ARIZONA SUPREME COURT

STATE OF ARIZONA, Respondent, v. RONALD BIGGER, Petitioner.	No. CR–20–0383–PR Court of Appeals No. 2 CA-CR 2019-0012-PR Pima County Superior Court Cause No. CR-004-3995-002

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEY GENERAL

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Nicholas Klingerman (No. 028231)
Section Chief Counsel, Southern Arizona White Collar and Criminal Enterprise
400 West Congress South Building
Suite 315
Tucson, Arizona 85701
Telephone: (520) 628-6504

Lindsay St. John (No. 024825)
Assistant Attorney General
400 West Congress South Building
Suite 315
Tucson, Arizona 85701

Attorneys for Amicus Curiae Arizona Attorney General

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Cases Continued Page

Cases Continued Page

Statutes

Rules

Rules Continued Page

Constitutional Provisions

Other Authorities

Other Authorities Continued Page

INTEREST OF AMICUS CURIAE

This Court accepted review of the following three questions:

1. What standard must a defendant meet to make a colorable claim of ineffective assistance of counsel?

2. Did *Perry v. New Hampshire* constitute a significant change in Arizona law?

3. Did the court of appeals erroneously state the law as to "jurisdictional" time limits for filing PCR notices?

This Court's resolution of the first and third questions presented for review will have a substantial effect on the statewide application or the postconviction remedies in Arizona Rules of Criminal Procedure 32 and 33 and in Title 13, Chapter 38, Article 29 of the Arizona Revised Statutes (hereinafter "Article 29"). In addition, the third question presents a separation of powers issue. As the State's chief legal officer, the Arizona Attorney General has a manifest interest in this Court's interpretation and application of Arizona's Constitution and Arizona's penal statutes. *See* A.R.S. § 41–192(A); *see also Fund Manager, Pub. Safety Pers. Ret. Sys. v. Corbin*, 161 Ariz. 348, 354 (App. 1988) ("as 'chief legal officer of the state,' . . . the Attorney General [] has a duty to uphold the Arizona and United States Constitutions").

Additionally, the Attorney General's Office litigates statewide postconviction relief ("PCR") petitions in cases that it has prosecuted, represents the State in all capital PCR proceedings, and represents the State in criminal

appeals in Arizona's appellate courts. For all these reasons, the Attorney General files this brief as of right pursuant to Rule 31.15(b)(1)(B) of the Arizona Rules of Criminal Procedure.

ARGUMENT

I. EXPERT TESTIMONY ON PREVAILING PROFESSIONAL NORMS IS UNNECESSARY AND IRRELEVANT FOR AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

To plead a colorable claim of ineffective assistance of counsel ("IAC") in a PCR petition, a defendant "must show 'both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him or her].'" *State v. Kolmann*, 239 Ariz. 157, 160, ¶ 9 (2016). Thus, a notice of PCR alleging IAC must show: (1) that defense counsel violated prevailing professional norms and (2) that there is a reasonable probability that the prevailing professional norms violation had a prejudicial effect on the outcome.[1] *See State v. Pandeli*, 242 Ariz. 175, 180–81, ¶ 5–6 (2017); *see also Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); Ariz. R. Crim. P. 32.11(a). An affidavit from an expert witness is irrelevant as a matter of law to establish the prevailing professional norms for an

---

[1] Although Bigger references the standard of care in his petition for review, *see generally* Pet. for Rev., this *amicus* brief uses the term "prevailing professional norms" because that was the standard the Supreme Court established in *Strickland*. 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

IAC claim because deficient performance is a legal question for the court.

