court of appeals affirmed. (*Amici* App'x at 31–32) A federal judge ultimately forgave Mr. Viramontes's procedural misstep because of the incompetent representation by his first postconviction counsel (*Amici* App'x at 33–55) and granted relief on his plea-bargaining ineffective-assistance claim (*Amici* App'x at 56–70). Mr. Viramontes was ultimately resentenced to 30 years in prison; the Department of Corrections anticipates his release in 2027.

Mr. Viramontes's case raises issues similar to those in *State v. Anderson*, No. CR-23-0008-PR (oral argument heard Nov. 21, 2023). Yet in addition to presenting questions about whether the "confusion in Arizona about the availability of parole after it was abolished," Order Granting Review and Rephrasing Issues, *State v. Anderson*, No. CR-23-0008-PR (Aug. 22, 2023), Mr. Viramontes's case also presents the all-too-common case of postconviction counsel failing to notice an obvious mistake in the record—here, one about "probation" being available in a first-degree-murder case. The federal courts afforded him relief because federal law recognizes an equitable exception to its preclusion rules in situations where inadequate assistance of postconviction counsel prevents the state courts from addressing a claim of ineffective assistance of trial counsel. *See generally Martinez v. Ryan*, 566 U.S. 1 (2012).

Jonathan Sosnowicz. Mr. Sosnowicz was charged with second-degree murder and aggravated assault stemming from a collision with a pedestrian in a parking lot. (*Amici* App'x at 75) Before trial, the state offered him a plea bargain under which it would stipulate to concurrent sentences for all counts in exchange for guilty pleas to all counts, thus setting a maximum total sentence of 22 years in prison. (*Amici* App'x at 78) *See* A.R.S. § 13-710(A) (2010). Neither of his appointed public defenders confirmed with him that he could be convicted at trial based on reckless conduct—a fact that he was willing to admit—and so he rejected this plea offer. (*Amici* App'x at 80) It emerged at a pretrial conference that defense counsel might not have fully explained to him the *mens rea* element of second-degree murder. (*Amici* App'x at 91) That fact should have led postconviction counsel to raise an ineffective-assistance claim relating to the advice that led him to reject the offer. Instead, postconviction counsel expressly declined to raise such a claim on the mistaken belief that leaving out some claims would make those omitted claims stronger in successive proceedings.

Mr. Sosnowicz retained counsel to raise the plea-bargaining ineffective assistance claim in a second round of state postconviction proceedings. (*Amici* App'x at 119) But the court held the claim precluded because it was omitted from prior proceedings, and did not allow the incompetence of prior postconviction counsel to excuse the procedural misstep. (*Amici* App'x at 120–21) The federal courts initially were open to hearing the claim, but ultimately refused to do so because of this same misstep. (*Amici* App'x at 131–62) The Ninth Circuit is set to hear oral argument on whether federal relief is available on February 8, 2024.

Danny Jacobs. Mr. Jacobs was charged with kidnapping his own daughter during a mental-health crisis when he refused to allow the police to conduct a welfare check requested by the girl's mother, his live-in girlfriend. (*Amici* App'x at 167–68) The state offered him a no-agreements plea, and at a pretrial conference the judge strongly hinted that he would impose a sentence of probation if Mr. Jacobs accepted the offer. (*Amici* App'x at 177–78) Nothing about the discussion at the conference reflects whether the evidence allowed a conviction for kidnapping where there was no evidence of felonious acts on Mr. Jacobs's part toward his daughter, such that the statutory definition of "restraint" was not met. *Cf.* A.R.S. § 13-1301(2)(b); *State v. Felix*, 234 Ariz. 118, 121 ¶ 13, 317 P.3d 1185, 1188 ¶ 13 (App. 2014) (citing *State v. Viramontes*, 163 Ariz. 334, 337–38, 788 P.2d 67, 70–71 (1990)). Without any advice from counsel on this point, and unwilling to plead guilty to any felony charge, Mr. Jacobs rejected the offer and was convicted at trial.

Despite this gap in the record of the advice regarding the plea offer and the elements of kidnapping under Arizona law, appointed postconviction counsel raised no claim regarding effective assistance of counsel in plea negotiations—or indeed any claim at all on his behalf. (*Amici* App'x at 200) Mr. Jacobs attempted to challenge trial counsel's advice regarding the plea himself (*Amici* App'x at 203), but the court refused to consider it (*Amici* App'x at 215). The Ninth Circuit is scheduled to hear oral argument on an issue relating to the validity of Mr. Jacobs's conviction on February 9, 2024.

These three cases—all drawn from the experience of counsel for *amici*—help to demonstrate that the rules of preclusion frequently prevent Arizona courts from addressing viable claims of ineffective assistance of counsel in plea negotiations. Postconviction counsel often fail to raise these claims at the proper time, even though the claims are often apparent from the record. This Court should grant review to decide whether postconviction relief is available when both trial and postconviction counsel fail to adequately represent a defendant.

CONCLUSION

The petition for review should be granted.

Respectfully submitted: January 9, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the length limit set forth in Ariz. R. Crim. P. 31.15(d)(1) and 31.21(g)(2) because it contains 3,429 words, excluding the items exempted by Ariz. R. Crim. P. 31.6(d). I further certify that this brief complies with the typeface and type style requirements of Ariz. R. Crim. P. 1.6(b) and 31.12(b) because it was prepared in a proportionally-spaced serif typeface (Equity, designed by Matthew Butterick and published by MB Type) using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I certify that on January 9, 2024, I caused the foregoing brief and its accompanying appendix to be filed with the Clerk of Court using the TurboCourt system. I further certify that all case participants are registered TurboCourt users and that service will be accomplished by the TurboCourt system.

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