

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NATASHA WRAE  
Attorney At Law  
P.O. Box 3026  
TUCSON, AZ 85702  
TELEPHONE (520) 624-4224

Attorney for Phillip Smith  
ASPC-Eyman  
SMU I  
Florence, AZ

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Phillip Alden Smith (ADC # 56505),  
Petitioner/Appellant,  
vs.  
Robert Stewart (Warden, ASPC-Eyman)  
and Terry Goddard (Arizona Attorney  
General),  
Respondent/Appellee.

) No.  
)  
) Arizona Supreme Court No.:  
) CR-05-0297-PR  
) Arizona Court of Appeals, Div. 1 No.:  
) 1 CA-CR 04-0235 PRPC  
) Maricopa County Case No.:  
) CR 1996-012436

**PETITION FOR WRIT OF HABEAS  
CORPUS UNDER 28 U.S.C. § 2254**  
  
(First Amended Petition)

Petitioner/Appellant, Philip A. Smith, by and through counsel undersigned,  
hereby respectfully petitions this Honorable Court to review the unconstitutional  
judgments of the courts of the State of Arizona pursuant to 28 U.S.C. § 2254.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of March, 2007,

**NATASHA WRAE, ESQ.**  
  
\_\_\_\_\_  
/s/ Natasha Wrae  
Natasha Wrae  
Attorney for Petitioner

**PETITION**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1. (a) Name and location of court that entered the judgment of conviction being challenged: Arizona Superior Court in and for Maricopa County  
(b) Criminal case number: CR 1996-012436
  
2. (a) Date of judgment of conviction: April 3, 1997  
(b) Date of sentencing: May 30, 1997
  
3. Length of sentence: aggravated term of 25 years as to Count 2 and lifetime probation following the term of incarceration on Count 4
  
4. In this case, Petitioner was convicted on more than one count.
  
5. Petitioner was convicted and sentenced on the following crimes: Count 2, Sexual Conduct with a Minor, a class 2 felony and dangerous crime against children in the first degree and amended Count 4, attempted Sexual Conduct with a Minor, a class 3 felony and dangerous crime against children in the second degree
  
6. (a) Petitioner plead guilty to the crimes listed in number 5, supra.  
(b) Petitioner plead not guilty to the following charges: Counts 1 & 3, Molestation of a Child, class 2 felonies and dangerous crimes against children in the first degree.
  
7. Petitioner testified at the change of plea and the sentencing in this matter.

1 8-9. Petitioner was not entitled to take a direct appeal due to the fact that he  
2 entered into the plea agreement.

3  
4 10. Petitioner filed a Notice of Post-conviction Relief pursuant to Rule 32 of the  
5 Arizona Rules of Criminal Procedure.

6  
7 11. (a)(1) Name of Court: Maricopa County Superior Court of Arizona

8 (2) Case Number: CR 96-12436

9 (3) Date of filing: On July 15, 1997, Petitioner executed and had notarized  
10 an Affidavit of Indigency. The Affidavit of Indigency was attached to and  
11 promptly mailed with Petitioner's original Notice of Post-conviction Relief.  
12 For reasons unknown, this Notice was not filed by the trial court until  
13 February 24, 1998.

14 (4) Nature of the proceeding: Rule 32 Notice of Post-conviction Relief

15 (5) Grounds raised: No grounds for relief were ever presented since the  
16 only document filed was a Notice of Post-conviction Relief. Petitioner never  
17 had an opportunity to present any grounds for relief before the Rule 32  
18 Petition was summarily dismissed as untimely mere weeks after its filing.

19 (6) No hearing was conducted on this petition.

20 (7) Result: Summary dismissal by the Hon. Ronald S. Reinstein

21 (8) Date of dismissal: March 9, 1998

22  
23 (b) Subsequent relief efforts:

24 (1) Name of Court: Maricopa County Superior Court of Arizona

25 (2) Case Number: CR 96-12436

26 (3) Date of filing: February 25, 2004

27 (4) Nature of the proceeding: Rule 32 Notice of Post-conviction Relief

1 (5) Grounds raised: 1.) No fault of Defendant's for Filing Untimely Notice,  
2 2.) Significant Change in the Law- Illegal Sentence, 3.) Significant Change in  
3 the Law- Cruel and Unusual Punishment.

4 (6) No hearing was conducted on this petition.

5 (7) Result: Summary dismissal by the Honorable Eddward Ballinger, Jr.

6 (8) Date of dismissal: March 18, 2004

7 (c) A third petition was not filed.

8 (d) (1) Petitioner did not appeal to the highest state court on the first petition.