A. Colorable claim standard.

"Summary dismissal of a petition for post-conviction relief is appropriate '[i]f the court . . . determines that no . . . claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings.'" *Kolmann*, 239 Ariz. at 160, ¶ 8 (quoting former Ariz. R. Crim. P. 32.6(c), now Ariz. R. Crim. P. 33.11(a)); *see State v. Amaral*, 239 Ariz. 217, 220, ¶ 12 (2016) ("If the alleged facts, assumed to be true, would not provide grounds for relief, the court need not conduct an evidentiary hearing because those facts would not have changed the outcome."). In other words, courts should only order an evidentiary hearing when a defendant has presented "a colorable claim," which is shorthand for a claim that if the alleged facts are assumed true, they "'would *probably* have changed the verdict or sentence." *Kolmann*, 239 Ariz. at 160, ¶ 8 (quoting *Amaral*, 239 Ariz. at 220, ¶ 11).

Whether a defendant has advanced a colorable claim "is, to some extent, a discretionary decision" for the trial court, and only when doubt exists should a court order a hearing "'to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review." *State v. Bowers*, 192 Ariz. 419, 422, ¶ 10 (App. 1998) (quoting *State v. Schrock*, 149 Ariz. 433, 441 (1986)). A trial court should not grant an evidentiary hearing "based on mere

generalizations and unsubstantiated claims." *State v. Borbon*, 146 Ariz. 392, 399 (1985). In fact, "[t]o mandate an evidentiary hearing, [a] defendant's challenge must consist of more than conclusory assertions and be supported by more than regret." *State v. Donald*, 198 Ariz. 406, 414, ¶ 21 (App. 2000); *see State v. Leyva*, 241 Ariz. 521, 527 n.9, ¶ 17 (App. 2017) (where defendant claimed he was not "thinking straight," holding "in the absence of any other support, such as an affidavit from an expert, we have no difficulty finding these self-serving assertions insufficient to rebut the presumption of verity occasioned by his plea colloquy or to state a colorable claim that his plea was involuntary"). At the least, it is sufficient to say that the showing necessary to plead a colorable claim will necessarily vary based on a defendant's alleged error. *See* Ariz. R. Crim. P. 32.7(e).

B. An expert on prevailing professional norms is unnecessary to establish IAC because whether counsel's performance was deficient is a legal issue for the trial court.

An expert witness is generally not appropriate to establish the prevailing professional norms for defense counsel because PCR courts are well-aware of those norms. It is never appropriate for an expert witness to step into the court's role by opining that trial counsel's performance fell below professional norms because that it is a legal issue for the PCR court to decide. *See, e.g.*, *Earp v. Cullen*, 623 F.3d 1065, 1075 (9th Cir. 2010) (citing *Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006) (finding that the district court did not abuse its discretion in precluding

testimony regarding the "ultimate legal conclusion" of whether "trial counsel satisfied the appropriate standard of care"); *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1242 n.19 (11th Cir. 2011) (Logically, "because the reasonableness of counsel's actions under *Strickland* is a question of law for the court to decide, expert testimony regarding performance deficiencies carries little, if any, weight."); *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998) ("[T]he question of whether the strategic or tactical decision is reasonable enough to fall within the wide range of professional competence is an issue of law not one of fact. . . ."); *Lytle v. Jordan*, 22 P.3d 666, 680 (N.M. 2001); *Jefferson v. Zant*, 431 S.E.2d 110, 112 (Ga. 1993); *Clemmons v. State*, 785 S.W.2d 524, 531 (Mo. 1990); *State v. Ohler*, 366 N.W.2d 771, 775 (Neb. 1985).

Conversely, trial counsel's decision-making processes and tactics are a question of fact. *See, e.g.*, *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) ("Although the *reasonableness* of counsel's decision is best described as a question of law, whether [counsel's] actions were indeed 'tactical' is a question of fact."); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) ("This Court's review of an ineffective assistance of counsel claim is *de novo* because it is a mixed question of law and fact" noting that the question of "whether a decision was a tactical one is a question of fact."). But "[w]hether an attorney's trial tactics are reasonable is a question of law, not fact." *Jefferson*, 431 S.E.2d at 112 (internal

citations omitted)).

