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IN THE ARIZONA SUPREME COURT

THE STATE OF ARIZONA,	)	S.Ct. Case No. CR-20-0383-PR
	)	
Respondent,	)	Court of Appeals No.
	)	2 CA-CR 2019-0012-PR
v.	)	
	)	(Pima County Superior Court
RONALD BRUCE BIGGER,	)	Cause No. CR-20043995-002)
	)	
Petitioner.	)	**PETITION FOR REVIEW TO**
	)	**ARIZONA SUPREME COURT**

Petitioner, requests this Court review the court of appeals' (COA) opinion dated October 14, 2020. Ariz.R.Crim.P. 32.16(l). Review should be granted because the COA misapplied the law in a published opinion on three important points of law related to post-conviction relief (PCR). First, it created a requirement that ineffective-assistance-of-counsel (IAC) claims must be supported by a standard-of-care expert opinion at the petition stage without any basis in law. Second, for purposes of Ariz.R.Crim.P. 32.1(g), it misstated which legal precedent constituted the "significant change in the law" that affects this case. Finally, it engaged in a lengthy disquisition of PCR "jurisdiction" that fundamentally misunderstood the subject and ignored this Court's recent opinion in *State v. Reed*, 248 Ariz. 72 (2020). Alternatively, this Court should depublish the opinion. Ariz.R.Sup.Ct. 111(g).

ISSUES PRESENTED

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 COA erroneously state the law as to "jurisdictional" time limits for filing PCR notices?

STATEMENT OF THE CASE

Ronald Bruce Bigger was charged, along with co-defendant Bradley Schwartz, with first-degree murder and conspiracy to commit first-degree murder. Their trials were severed, and Bigger was convicted of both charges at his 2007 trial. On appeal, Bigger exhausted claims that his motions for change of venue and to preclude certain DNA evidence were erroneously denied and that third-party culpability evidence was erroneously precluded. *State v. Bigger*, 227 Ariz. 196 (App. 2011). Through counsel, Bigger filed a PCR petition on January 15, 2016. Bigger received the superior court's permission to act as hybrid counsel, and he filed a *pro se* petition on February 7, 2017. After a response and replies, the superior court found no colorable claims and dismissed both petitions summarily on September 17, 2018. Bigger petitioned for review; the COA granted review but denied relief in a published opinion.

FACTS

Pediatric ophthalmologist David Stidham was murdered outside his car in his medical complex's parking lot. His body was discovered at approximately 10:40 p.m., his car nowhere to be found, and 911 was immediately called. Detectives found Stidham's wallet in his pocket and his vehicle registration in his hand. Stidham activated the office alarm at 7:26 p.m.

At the same time, Bruce Bigger was at Denny's restaurant on Speedway near Dodge Blvd. Waitress Erin Sullivan remembered that Bruce was sitting at the counter eating fries for nearly an hour prior to asking to use a phone. While in Denny's, Bigger was not acting suspicious, was not out of breath, had no blood on him, and no cuts on his hands. After eating, Bigger asked Sullivan if he could use the telephone to call a cab. Sullivan did not let him use the house phone, but gave Bigger a business card for Allstate Cab Co., which Bruce called at 7:46 p.m. from the Denny's pay phone. Cab driver Thomas Boager loaned Bigger his cell phone to call Schwartz and get directions to Karuna's restaurant, where Schwartz was dining with Lisa Goldberg. At Karuna's, Schwartz introduced Bigger as someone he met in rehab. According to Goldberg, Schwartz asked Bigger "how the scrubs worked out"; Bigger said he had "used them for horseback riding and they worked out fine."

After dinner Schwartz drove Goldberg and Bigger to his office to pick up Bigger's bike, which he had left there earlier in the day. Goldberg testified that

Schwartz asked her if she saw a knife on Bigger's bike. After going to an ATM machine, where Schwartz said he had only $20, they drove Bigger to a Residence Inn; Schwartz checked him in and gave his credit card for incidental charges. The following day, Schwartz went to the bank and withdrew $10,000.

Police discovered that Schwartz was dating many women who described Schwartz as talking repeatedly about harming or killing Stidham. Schwartz asked several people to help him find someone he could pay to kill or injure Stidham. Schwartz paid Danny Lopez $5,000 to put a hit on Stidham, but Lopez died before he could do it. Schwartz later paid Aisha Henry $1,500 to have her husband, Dallas Henry, maim or blind Stidham, with the promise of an additional $2,000 to be paid once the deed had been done.