9 (2) Petitioner did appeal to the highest state court on the second petition.

10 (e) (1) With respect to the first petition that was summarily dismissed,  
11 Petitioner did not pursue further appellate relief believing that the Court was  
12 correct in summarily dismissing the matter for being untimely. Further  
13 research revealing newly discovered material facts, a significant change in the  
14 law and that Petitioner's "untimely" filing was forgivable if it was without fault  
15 of Petitioner's prompted the subsequent filing in 2004.

16  
17 12. Petitioner asserts the following grounds in this Petition:

18  
19 GROUND ONE: Imposition of illegal life-time term of probation is cruel and  
20 unusual punishment pursuant to the Eighth Amendment of the United States  
21 Constitution.

22 (a). Supporting facts: Petitioner plead guilty to amended Count 4, Attempted  
23 Sexual Conduct with a Minor, a class 3 felony and dangerous crime against children  
24 in the second degree, nondangerous and nonrepetitive offense in violation of A.R.S.  
25 § 13-1405. Petitioner was sentenced on May 30, 1997. Under the plea, Petitioner  
26 was to be sentenced to lifetime probation for this offense. At the time of commission  
27 of the offense, November 17, 1996, section 13-902(E) did not permit lifetime  
28 probation for convictions for "attempted" offenses. This section was amended by the

1 Forty-third Legislature effective July 21, 1997 to include attempted offenses..  
2 Therefore the maximum term of probation that Petitioner should have received was  
3 5 years.

---

4  
5 (b) Petitioner requested review of this issue at all available levels in the state  
6 courts.

7  
8 (c) Direct Appeal of Ground One: Petitioner entered into a plea agreement  
9 therefore, direct appeal was not an option.

10  
11 (d) Post-Conviction Proceedings: Petitioner attempted to raise this issue in a  
12 post-conviction motion in a Rule 32 Notice of Post-conviction Relief filed in the  
13 Superior Court of Arizona in and for Maricopa County under case number CR-1996-  
14 12436. No hearing was conducted on this petition and the petition was summarily  
15 dismissed by the Hon. Eddward Ballinger, Jr. on March 18, 2004. Petitioner then  
16 appealed the issue to Division One of the Court of Appeals of Arizona in a Petition  
17 for Review with case number 1 CA-CR 04-0235 PRPC. The Court of Appeals  
18 denied review on May 26, 2005. Petitioner then filed a Petition for Review requesting  
19 that the Arizona Supreme Court order that the issue be reviewed by the lower courts.  
20 The Arizona Supreme Court denied review on March 9, 2006.

21 GROUND TWO: Petitioner's Fourteenth Amendment right to due process was  
22 violated when the state courts summarily denied his opportunity to raise the issue  
23 in Ground One, *supra*.

---

24  
25 (a). Supporting facts: In the Notice of Post-conviction Relief filed on  
26 February 25, 2004, Petitioner set forth claims for relief under Rule 32.1 (e), (f) and  
27 (g). Petitioner stated the requisite meritorious reasons substantiating the claims and  
28

1 indicating why the claims were not stated in the previous Notice of Post-conviction  
2 Relief or in a timely manner pursuant to Rule 32.2(b). The trial court summarily  
3 dismissed the Notice of Post-Conviction Relief on March 18, 2004 stating the  
4 following:

5 Defendant claims that he should be excused from the  
6 timeliness requirement of Rule 32.4(a), Arizona Rules of  
7 Criminal Procedure, because he believed his trial attorney  
8 was filing the notice for him. Defendant raised this claim  
9 in a prior notice. The court found that defendant had failed  
10 to show that the failure to timely file the notice was without  
11 fault on his part, as required by Rule 32.1(f), and  
12 summarily dismissed the proceeding on March 9, 1998.  
13 This court agrees with that ruling

14 A review of the March 18, 2004 Minute Entry clearly shows that the trial court  
15 did not conduct the requisite three part test prior to summarily dismissing the Notice  
16 of Post-conviction Relief. Petitions for Post-Conviction Relief are permitted after the  
17 original time for filing have expired when claims for relief based on Rule 32.1(d), (e),  
18 (f), (g) and (h) are raised. Ariz. R. Crim. P. 32.2(b). When an excepted claim is  
19 raised in a successive or untimely petition for post-conviction relief, the notice of  
20 post-conviction relief must set forth the substance of the specific exception and the  
21 reasons for not raising the claim in the previous petition or in a timely manner. Id.  
22 It is only “[i]f the specific exception and meritorious reasons do not appear  
23 substantiating the claim and indicating why the claim was not stated in the previous  
24 petition or in a timely manner, [that] the notice shall be summarily dismissed.” Id.  
25 The court must identify all precluded claims, determine that no remaining claims  
26 present a material issue of fact or law that would entitle the defendant to relief under  
27 Rule 32 and that no purpose would be served by any further proceedings before  
28 ordering the petition dismissed. Ariz. R. Crim. P. 32.6 ( c ). The court’s analysis  
under Rule 32.6( c ) is a three part test. Clearly, the trial court did not (1.) identify all  
precluded claims, (2.) make a determination that no remaining claims presented  
material issues of fact or law which would entitle the defendant to relief under Rule

1 32, and (3.) make a determination that no purpose would be served by any further  
2 proceedings.