Determining whether trial counsel's decision was strategic or tactical, however, does not mean expert witness testimony is necessary, or even admissible. Expert testimony is admissible only to help the trier of fact resolve certain factual issues, *see* Arizona Rule of Evidence 702, but an expert cannot answer whether trial counsel actually made a strategic or tactical decision—that is solely within the knowledge of trial counsel. *See State v. Forde*, 233 Ariz. 543, 562, ¶ 68 (holding, "the expert may not usurp the jury's role by offering opinions concerning the accuracy, reliability, or credibility of a particular witness"); *cf. State v. Pandeli*, 242 Ariz. at 182, ¶ 15 ("The PCR court erred by substituting its after-the-fact judgment for counsel's during trial."). Nor is an expert generally necessary to explain to a PCR judge—who is well-acquainted with Arizona law—the prevailing norms. *See State v. Smith*, 244 Ariz. 482, 485 & n.1, ¶ 10 (App. 2018) (holding that counsel fell below professional norms despite no expert opinion on the issue because "where counsel has provided reasons for the decision and those reasons are contradicted by the record, such evidence is not necessary to establish counsel's performance was deficient"). Thus, an affidavit from trial counsel, not a prevailing professional norms expert, will often be more useful to the PCR court for a

colorable claim analysis under the first *Strickland* prong.[2] In its absence, a court may have no basis to determine that trial counsel did not make a reasonably informed strategic or tactical decision. Then, in making the colorable claim assessment, the court would have the legal authority to conclude that trial counsel's decision fell below the prevailing professional norms.

As stated above, expert testimony on prevailing professional norms is irrelevant to establish deficient performance. To clarify the standard, this Court should hold that evidence regarding prevailing professional norms from an expert witness is irrelevant to establish deficient performance and is generally irrelevant to define prevailing professional norms. It is the PCR court's role to determine as a

---

[2] The circumstances of each case will determine the necessary showing for a colorable claim. For example, statements in the record may be sufficient to raise a colorable claim. Or a defendant's affidavit outlining trial counsel's conduct may raise a colorable claim. This does not mean that other expert witness affidavits are unnecessary to raise colorable IAC claims, particularly when a defendant alleges error based on trial counsel's failure to consult, or use, an expert witness, such as testing intellectual disabilities, establishing certain mitigation in a capital case, or moving for incompetency to stand trial. In those circumstances, neither a defendant nor PCR court likely possess the expertise to determine whether a defendant can establish the intellectual disability, mitigation, or incompetency actually exists and affected the verdict. *See State v. Meeker*, 143 Ariz. 256, 264 (1984) ("Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation."). An affidavit from an expert witness will be necessary to plead a colorable claim, but the underlying standard-of-care remains a question of law for the trial court. *See Leyva*, 241 Ariz. 521, 527 n.9, ¶ 17 (holding an affidavit was insufficient).

matter of law whether the strategic decisions made by defense counsel fell within the prevailing professional norms to raise a colorable claim.

II. RULE 32.4(b)(3)(D) IS UNCONSTITUTIONAL BECAUSE IT IRRECONCILABLY CONFLICTS WITH A.R.S. § 13–4234(G).

Arizona's post-conviction remedies are primarily contained in Arizona Rules of Criminal Procedure 32 and 33 and Article 29. Until 2020, no provision in Rule 32 or Article 29 excused a defendants' failure to file a timely notice of PCR for defendants convicted by a jury. Following the Rule 32 Task Force's recommendation, Ariz. Supr. Ct. Pet. No. R-19-0012, Appx. 2, at 4, this Court adopted Arizona Rule of Criminal Procedure 32.4(b)(3)(D) in 2019, which provides that "[t]he court must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault."[3] Ariz. Supr. Ct., *In re Rule 32 & Rule 33, R. Crim. P.*, filed Aug. 29, 2019. The legislature, however, has not adopted a statutory provision similar to Rule 32.4(b)(3)(D). Instead, the legislature has expressly stated in § 13–4234(G) that "[t]he time limits [in § 13–4234] *are jurisdictional*, and an untimely filed notice or petition *shall* be dismissed with prejudice." (Emphasis added).