Jennifer Dainty, a convenience store clerk who worked close to Stidham's office, testified that a man wearing light blue scrubs came into her store at 6:00 p.m., complained of locking his keys in the car, and placed several calls from the store phone, during the last of which he expressed distress that the person he called was not answering "tonight of all nights." Dainty testified that this man was in and out of her store several times, the final time leaving at 6:45. Ten minutes later, Schwartz's cell phone called the store phone. When detectives returned days later with a six-pack lineup, Dainty identified #5 (Bigger) as the man in scrubs.

One day in October, Bigger and his girlfriend Therese visited two of Bigger's

acquaintances, both named Chris. The Chrises said that Bigger had a lot of money and Bigger and Therese brought a large quantity of crack cocaine. Bigger, Therese, and another acquaintance, Robert Wetzel, left in Wetzel's car for Las Vegas; Bigger paid for the trip, but only had enough money to get one cheap hotel room. Wetzel testified he heard Bigger talk about having $10,000, but he admitted that he had never revealed this in prior statements to police, or in multiple pretrial interviews, or even in Schwartz's trial.

Investigators found eight eyewitnesses at the medical complex who saw a man in blue scrubs in and around the parking lot; not one identified Bigger, with six specifically excluding Bigger. Those witnesses were one of Stidham's employees, four employees of other physicians who worked in the complex, two ophthalmology residents who went to Stidham's office that evening, a physician who worked in the complex, and that physician's adult daughter.

DNA evidence was largely immaterial except for one swab on Stidham's car dashboard (called "LX-39"). This swab produced data suggestive of Bigger's DNA potentially being a minor contributor to the sample; testimony of several witnesses on both sides disputed whether this evidence was reliable but the court allowed the jury to hear the evidence.

Despite overwhelming evidence of Schwartz's alibi that night, defense counsel told the jury—in both openings and closings—that Schwartz was the killer.

Even though several witnesses excluded Bigger as the suspicious "scrubs guy" at the medical complex who then called Schwartz from Dainty's convenience store, defense counsel inexplicably argued that "scrubs guy is a red herring." The State's closing argument eviscerated this and other claims from defense counsel.

REASONS TO GRANT REVIEW

Bigger's case was a complicated two-month trial, followed by a co-defendant's complicated two-month trial. Despite the factual complexity, the legal issues presented in this petition are narrow. The lower courts interpreted PCR law inconsistently with all prior cases, in a manner that distorted their reasoning on the facts. Similarly, because both courts incorrectly held which prior case represents the significant change in law affecting Bigger's case, neither court reviewed the impact of the change on the case under the correct standard. This Court should grant review of these important legal issues and remand to the trial court for further proceedings.

A. IAC claims do not require standard-of-care expert testimony, certainly not at the petition stage. In ruling otherwise, the COA rewrote law and ignored unintended consequences.

Under *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984), "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

professional judgments support the limitations on investigation." Bigger's PCR petition cited five manifestations of IAC—some involving decisions after investigation, others involving lack of adequate investigation.

In denying relief, the trial court emphasized the lack of an expert opinion as to every point. Ruling at 4, 6, 7, 8, 9. The trial court's ruling unequivocally held that such an expert opinion is a prerequisite to lodging a colorable IAC claim, and its absence in this case undoubtedly affected the ruling's outcome.

With minimal analysis and no supporting legal authority, the COA agreed with the trial court: "Although an affidavit may not always be required to establish that counsel's performance did not meet prevailing professional standards, a defendant must do more than disagree with, or posit alternatives to, counsel's decisions to overcome the presumption of proper action." Opinion ¶ 23. Prior to that sentence, the court includes three other sentences suggesting that the only time an expert opinion is not required is "when it may be established as a legal matter that counsel 'was "unreasonably mistaken" about the law.'" *Id*. (quoting *State v. Speers*, 238 Ariz. 423, ¶ 18 (App. 2015), *quoting in turn State v. Lee*, 142 Ariz. 210, 218-19 (1984)).