3 Additionally, a finding that the original Notice of Post-conviction Relief was  
4 untimely should have no bearing on the analysis of the excepted “late” issues raised  
5 in the subsequent Notice. Given that there exists significant changes in the law and  
6 that newly discovered material facts that would change the sentence had been  
7 discovered since the filing of the original Notice, the newly presented, meritorius  
8 issues were *not* precluded pursuant to Rule 32.2 (a). Furthermore, a claim asserting  
9 Rule 32.1 (g) regarding significant changes in the law “encompasses all claims for  
10 retroactive application of new constitutional and nonconstitutional legal principles.”  
11 Ariz.R. Crim.P. 32.1 Comment.

12  
13 (b) Petitioner requested review of this issue at all available levels in the state  
14 courts.

15  
16 (c) Direct Appeal of Ground Two: Petitioner entered into a plea agreement  
17 therefore, direct appeal was not an option.

18  
19 (d) Post-Conviction Proceedings: Petitioner attempted to raise the issue set  
20 forth in Ground One, *supra*, in a post-conviction motion in a Rule 32 Notice of Post-  
21 conviction Relief filed in the Superior Court of Arizona in and for Maricopa County  
22 under case number CR-1996-12436. No hearing was conducted on this petition and  
23 the petition was summarily dismissed by the Hon. Eddward Ballinger, Jr. on  
24 March 18, 2004. Petitioner then appealed the issue to Division One of the Court of  
25 Appeals of Arizona in a Petition for Review with case number 1 CA-CR 04-0235  
26 PRPC. The Court of Appeals denied review on May 26, 2005. Petitioner then filed  
27 a Petition for Review requesting that the Arizona Supreme Court order that the issue  
28

1 be reviewed by the lower courts. The Arizona Supreme Court denied review on  
2 March 9, 2006.

3  
4 13. (a) All grounds for relief that are raised herein have been presented to the  
5 highest state court having jurisdiction.

6 (b) There are no grounds in this petition that have not been presented in some  
7 state or federal court.

8  
9 14. Petitioner has never filed any type of petition, application or motion in a federal  
10 court regarding the conviction that he is challenging herein.

11  
12 15. Petitioner has no petitions or appeals pending in any court, state or federal, for  
13 the judgment being challenged herein.

14  
15 16. Attorneys representing Petitioner at the different stages of the case:

16 (a) At preliminary hearing: U/K

17 (b) At arraignment and plea: John Movroydis; 11 West Jefferson, Suite 5,  
18 Phoenix, AZ 85003-2302

19 (c) At trial: John Movroydis

20 (d) At sentencing; John Movroydis

21 (e) On appeal: N/A

22 (f) In any post-conviction proceeding: Pro per

23 (g) On appeal from any ruling against Petitioner in a post-conviction  
24 proceeding: Natasha Wrae; 100 North Stone, Suite 512, Tucson, AZ 85701

25  
26 17. Petitioner has no future sentences to serve after he completes the sentence for  
27 the judgement challenged herein.

1 18. This Petition is timely since the Supreme Court of Arizona denied Petitioner's  
2 Petition for Review on March 9, 2006.

3  
4 For the foregoing reasons, Petitioner, by and through counsel undersigned,  
5 hereby respectfully Petitions this Honorable Court to review the actions of the state  
6 courts , find that the state courts denied Petitioner due process of law by summarily  
7 dismissing the Notice of Post-Conviction Relief filed February 25, 2004, and in so  
8 doing, subject Petitioner to illegal and unconstitutional period of probation.

9  
10 RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of March, 2007,

11  
12 **NATASHA WRAE, ESQ.**

13 /s/ Natasha Wrae  
14 Natasha Wrae  
15 Attorney for Petitioner

16  
17 I declare under penalty of perjury that the foregoing is true and correct.

18  
19 11/03/06  
20 Executed Date

21 /s/ Phillip Alden Smith  
22 Phillip Alden Smith  
23 Petitioner