---

[3] The State conceded that the 2019 PCR amendments applied, and the court of appeals agreed. *Bigger*, 250 Ariz. 174 at ___, ¶ 5. That determination was not petitioned for review.

Resolving the apparent conflict between Rule 32.4(b)(3)(D) and § 13–4234(G) raises a separation of powers question. As explained below, Rule 32.4(b)(3)(D) creates a substantive right that the legislature has not authorized. As such, it violates the separations of powers clause in Article III of the Arizona Constitution. And even assuming this Court finds that § 13–4234(G) is not substantive, the time limits in § 13–4234(C) were enacted to further the interests of victims based on authority granted to the legislature in the Victim's Bill of Rights ("VBR"). This Court should hold that Rule 32.4(b)(3)(D) is unconstitutional by providing an exception to the jurisdictional requirement.

A. Separation of powers principles.

"[U]nlike the federal constitution in which the separation of powers principle is implicit, our state constitution contains an express mandate, requiring that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately." *Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 19 (2003); *see* Ariz. Const. art. 3. The Constitution vests this Court with "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. 6, § 5(5). "[L]egislative authority," in contrast, "shall be vested in the legislature." Ariz. Const. art. 4, pt.1, § 1(1); *see Adams v. Bolin*, 74 Ariz. 269, 283 (Ariz. 1952) ("[T]he Legislature has all power not expressly prohibited or granted to another branch of the government."). Thus, both the legislature and this

Court have rulemaking authority, but "in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails." *Seisinger v. Siebel*, 220 Ariz. 85, 89, ¶ 8 (2009). Similarly, this Court can develop substantive law, but "just as a procedural statute cannot prevail against a procedural rule validly promulgated under Article 6, judge-made substantive law is subordinated to contrary legislative acts validly adopted under Article 4." *Id*. at 92, ¶ 28.

This Court presumes that statutes are constitutional. *See State v. Arevalo*, 249 Ariz. 370, 373, ¶ 9 (2020). When separation of powers concerns are raised, "it is [the Court's] duty to save a statute, if possible, by construing it so that it does not violate the constitution." *Seisinger*, 220 Ariz. at 89, ¶ 11 (citation omitted). Courts do not "hastily find a clash between a statute and court rule" and avoid "interpretations that unnecessarily implicate constitutional concerns." *Duff v. Lee*, 250 Ariz. 135, ___, ¶ 14 (Nov. 25, 2020) (internal quotation marks and citations omitted). The goal is to "harmonize rules and statutes, reading them in tandem whenever possible." *Id.*

The first step in a separations of powers analysis is determining whether "a statue and court rule cannot be harmonized." *Seisinger*, 220 Ariz. at 91, ¶ 24. If this Court can harmonize the two, its analysis is finished. When a conflict exists, the second step in the analysis requires that this Court determine whether the statute is substantive or procedural, but the difference between a substantive or

procedural statute or rule "'has proven elusive.'" *Id.* at 91–92, ¶¶ 24, 29 (quoting *In re Shane B.*, 198 Ariz. 85, 88, ¶ 9 (2000)). Ultimately, a statute is substantive if it "enacts, at least in relevant part, law that effectively 'creates, defines, and regulates rights.'" *Id.* at 93, ¶ 29.