This creates a dramatic change in Arizona law. Opinion ¶ 23 cites to Ariz.R.Crim.P. 32.7(e) (formerly Rule 32.5(d)), which requires a petition to be accompanied by "any affidavits, records, or other evidence currently available to the

defendant supporting the petitioner's allegations." In Arizona's history of PCR remedies,[1] never before had that Rule been interpreted to **require** a standard-of-care expert to establish an IAC claim at the pleadings stage. This Court's Rule 32 Task Force intensively studied the PCR rules and proposed many substantive changes. Nowhere in the Task Force's meeting minutes or materials is there any indication of discussion on standard-of-care experts.[2] For example, new Rule 32.5(c), related to appointment of investigators, expert witnesses, and mitigation specialists, was intended to mirror Rule 6.7; but beyond that, there is no discussion about what kind of experts are necessary. Thus, by writing into the opinion a requirement that most IAC claims will require a standard-of-care expert opinion, the COA essentially rewrote this rule.

No Arizona law required such an expert opinion, whether at the petition stage or in an evidentiary hearing. Because the *Strickland* standard is one of objective reasonableness, the trial court can assess on its own whether counsel's performance

[1] This rule was renumbered in 2020 without substantive change. The 1989 version of Rule 32.5(a) included the language: "Affidavits, records, or other evidence currently available to the petitioner supporting the allegations of the petition shall be attached to it."

[2] The documents accompanying Rule Change Petition R-19-0012 are available at https://www.azcourts.gov/Rules-Forum/aft/949 (last visited October 26, 2020). The documents circulated in advance of public meetings are available at https://www.azcourts.gov/cscommittees/Rule-32-Task-Force/Rule-32-Task-Force-Meeting-Information (last visited October 26, 2020).

was objectively unreasonable. The Ninth Circuit has expressly held that the court is "qualified to assess the factual and legal issues involved in [Petitioner's] *Strickland* claim." *Hovey v. Ayers*, 458 F.3d 892, 911 (9th Cir. 2006).[3] *See also Heishman v. Ayers*, 621 F.3d 1030, 1042 (9th Cir. 2010) ("[I]t is within a district court's discretion to exclude proposed expert testimony concerning a legal standard of care and to rely solely on the briefs[.]"); *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir. 1995) (A judge is "qualified to understand the legal analysis required by *Strickland*."). In a capital habeas case arising out of Arizona, the Ninth Circuit noted that "there is no requirement that expert testimony of outside attorneys be used to determine the appropriate standard of care." *LaGrand v. Stewart*, 133 F.3d 1253, 1270 n.8 (9th Cir. 1998). For this reason, anecdotally, federal courts routinely deny funding requests for legal standard-of-care experts.

At the petition stage, if the case is close enough that the expert can help tip the balance in favor of the defendant, then the trial court must grant an evidentiary

[3] *Hovey* cited Fed.R.Evid. 702, which states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert...may testify thereto in the form of an opinion or otherwise…" Ariz.R.Evid. 702(a) similarly permits experts to testify "in the form of an opinion…if…the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Since the trial court is the trier of fact in PCR proceedings and is presumed to know the law and apply the law, *State v. Vermuele*, 226 Ariz. 399, 404 ¶ 17 (App. 2011), then it follows that the trial court would not need a standard-of-care expert to explain how to apply the law of *Strickland*.

hearing because the defendant alleged a colorable claim. *See* Rule 32.11(a)-(b) (court must grant an evidentiary hearing on any claim that "presents a material issue of fact or law that would entitle the defendant to relief").

The COA also ignored repeated arguments that requiring an expert opinion at the petition stage of PCR proceedings substantially burdens indigent defense budgets, because such expert opinions are rare except in capital cases.[4] Of course, if such an expert opinion is required, then the Sixth Amendment requires counties to bear that cost. *Ake v. Oklahoma*, 470 U.S. 68 (1985). But what happened in our case is the trial court created a new requirement out of thin air, and the COA endorsed that new requirement, without any notice to Bigger (or any other Arizona PCR petitioner). The COA ignored unintended consequences of dictating such an unfunded mandate on Arizona's counties—particularly when the mandate is unwarranted.

Finally, Bigger lacked notice that the trial court or the COA would alter established rules of procedure by requiring a standard-of-care expert opinion as a prerequisite to making his IAC claim. The COA denied him due process by changing the rules midstream and then punishing him for not following the new rule. *See State v. Melendez*, 172 Ariz. 68, 71 (1992) ("The touchstone of due process under both the

[4] *See* Motion for Reconsideration at 5-6 (citing oral argument and attaching declaration from funding agency director).