A. Rule 32.4(b)(3)(D) conflicts with § 13-4234(G), and the two provisions cannot be harmonized.

Rule 32.4(b)(3)(D) and § 13–4234(G) plainly conflict. The rule excuses certain untimely notices of PCR while the statute mandates that an untimely notice is a jurisdictional defect and requires dismissal with prejudice. The court of appeals also recognized this conflict. *Bigger*, 250 Ariz. at ___, ¶¶ 8, 18 (stating that "§ 13–4234 arguably conflicts with . . . Rule 32"). Faced with contradictory statutes, the court of appeals sought to harmonize the two by construing the jurisdictional statement in § 13–4234(G) as procedural.[4] *Bigger*, 250 Ariz. at ___, ¶¶ 15–19

---

[4] Implicitly, the court of appeals reached the second step of the separation of powers analysis when it addressed whether § 13-4234(G) was a substantive or procedural statute. *See Seisinger*, 220 Ariz. at 91, ¶ 24 (after finding a conflict, a court "must then determine whether the challenged statutory provision is substantive or procedural"). Generally, jurisdictional statutes or rules cannot be waived or tolled. *See State v. Hill*, 85 Ariz. 49, 53 (1958) ("If the three-day Rule in effect in this state is harsh it should be amended to grant a longer period. Certainly this is no justification for ignoring the Rule. . . . The Rules are mandatory and must be obeyed by the courts as well as by the parties."); *see also State v. Hickle*, 129 Ariz. 330, 332 (1981); *cf. Pritchard v. State*, 163 Ariz. 427, 432 n.4 (1990). Having "displaced and incorporated all trial court post-trial remedies except post-trial motions and habeas corpus," § 13–4233, the legislature had the authority to

(continued ...)

("Thus, we cannot say the use of the word 'jurisdictional' in subsection (G) transforms the time limits in the statute into substantive provisions."). With that determination, it harmonized § 13–4234 and Rule 32.4 by concluding, "insofar as a claim is either exempt or excused from the time limits for notices provided by Rules 32 and 33, the claim will not be time barred. But if a claim is time barred under the rule, the court will lack the authority to consider it." *Bigger*, 250 Ariz. at ___, ¶ 18.

The court of appeals' analysis misses the mark because an untimely notice excused by Rule 32.4(b)(3)(D) remains untimely under Rule 32.4(b)(3)(A) and, more importantly, untimely under the plain and unambiguous text of § 13–4234(C). In other words, § 13–4234(G) continues to apply when a notice is excused by Rule 32.4(b)(3)(D). The court of appeals erred when it implicitly reasoned that the legislature's use of the term, "jurisdiction," was ambiguous in this context. *See Lay v. Nelson, in & for Cty of Yuma*, 246 Ariz. 173, 175–76, ¶ 12 (App. 2019). As a result, the two statutes conflict and cannot be harmonized.

B. Rule 32.4(b)(3)(D) is substantive because it creates defines and regulates rights.

(... continued)

determine the scope of PCR. *See In re Marriage of Waldren*, 217 Ariz. 173, 177, ¶ 22 (2007) ("The legislature's substantive divestiture of jurisdiction in this area supersedes the court's procedural rule."); *cf. State v. Thompson*, 139 Ariz. 552, 577 (1984) ("[T]here is no constitutional right to post-conviction review."). Nor does this case involve confusion over subject matter jurisdiction. *See State v. Jackson*, 208 Ariz. 56, ¶ 23 (App. 2004) (discussing statute of limitations).

Subject to the preclusion limitations in § 13–4232, § 13–4231 specifies the "grounds" under which "any person who has been convicted of or sentenced for a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief." *See* Ariz. R. Crim. P. 32.1 & 33.1 (both specifying "[g]rounds for relief"). As *State v. Fowler* suggested, § 13–4231 creates substantive rights. 156 Ariz. 408, 413 (App. 1987), *approved by State v. Bejarano*, 158 Ariz. 253 (1988); *see* Post-Conviction Study Comm., *Final Report*, at 3 (Feb. 1992) (hereinafter *Final Report*) (Attch. A.) (recommending that "The Supreme Court should adopt substantive, procedural and technical court rules relating to post-conviction relief. The Legislature should adopt substantive legislation relating to post-conviction relief.").

Section 13–4231(6) authorizes as a claim for PCR that "[t]he defendant's failure to appeal from the judgment or sentence, or both, within the prescribed time was without fault on his part." Similarly, Rule 32.1(f) authorizes as a claim for relief "failure to timely file a notice of appeal was not the defendant's fault," and newly promulgated Rule 33.1(f) includes a provision for pleading defendants, authorizing a claim for "failure to timely file a notice of post-conviction relief was

not the defendant's fault."[5]

Given their placement, § 13–4231(6), Rule 32.1(f), and Rule 33.1(f) are substantive remedies. *See Fowler*, 156 Ariz. at 413. There is no basis to treat the nearly identical provision in Rule 32.4(b)(3)(D) as procedural merely because it was not included with the other substantive remedies. Like other substantive claims, a defendant must plead that his or her failure to timely file a notice for PCR was not his or her fault. *See* Ariz. R. Crim. P. 33.7(b), (e). The State is afforded an opportunity to respond. *See* Ariz. R. Crim. P. 33.9. And if contested and colorable, the trial court must set an evidentiary hearing to determine whether the defendant's allegations are true. Ariz. R. Crim. P. 33.11(b) & 33.13(a). Thus, this provision "creates, defines, and regulates rights." *Seisinger*, 220 Ariz. at 93, ¶ 29.

Nor is this case controlled by *Fowler*, *Bejarano*, and *State ex rel. Napolitano v. Brown*, 194 Ariz. 340 (1999), as the court of appeals implied by stating that this Court "has determined that when statutory provisions relating to time requirements in post-conviction relief proceedings conflict with those provided in the rules of criminal procedure, they are unconstitutional." *Bigger*, 250 Ariz. at ___, ¶ 13. None of those cases make such a sweeping conclusion. Rather, these cases address

---

[5] The remedy authorized by Rule 33.1(f) was first added to Rule 32.1(f) in 2000. *See* Ariz. R. Crim. P. 32. (f) cmt. to 2000 amend. ("Relief pursuant to subsection (f) [is] unavailable to all post-conviction relief proceedings not of-right.'").

a narrow issue not presented here: may the legislature enact shorter timelines that those set forth in Rule 32.

The question before the court in *Fowler* was whether the one-year limitations provision in § 13-4234(A) (1984) was constitutional. *Fowler*, 156 Ariz. at 410. This Court had promulgated the PCR rules in 1973 under Rule 32. *See State v. Brown*, 23 Ariz. App. 225, 228 (1975) (discussing the history of Rule 32). And in 1984, the legislature to "put[] into the statutes Rule 32 . . . in its entirety" by adding A.R.S. §§ 13–4231 through 13–4240. John Thomas & Julie Klein, *House of Representatives Memo Re Judiciary Committee Week of March 5*, (March 9, 1984) (Attch. B). Rule 32 had no time limit. *Fowler*, 156 Ariz. at 410; *see* 171 Ariz. XLIV (1992). Section 13–4234(A), however, required that certain PCR petitions be filed within one year from the court of appeals' mandate, but the jurisdictional statement in § 13–4234(G) was yet to be enacted. *See Fowler*, 156 Ariz. at 410; 1996 Ariz. Sess. Laws, ch. 7, § 2 (42d Leg., 7th Spec. Sess.).

Fowler held that "[t]he right to post-conviction relief is substantive but the time limits are purely procedural." 156 Ariz. at 413. Thus, it found the one-year limitations period unconstitutional. *Id.* Addressing the State's argument that § 13–4231 created new substantive rights, the court of appeals agreed that "were [it] to assume that the statutes had set up new substantive rights, those rights would be solely found in § 13–4231." *Fowler*, 156 Ariz. at 502. Nevertheless, because § 13–

4231, like Rule 32, was intended to standardize already-existing common law postconviction remedies and was "substantively and almost word-for-word identical to Rule 32.1," the statute and Rule 32.1 "may co-exist and the rules of procedure continue to apply." *Fowler*, 156 Ariz. at 413.