Arizona and federal constitutions is fundamental fairness."). Remand to the trial court would permit Bigger to comply with the new rule requiring a standard-of-care expert by seeking court funds to obtain such an expert opinion. By denying his Motion for Reconsideration, the COA violated due process.

B. *Strickland*'s objective reasonableness test does not absolve trial counsel of all strategic errors.

The second error in the COA's rejection of Bigger's IAC claim involves its transformation of *Strickland*'s presumption of reasonableness into an irrebuttable presumption in any case where the petitioner is challenging trial counsel's strategic or tactical decisions and fails to provide an expert opinion. Opinion ¶21. Where Bigger argued that his trial counsel made objectively unreasonable decisions, the COA relied on the lack of such an expert declaration in finding that the record does not support Bigger's "claim that counsel's decisions lacked a reasoned basis." Opinion ¶23. The COA agreed with the trial court that Bigger failed to prove that trial counsel's "decisions, even if ultimately unsuccessful, were the result of a lack of experience or ineptitude." Opinion ¶22.

In so holding, the COA has turned *Strickland* on its head—even while citing the *Strickland* standard of objective reasonableness. *See* Opinion ¶20 (citing *Strickland*, 466 U.S. at 687). The COA essentially states that a petitioner cannot prove the first prong of *Strickland*, i.e. that counsel was ineffective, unless the petitioner shows that trial counsel's decisions were the result of ineptitude or

inexperience. That is an incorrect statement of the law. If a trial lawyer conducts an extremely thorough investigation, brings all of her experience to bear, and then makes a patently unreasonable strategic decision, then *Strickland*'s first prong is satisfied. A lawyer who fully investigates and then decides to point the guilty finger at the one person who had an airtight alibi has renounced reason; the decision to point the finger at Dr. Schwartz for Dr. Stidham's murder "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 668, precisely because of how ludicrous the decision was. This is not simply "second-guessing" trial counsel's strategy.

Bigger recognizes *Strickland*'s language that trial counsel's strategic decisions made after thorough investigation are "virtually unchallengable." But the COA converted a high burden into an insurmountable burden. This essentially rewrote *Strickland*. This Court should grant review to restate that the test remains one of objective reasonableness.

C. For purposes of Rule 32.1(g), significant change in the law is represented by the case that made the change, not the case that recognized the change.

Dainty's eyewitness identification was critical to the State's case. Because trial counsel's pretrial motion to suppress her identification was denied, COA cases at the time of Bigger's trial disallowed giving the identification instruction in *Revised Arizona Jury Instructions* (Crim. 4th ed.), Standard 39 ("RAJI 39"). *State v. Nottingham*, 231 Ariz. 21, 26 ¶13 n.4 (App. 2012) (collecting cases holding

instruction not permitted in the absence of police suggestiveness). Right before this Court denied Bigger's petition for review and the mandate issued, the Supreme Court decided *Perry v. New Hampshire*, 565 U.S. 228 (2012). *Perry* held that the Due Process Clause of the Fourteenth Amendment does not require suppression of identification evidence if the jury is instructed on how to weigh such evidence, and it specifically stated RAJI 39 (now numbered RAJI 45) is sufficient to protect the due process rights of defendants. *Id*. at 246 & n.7. This change in law occurred prior to the issuance of the mandate, and thus Bigger is entitled to the benefit of *Perry*. *See Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *State v. Towery*, 204 Ariz. 386, 389-90 ¶8 (2003).[5]

The trial court and the COA considered the significant change in the law to have occurred when the COA decided *Nottingham*, as opposed to *Perry*. Opinion ¶¶31-35. This ignores that *Nottingham* specifically recognized the change in the law that *Perry* created:

> Accordingly, we conclude *Perry* has modified Arizona law to the extent our courts had conditioned a defendant's entitlement to a cautionary identification instruction on a trial court's formal finding that a pre-trial identification procedure was "unduly suggestive."

Nottingham, 231 Ariz. at 26 ¶13. Instead of honoring its words in *Nottingham*, the

[5] Because *Nottingham* was decided after Bigger's case was final, he could only obtain PCR if the rule was retroactive under *Towery*. Opinion ¶¶36-38. Bigger has never argued retroactivity.