Fowler did not render the substantive provisions of Rule 32, or the procedural statutes in Article 29, unconstitutional. When promulgated, Rule 32 was a procedural mechanism to organize the various substantive common law collateral post-conviction remedies. *Cf. Seisinger*, 200 Ariz. at 92, ¶ 27 ("The American legal tradition relies on courts to make substantive law through the development of the common law."); *see State v. Coats*, 165 Ariz. 154, 157 (App. 1990) ("[A] rule may be procedural in one context and substantive in another, depending on the policy that the rule is intended to serve."). But the legislature has the authority to change common law remedies if it "clearly and plainly manifests[] an intent' to have the statute do so." *Young v. Beck*, 227 Ariz. 1, 4–5, ¶ 13 (2011) (internal quotation marks omitted). When the legislature enacted § 13–4231, it "displace[d] and incorporate[d] all post-trial remedies except post-trial motions and habeas corpus." A.R.S. § 13-4233 (1984); *see Floyd v. Superior Court*, 134 Ariz. 472, 473–74 (App. 1982). In fact, the legislature directed that for claims falling within the ambit of § 13–4231, "the procedures of this article [Article 29] apply." A.R.S. § 13–4233. Which provision controlled was mostly academic; the statute and rule

continued to function without other separation of powers concerns because they were nearly identical. *Fowler*, 156 Ariz. at 413.

In 1992, both Arizona Rule of Criminal Procedure 32.4 and § 13–4234(A) (1992) were amended to impose a 30-day time limit to file a notice of PCR in noncapital cases following a direct appeal mandate, or 90 days from entry of judgment and sentence from a plea agreement.[6] 1992 Ariz. Sess. Laws, ch. 358, § 4 (40th Leg., 2d Reg. Sess.). The legislature subsequently made various amendments to § 13–4234 in 1996, and of importance here, it added the jurisdictional provision in § 13–4234(G). 1996 Ariz. Sess. Laws, ch. 7, § 2.[7] Two years later, the legislature reduced the time limit to file a petition for PCR in capital cases from 120 days to 60 days, thus setting up another conflict with Rule 32.4, which retained the 120-day limitations period. 1998 Ariz. Sess. Laws, ch. 120, § 2 (43d Leg., 2d Reg. Sess.). Consistent with *Fowler*, this Court held that the shortened time limit to file a PCR petition in a capital case was unconstitutional. *Brown*, 194 Ariz. at 344,

---

[6] The court of appeals decision appears to incorrectly suggest that the 30 and 90 day time limits were first added in 1996. *Bigger*, 250 Ariz. at ___, ¶ 13. That issue is important when discussing *Brown*, as explained below.

[7] The legislative history offers little insight into the purpose of § 13–4234(G). *See* Senate Fact for S.B. 1003, Final Revised, 42d Leg., 2d Reg. Sess. (July 23, 1996) (Attch. D.); *Minutes of Comm. on S. Jud. On July 17, 1996*, 42d Leg., 2d Reg. Sess. (Ariz. 1996) (Attch. E).

¶ 14 (holding that "the statutory time limits conflicting with those in Rule 32.4(c) are unconstitutional and not justified under the VBR").[8]

This case, therefore, presents an issue previously unaddressed by this Court: whether the right to file an untimely notice of PCR is a substantive right that the legislature has not authorized, or a procedural right falling under this Court's authority. Neither *Fowler* nor *Brown* answers that question. As stated above, A.R.S. § 13–4231 is a substantive statute, as it creates the right to obtain post-conviction relief under certain conditions. *See Seisinger*, 220 Ariz. at 92, ¶ 26; *see also Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 155, 162, ¶ 22 (App. 2008). As such, this Court should find that Rule 32.4(b)(3)(D) is unconstitutional.

C. The time limits in Article 29 were promulgated to further the Victim's Bill of Rights.

Even if this Court finds that the time limits set forth in A.R.S. §§ 13–4231(6) and 13–4234 are procedural, they fall within the legislature's mandate to enact laws giving effect to the VBR. *Brown*, 194 Ariz. at 343.

The statutory time limits set forth in § 13–4234 were specifically enacted to further the goals set forth in the VBR. The 1992 Joint Legislative Study

---

[8] The court of appeals noted that *Brown* was decided "even after the addition in 1996 of the term 'jurisdictional' in § 13–4234(G)." *Bigger*, 250 Ariz. at ___, ¶ 13. Although correct, this Court did not cite, or address, the jurisdictional provision in § 13–4234(G) in *Brown*.

Committee on Post-Conviction Relief ("PCR Committee") proposed amending Article 29 to implement time limits for PCR petitions. Pet. to Amend. Rule 32, Ariz. R. Crim. P., at 13–14 (Jan. 29, 1992) (hereinafter 1992 Pet.) (Attch. C); *see Final Report*, at 7–8. In fact, the PCR Committee "was charged with making recommendations regarding changes in rules concerning post-conviction relief to implement the 'prompt and final' provision of the" VBR. 1992 Pet. at 2; *see* Ariz. Const. art. 2, § 2.1(A)(10). The chairmen of the PCR Committee noted that the then-current system where "a defendant could exercise his right of post-conviction relief at any time after the trial," did not achieve the goal of ensuring a "'prompt and final' resolution of the matter," was "counter productive" and "did not insure finality for the victims of crime." 1992 Pet. at 14.

To remedy these concerns, the PCR Committee proposed, and the legislature then enacted in § 13–4234(A) (1992), creating a notice of PCR, which would be "similar to a notice of appeal" and would have to be filed "within 90 days of the entry of judgment and sentence or within 30 days of the order and mandate affirming the judgment and sentence on direct appeal, whichever is later." 1992 Pet. at 14; *see Final Report*, at 7–8 (Appx. A). As one PCR Committee member stated, "the victim … suffers while awaiting the defendant's decision to appeal" and that delay "impacts on the victim's life." *Final Report*; (*Min. of Meeting of PCR Committee on Oct. 17, 1991*, at 5 (statement of Karen Duffey)).

Nor does *Brown* undermine the above legislative history. *Brown* held that the legislature's 1998 amendments truncating the timelines for capital PCR petitions (not noncapital notices of PCR), violated the separation of powers clause, in part because there was no VBR basis justifying the 1998 time limit. *Brown*, 194 Ariz. at 341, ¶ ¶ 1, 3. As a result, this Court's time limits in Rule 32 controlled. *Id.* at 341, ¶ 7.

Brown did not address the 1992 time limits. *Id.* at 341, ¶ 4. As this Court recognized in *Brown*, "the scope of legislative rulemaking power under the VBR extends to those rules that define, implement, preserve, and protect the specific rights unique and peculiar to crime victims, as guaranteed and created by the VBR." *Id.* at 343, ¶ 11. And the time limits in § 13–4234 were intended to ensure "'prompt and final' resolution of the matter," a right specifically provided in the VBR. 1992 Pet. at 2. Therefore, even if this Court holds that § 13–4234(G) is procedural, the statute still prevails over Rule 32.4(b)(3)(D).

CONCLUSION

This Court should hold that an expert witness is never appropriate to establish the standard-of-care for defense counsel, either in a notice for PCR or at a subsequent evidentiary hearing. It should additionally hold that Rule 32.4(b)(3)(D) is unconstitutional because it conflicts with § 13–4234(G).

Respectfully submitted this 17th day of May, 2021.

Mark Brnovich
Attorney General

/s/ Nicholas Klingerman
Nicholas Klingerman (No. 028231)
Section Chief Counsel, Southern Arizona White Collar and Criminal Enterprise
400 West Congress South Building
Suite 315
Tucson, Arizona 85701
Telephone: (520) 628-6504

Lindsay St. John (No. 024825)
Assistant Attorney General
Criminal Appeals Section
400 West Congress South Building
Suite 315
Tucson, Arizona 85701

Attorneys for Amicus Curiae Arizona Attorney General