COA sought to undermine them in a footnote. Opinion ¶35 n.7. In that footnote, the COA attempted to distinguish *Perry*'s effect on Arizona law from that of *Miller v. Alabama*, 567 U.S. 460 (2012), recognized by this Court in *State v. Valencia*, 241 Ariz. 206 (2016)—but the COA's reasoning is confusing and utterly fails to draw a meaningful distinction.

The COA impliedly accepted Bigger's argument that a retroactivity analysis is unnecessary if *Perry* represents the relevant change in law. No Arizona case has ever analyzed Rule 32.1(g) except in terms of retroactive application of a final case. *But see State v. Montes*, 223 Ariz. 337, 338 ¶5 (App. 2009), *vacated*, 226 Ariz. 194 (2011) (recognizing change in law could be raised under Rule 32.1(g), but appellate court considered issue on appeal). This issue is ripe for this Court's review. This Court should find *Perry* is the significant change in law and remand to the trial court to consider its effect on the verdict.

D. The COA's extended discussion of PCR jurisdiction after an untimely notice contradicts this Court's cases.

The COA ordered supplemental briefing on the question whether it had jurisdiction to hear this case because Bigger's appellate counsel filed a motion to extend the due date for filing the PCR notice (which was granted by the trial court). Bigger filed a fifteen-page brief challenging incorrect assumptions and noting the COA's continued "imprecise" use of the term "jurisdiction." The State's response conceded that the COA should hear Bigger's case because any untimeliness was not

his fault. Opinion ¶¶5-7. The COA should have ended with that. Instead, it used the next twelve paragraphs to discuss jurisdiction inconsistently with this Court's precedent. The COA admitted its past "imprecise" use of the word "jurisdiction." Opinion ¶16. In attempting to clear the air, however, the COA compounded its past errors.

It is abundantly clear that untimely PCR notices do not affect a court's jurisdiction, which is a court's power to hear a case. If the notice deadline was jurisdictional, then there would be no "excusing an untimely notice." Rules 32.4(b)(3)(D), 33.4(b)(3)(D). *Cf. State v. Whitman*, 234 Ariz. 565 (2014) (notice of appeal is jurisdictional, so court has no power to hear appeal if notice is untimely). The penalty for an untimely PCR notice is not dismissal for lack of jurisdiction, but preclusion of an untimely claim. Preclusion is a defense that the State may waive, *State v. Peek*, 219 Ariz. 182, 183 ¶4 (2008), whereas subject matter jurisdiction claims are unwaivable. Moreover, since the PCR notice deadline is not jurisdictional, it is a deadline that may be extended so long as the request for extension is made prior to the expiration of time to file the substantive motion. *See Maule v. Superior Court*, 142 Ariz. 512, 515 (App. 1984) (allowing extensions of time for filing motion to remand to grand jury). This means the COA's erred in equating notices of appeal with PCR notices in *State v. Lopez*, 234 Ariz. 513, 515 ¶9 (App. 2014), yet the COA dug in to uphold *Lopez*. Opinion ¶9 n.6.

In that same vein, the COA, even while recognizing past misuse of the word "jurisdiction" to describe "performing [an act] when it was prohibited," Opinion ¶16 (quoting *Collins v. Superior Court*, 48 Ariz. 381 (1936)), it then misused "jurisdiction" in a quixotic attempt to save the constitutionality of A.R.S. §13-4234(G), which it acknowledged conflicted with this Court's rules. Opinion ¶17. Instead, it should have followed *State ex rel. Napolitano v. Brown*, 194 Ariz. 340 (1999), and *State v. Bejarano*, 158 Ariz. 253 (1988), each holding other subsections of §13-4234 unconstitutional for violating this Court's rulemaking authority. Similarly, this Court's reasoning in *State v. Reed*, 248 Ariz. 72 (2020), settled the question of the propriety of striking unconstitutional statutes conflicting with this Court's rules; the COA entirely glossed over *Reed*'s applicability.

This Court should grant review to clarify the jurisdiction of PCR courts.

CONCLUSION

Because the COA's reasoning is unsound on every front, this Court should accept review. Alternatively it should depublish the opinion. Ariz.R.Sup.Ct. 111(g).

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